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The *Layha*

Calling the Taleban to Account

1. INTRODUCTION

A year has passed since the Taleban issued the latest version of their Code of Conduct or *Layha*,¹ a rule book that directs Taleban fighters how to fight; details their duties and obligations within the movement and instructs them on how to deal with the common people, prisoners, suspected spies and other members of the ‘opposition’ – those Afghans seen as allied with the foreign-supported, Afghan government.

This paper looks at what the *Layha* says about the Taleban – the concerns, fears and changing dynamics of the movement. It looks at why the Code was issued in 2006 and updated in 2009 and 2010, before analysing the 2010 *Layha* in detail and exploring how it could be used proactively to reduce the suffering of civilians in the war.

Section 2 of this paper examines why the Taleban initially wanted to codify their fighters’ behaviour.

It explores the tension between the Taleban’s image of themselves as a movement that brings

security and justice and the fact that, since 2001, some of its fighters have committed the very crimes it sought in the 1990s to prevent, such as using the ‘jihad’ to make money or to pursue personal enmities. The paper examines how the 2006 *Layha* was intended to both motivate fighters and curb these sorts of abuses, in particular the brutality of commanders like the late Mullah Dadullah. It also examines how the *Layha* harks back to the 1980s jihad and at how it functions as both rule book and something more aspirational: this is how the movement would like (to be seen) to be fighting.

Section 3 analyses the 2010 *Layha* and how it has changed from earlier versions by exploring its main themes: (1) dealing with those who surrender (including amnesties and security guarantees); (2) prisoners, crime and punishment (who can be killed, executed and punished and by whom; how prisoners should be treated; judicial safeguards and admissible evidence and what to do with contractors, foreign soldiers and suspected spies); (3) dealing with the people (managing complaints against the Taleban, protecting the people and restricting those who seek to exploit the ‘jihad’ for material gain, which usually also involves oppressing local populations); (4) organisational structure and hierarchy (command and control structures and the various quasi-state bodies) and (5) miscellaneous injunctions (including advice on fighting, suicide attacks and various ethical

¹ I would like to thank two unstinting translators at AAN, colleague Gran Hewad, and former colleague Amir Ramin. Thanks go also for their insight to the various peer reviewers who are working journalists, human rights defenders or specialists in the insurgency, as well as to the several Afghan researchers working on the Taleban, who preferred not to be named. All views in this paper, however, are the author’s alone.

concerns, such as smoking, praying and fraternising with youths).

Section 4 examines how the *Layha* could be used to reduce the suffering of civilians in the conflict. It assesses the Taleban's own command and control and grievance mechanisms before looking at whether the *Layha* could be useful by journalists in reporting and human rights defenders in advocacy.

It examines why some human rights defenders are uneasy about using the Code in advocacy and their fears that citing it could confuse what is actually legal or illegal under IHL, the body of law, including the Geneva Conventions, which regulates conflict and in particular seeks to minimise the harm done to civilians. It looks at how the *Layha* approaches and diverges from IHL, particularly with regard to the protection of civilians. It takes two case studies: (1) the effective use that UNAMA made of the *Layha* in reporting civilian casualties; and (2) how using the *Layha* could have made journalists' reporting of the killing of ten aid workers in Badakhshan in August 2010 much more robust and accurate.

The conclusion places the *Layha* in the context of possible peace talks with the Taleban. It argues that dismissing the movement as beyond the pale, in effect, puts it beyond criticism. At the same time, referring to the Taleban as 'upset brothers' white-washes their many crimes. The paper makes the case for the *Layha* to be used to help chart a tougher and fairer approach by expecting the Taleban to at least uphold their own stated norms.

2. WHY ISSUE A CODE OF CONDUCT?

2.1 Background

In May 2010, the Taleban issued a new version of their Code of Conduct or *Layha* and over the following months, distributed it to some Taleban field commanders. The Code regulates how Taleban fighters wage war and how they deal with each other, with the 'common people' and with the enemy (the foreign-supported Afghan state and those Afghans seen as allied with it). This is an intra-Afghan affair – foreigners, whether civilian or military, are barely mentioned. The *Layha* is written as a rule book for the Taleban, but it also reads as an aspirational document, projecting an

image of an Islamic and rule-bound jihad and of a quasi state.²

The 2010 version of the Code is the third to emerge;³ each version has been longer, more detailed, more polished and less harsh. The first *Layha*, issued in 2006, came when the Taleban – or

² Some analysis has been done of this and earlier Codes. Two military papers look at how understanding the *Layha* could help the foreign military defeat the Taleban: 'Understanding Afghan Culture, Analyzing the Taliban Code of Conduct: Reinventing the *Layha*.' Program for Culture and Conflict Studies (CCS), Department of National Security Affairs, Naval Postgraduate School (6 August 2009), <http://info.publicintelligence.net/Layha.pdf> and Greg Kleponis, 'Throwing the Book at the Taliban: Undermining Taliban Legitimacy by Highlighting Their Own Hypocrisy,' *Small Wars Journal* (2010), <http://smallwarsjournal.com/blog/journal/docs-temp/523-kleponis.pdf>. For a little analysis of possible implications of the *Layha* for IHL compliance, see Dapo Akande, 'The Taliban's New "Code of Conduct", Compliance with the Laws of War and POW Status,' *Blog of the European Journal of International Law* (31 August 2009), <http://www.ejiltalk.org/the-talibans-new-Code-of-conduct-compliance-with-the-laws-of-war-and-pow-status/>.

³ The original Pashto texts and fresh English translations of the 2006, 2009 and 2010 versions of the *Layha* are published as appendices to this paper. The texts were obtained as follows. 2006: A photograph of the booklet showing the Pashto text was published with an English translation by the Swiss newspaper *Die Weltwoche*, 'A new *Layha* for the Mujahedin' (29 November 2006). *Die Weltwoche's* editor noted: 'This Book of Rules was distributed initially to the 33 members of the Shura, the highest Taleban council, at their meeting during Ramadan [September, October], 2006.' Originally published at: <http://www.weltwoche.ch/ausgaben/2006-46/artikel-2006-46-Laheha-regelbuch-fuer-die-mudschaheddin.html>. AAN now publishes a new and more accurate translation. 2009: The Taleban published a Pashto text and their own English translation (6 August 2009) on their *Shahamat* website, saved at the time by an AAN member. AAN has re-translated the 2009 *Layha*, using the original Pashto text. (The Taleban's own translation was poor, leaving out details and conflating some articles.) The very last section, the advice on the back cover, was translated from a photo of the outer covers of the booklet, accessed at, 'Key Quotes from New Taliban Book,' al-Jazeera website, 27 July 2009, <http://english.aljazeera.net/news/asia/2009/07/200972775236982270.html>. 2010: A scanned image of the 2010 *Layha* was passed on to AAN by an international official. The translation into English is AAN's own.

the mujahedin as they call themselves⁴ – were re-emerging as an ever-more confident and powerful force in the Afghan arena. As one Afghan researcher said, ‘they were not well-organised; this was the beginning of their existence and they wanted to establish a Code for themselves, to demonstrate their presence and their re-grouping.’⁵ The first *Layha* looked like a cobbling together of disparate injunctions, thirty in all, but it addressed real problems which were hindering the Taleban’s fight and tarnishing their image. These injunctions included

- issues of command and control, including amnesties for those joining the resistance and bans on poaching fighters from other groups or changing districts without permission;
- bans on various ways of exploiting the jihad to make money, including confiscating property, exchanging foreign hostages for money and selling weapons;
- basic judicial measures, such as the injunction against the extra-judicial punishment of ‘spies’ and
- perennial issues, familiar from edicts of the Islamic Emirate of Afghanistan (IEA) era of the 1990s, such as the ban on fighters fraternising with beardless youths.

The drive to codify fighters’ conduct seems to have stemmed from three major issues: the need to curb the problematic behaviour of certain prominent commanders, to reiterate the movement’s Emirate-era self-identity as a bringer of security and justice and to deal with practical issues of rule given the increasing amount of territory coming under the movement’s direct control. The journalist Anand Gopal says that Mullah Beradar, a keen political strategist, played a major role in pushing for the original codification of conduct: ‘He understood that [this conflict] is about hearts and minds. He’s been a major push behind a lot of the insurgency’s efforts to clean up its act. He helped institute the complaints commissions, for instance and was also instrumental in streamlining and making more efficient the military structure.’⁶

⁴ The Taleban have rarely used the term, ‘Taleban’. In power, they referred to themselves as the ‘Islamic Emirate of Afghanistan’. Since 2001, they have used the term ‘mujahedin’, which explicitly places their ‘anti-invader’ fight in the context of the 1980s resistance against the Soviets.

⁵ Author’s interview, March 2011.

⁶ As Gopal also points out, Beradar, who has been in Pakistani detention since early 2010, also allegedly

The pre-eminent ‘problematic’ commander in 2006 was the late Dadullah ‘Lang’ (Dadullah the Lame). He emerged in the 1990s, during the Emirate, as one of the most feared and respected Taleban field commanders, a shrewd tactician, a brave fighter and one of the Emirate’s worst war criminals.⁷ After 2001, he was also one of the first senior commanders to publicly call for a jihad.⁸ In the four years until his death in May 2007, Dadullah’s strength grew, with a power base that was independent of the leadership and a network that ‘in a much stronger way than others cut across tribes and regions . . . Dadullah assumed the role of an official Taleban spokesman and projected himself as the Taleban supreme military commander – two positions he officially never had.’⁹ He favoured gruesome tactics, often apparently inspired by Iraq, including beheadings,

played a role in some of the atrocities committed during the Emirate period. (Written communication, April 2011). For details of Beradar’s possible command and control role, see Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity, 1978–2001 – Documentation and Analysis of Major Patterns of Abuse in the War in Afghanistan* (2005), www.afghanistanjusticeproject.org/warcrimesandcrimesaaginsthumanity19782001.

⁷ Mullah Omar repeatedly sacked Dadullah but, because of his battlefield value, also kept bringing him back. A famous story puts Mullah Omar during the Emirate chastising Dadullah for killing civilians; Dadullah put both his Kalashnikov rifle and prosthetic leg in front of Omar and said, ‘These were both received because of the jihad; if you no longer need me, I no longer need them.’ Interviews with Dadullah (Kabul, February 2001) and Northern Alliance commanders (Takhar, Badakhshan, May 2001). For details of some of the many atrocities he committed during the Emirate, see Afghanistan Justice Project, *Casting Shadows* 117, 128, 147–9 (FN 6).

⁸ Interview with BBC Pashto Service, March 2003. Dadullah probably ordered the first noteworthy killing of a foreign civilian after the fall of the Taleban. Ricardo Munguia, who worked with the International Committee of the Red Cross (ICRC) employee, was murdered despite ICRC’s reputation as a neutral body during the long years of war and the possibility that Dadullah had received his prosthetic leg from an ICRC clinic. Author’s interviews, March 2003.

⁹ Thomas Ruttig, *How Tribal Are the Taleban? Afghanistan’s Largest Insurgent Movement between its Tribal Roots and Islamist Ideology*, Afghanistan Analysts Network (2010), p 13, <http://aan-afghanistan.com/index.asp?id=865>. See also Thomas Ruttig, *The Other Side: Dimensions of the Afghan Insurgency: Causes, Actors and Approaches to ‘Talks’*, Afghanistan Analysts Network (2009), 17 <http://aan-afghanistan.com/index.asp?id=114>.

suicide bombings and hostage taking, and he enjoyed strong links with al-Qaeda, autonomous funding streams and an increasingly high personal profile in the media. For the leadership, he was too strong, too effective, too famous – and too infamous – to be tolerated.¹⁰ Looked at in this context, the *Layha* appeared to be an attempt to curb the autonomy of commanders like Dadullah and restrict the worst brutalities of Taleban fighters: not all methods of warfare would be acceptable.

A second strong context for the Code is the Taleban's own sense of themselves as bringers of security and justice.¹¹ Their founding legend has proved resilient – that of a movement which cleansed Afghanistan of criminal and predatory commanders in the 1990s (despite their actual rise to power being more complicated and controversial, involving Pakistani support and the persecution of segments of the population). Of course, the Taleban themselves also committed atrocities, but these were generally considered to have been perpetrated within the framework of a strong state (by Afghan standards) and relatively tight command and control. The leadership could and did order massacres and village burnings. It also enforced 'moral' behaviour, such as bans on women working outside the home, and compulsory prayer. However, the regime was characterised by *relatively*¹² low levels of abuses associated with corruption and criminality, such as the extortion of money from travellers at check-posts, sexual violence and the use of state assets – the police, jails – to facilitate crime (for example, kidnapping or detention for ransom). Such abuses have been perpetrated by many state and non-state armed groups since 1978, typically with weak command and control or a license (given by

¹⁰ Rumours circulated at the time that his death had been arranged by Mullah Omar because he had become too powerful.

¹¹ For an extensive discussion of the Taleban and justice, see Stephen Carter and Kate Clark, *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan*, Chatham House (December 2010), especially pp 20–23, http://www.chathamhouse.org.uk/files/18074_1210pr_afghan_justice.pdf.

¹² Criminal type abuses by Taleban in power did take place, but less commonly than by other armed groups. They tended to be perpetrated against civilians associated with opposition factions – eg Taleban police stealing from Hazara households in west Kabul in 2000 (author's investigation for BBC) and looting and seizure of women following battles in the north and in Shomali (author's interviews, 2005 and 2006).

superiors) to misbehave. It is these sorts of criminal abuses of power which the Taleban have always defined themselves against, projecting themselves instead as the group that saved the people from criminality and chaos.

The Taleban's image post-2001 has been helped by the poor record of the internationally-supported, Karzai administration, which has been bad enough to make many Afghans nostalgic for the 'harsh, but just' rule of the Emirate.¹³ Nevertheless, the re-emergent Taleban have been much more likely to commit crimes and engage in corruption than when they were in government. Their abuses now often resemble those they accuse both the current Afghan government and the factions from the 1990s civil war of perpetrating. These include forced taxation, exploiting tribal enmity and kidnapping for ransom.¹⁴ A large number of injunctions in the *Layha* are aimed at stopping fighters from making money off the back of the 'jihad'.

Maintaining internal discipline (and trying to project the image of a movement committed to

¹³ This is especially so because most Afghans did not experience the Taleban's most serious atrocities. These were narrowly directed against particular ethnic groups in particular areas (Hazaras and Sayeds in northern Hazarajat and areas to the north, including Mazar-e Sharif; Uzbeks to a more limited extent and the population of the Shomali). Other discontented groups were treated differently; eg restive pro-king Pashtun tribes in Khost were mollified and probably given money in late 1999. For a discussion on these issues, see Carter and Clark, *No Shortcut to Stability*, pp 4–9 (FN 11). See also Ladbury and CPAU on current attitudes to the Taleban; they found that government corruption and partisanship at provincial and district level 'was consistently cited as a major reason for supporting the Taleban and Hizb-e-Islam' and 'the government's record on corruption was deemed so extraordinarily unjust that "the people even prefer bad Taleban when the alternative is government"'. Sarah Ladbury (in collaboration with Cooperation for Peace and Unity, CPAU, Kabul), *Testing Hypotheses on Radicalisation in Afghanistan: Why Do Men Join the Taleban and Hizb-i-Islami?* (Kabul, UK Department for International Development, 2009), pp 7, 18.

¹⁴ Despite this, the Taleban may still hold on to their reputation for justice. Ladbury found her respondents tended to differentiate between 'good' or 'proper' (pious, non-corrupt) and therefore 'real' Taleban and 'bad', 'foreign' or 'American' (ie criminal) Taleban: the latter were blamed for abuses. (Ladbury, *Testing Hypotheses*, p 24. FN 13) See also Martine van Bijlert, 'Unruly Commanders and Violent Power Struggles: Taliban Networks in Uruzgan,' in *Decoding the Taliban*, edited by Antonio Giustozzi (London: Hurst, 2009).

security and justice) is a tall order for any group that is no longer in power. The Taliban leadership is simultaneously trying to conduct a guerrilla war and assert command and control; mobilise fighters and keep them happy while limiting the criminal behaviour that has been the reward for many Afghan armed groups historically; and maintain standards when the days of being a new, idealistic guerrilla movement are long gone – all this against a dynamic familiar in Afghanistan and elsewhere of idealistic revolutionaries becoming corrupted by the synergy of crime and war. Being under military pressure only makes preserving command and control more difficult, as it does disciplining recalcitrant commanders or weeding out those who have joined the jihad for criminal gain but may still be useful to the overall military effort. As one Afghan researcher on the Taliban said, the 2006 *Layha* was intended to both motivate and restrain fighters.¹⁵

The third context for the publication of the 2006 *Layha* is historical: the 1980s anti-Soviet jihad. Like the mujahedin, whom the Taliban see as their forerunners, the Taliban seek to draw sharp lines between themselves on one hand and the government in Kabul and those who work and fight for it on the other. The *Layha* lays out a vision of guerrilla warfare that is not just a fight between armed forces, but a struggle to separate the population from the state and create ‘social’ frontlines. The 2006 orders to kill teachers and pro-government *ulema* and to burn schools are reminiscent of the mujahedin’s assassination of opponents and targeting of state institutions.¹⁶ Yet

¹⁵ Author’s interview, March 2011.

¹⁶ Killings of people perceived to be associated with ‘the enemy’ – whether by ethnicity, profession or where they live – have been carried out by different groups since 1978. The most extreme purges were carried out by the communist regime, particularly during the first twenty months after the Saur revolution. However, mujahedin also killed surrendered soldiers, government and party officials, mujahedin from rival groups and, in some cases, teachers and school students, as well as burning government offices, schools and clinics (author’s interviews, 2005, 2006). For a comparison of current methods of warfare with the 1980s jihad, see Michael Semple, ‘Intimidating, Assassinating, and Leading: Two Early Mujahidin Commanders Reflect on Building Resistance Fronts,’ *Viewpoints*, Special Edition Afghanistan, 1979–2009: In the Grip of Conflict, The Middle East Institute Washington, DC (2009), 67–80, published online at <http://www.mei.edu/Publications/WebPublications/Viewpoints/ViewpointsArchive/tabid/541/ctl/Detail/mid/1623/xmid/831/xmfid/11/Default.aspx>. For detail on the

as fighters in a guerrilla struggle, the Taliban need not only to intimidate the population enough to deter ‘collaboration’ with the Afghan government and foreign forces, but also not be so unforgiving as to deter ‘collaborators’ from switching sides. This strategic dilemma is clear in the *Layha*, especially in the way later versions have become less harsh.

The later versions of the *Layha* are longer (67 articles arranged in eleven sections in 2009 and 84 articles in fourteen sections in 2010). This expansion has matched the movement’s expansion into more of the country and its rolling out of some of the trappings of a state. Later versions have greater detail, particularly on resolving disputes among Taliban and between Taliban and the population, and they codify the Taliban’s command structures and its rudimentary shadow government. The Code still focuses on dealing with the ‘enemy’, although the later versions are less harsh and much more restrictive in terms of who can kill or order executions and of whom. For one long-term Afghan researcher on the Taliban, changes to the *Layha* parallel actual changes within the movement:

In 2006, they were not well-organised . . .

They wanted to show their presence and that they had re-grouped and could demolish and burn . . . They killed many people. In 2006, they wanted to give full authority to their fighters . . . to show that they were back and present and to scare the public into obeying them. This dates from the jihad period when the mujahedin used to kill, burn and destroy to show they were there and could do these things. This is a tradition – whoever kills more, he is more famous. In 2009, we see a bit of pleasantness in the orders. Now, they are feeling powerful and feel they have won the ground, so they are showing themselves like legitimate rulers . . .¹⁷

war crimes of the 1980s, see Afghanistan Justice Project, *Casting Shadows*, especially pp 12–28 (FN 6), and *The United Nations Mapping Report (of War Crimes and Human Rights Abuses)*, pp 12–31, officially unpublished, but accessible at <http://www.flagrancy.net/salvage/UNMappingReportAfghanistan.pdf>.

¹⁷ Author’s interview, March 2011.

At the same time, the new articles in the 2010 Code concerning bodies within the movement and the details about duties, responsibilities and function point to fears of fragmentation,¹⁸ says the same researcher:

The insistence on hierarchies and obedience [in the 2010 *Layha*] is also a reflection of the concerns of the senior leaders and commanders, at the Quetta and Karachi level over the long-term absence of Mullah Omar. In the past, and regularly, radio tapes from him were released, with new orders and guidelines. In 2010, there was nothing. It makes commanders a bit demoralised and far from each other. There are tensions among the senior leadership.¹⁹

A closer analysis, in Section 2 of the 2010 *Layha*, and how it has changed from earlier versions, reveals much about what concerns the leadership: not just fragmentation, but also the monetisation of the 'jihad' and continuing freelance killings, especially of suspected spies, as well as how to deal with NGOs and schools in a way which does not alienate local populations.

2.2 *Layha* as rule book and aspiration

Pointing out gaps between the text of the *Layha* and reality is easy, where injunctions that look good on paper are more honoured in the breach. Kidnap for ransom, for instance, has been illegal for Taleban fighters since 2006, and forcible collection of religious taxes since 2009, yet both are widely practiced. The injunction to not intervene in people's disputes also contradicts one of the Taleban's usual methods of gaining traction with parts of the population in a new area of operations – although once in control, orders may be given to not interfere in or aggravate disputes.

Yet, the Code can not be dismissed as simply propaganda that was never intended to be actually implemented. The *Layha* has been distributed, albeit patchily. Interviews with commanders, researchers and journalists suggest that distribution is better in the central region, for instance in Logar and Wardak and the south, with the exception of Kandahar where finding it is

¹⁸ The same comment was made by Alex Strick van Linschoten (February 2011 email communication).

¹⁹ Author's interview, March 2011.

extremely difficult and patchy in Loya Paktia. One Afghan researcher on the Taleban saw it being printed in Kabul for distribution in the north.²⁰ One would not expect thorough distribution, given that many members of the movement are illiterate. According to the Code itself, superiors have a duty to disseminate the injunctions of the *Layha* down through the chain of command. One source said the 2010 *Layha* was drafted by the Taleban's Cultural Commission, which is also responsible for dealing with the press, headed by Amir Khan Muttaqi (Information and Culture Minister and then Education Minister during the Emirate and one of the Taleban's more-educated and political commanders). Then the Taleban's *ulema* council had discussions about it before it was submitted to the Leadership (Quetta) Council for discussion and amendments.²¹

The *Layha* gives the impression of being a training manual or set of written standards used as a reference for mid- to senior-level commanders and strategists.²² It is more than straight propaganda: It is a rule book that is also aspirational, detailing how the leadership would like the 'jihad' to be run, or be seen to be run.²³ The most clearly idealistic and motivational part is the advice supposedly from Amir ul-Mu'minin,²⁴ Mullah Omar, on the back cover, which calls on the 'mujahedin' to be true to their religion, their nation and their people (for detail see Section 2).

In places, the Code appears intentionally vague on what fighters can and cannot do, where a rule book aimed purely at ensuring correct behaviour would want to clarify. The rules on assassination and execution appear deliberately obfuscatory, despite this being one of the movement's most common methods of conducting warfare against elements of a local population seen as collaborators with the government and foreign

²⁰ Author's interviews, August, September 2010.

²¹ Afghan researcher on the Taleban with good links to the Quetta Council (author's interview, March 2011).

²² Comment made by Alex Strick van Linschoten (February 2011, email communication).

²³ 'Traditionally, there is always a tension,' writes Matthias Vanhullebusch, a specialist in IHL and the Islamic laws of war, 'whether a law necessarily follows the reality on the ground or whether it wants to create a new reality in a more pro-active sense. One could argue that this Code of Conduct reflects both aims; it is both reactive (wanting to deal with actual problems and dilemmas) and has pro-active ambitions.' Email communication, May 2011.

²⁴ Commander of the Faithful, Mullah Omar's official title, according to the Taleban.

armies. Some methods of warfare may simply be too cruel and too unpopular with the public to recommend, but also too useful militarily to ban. The next section looks at the contents of the *Layha* in detail.

3. THE CODE'S CONTENT IN DETAIL

3.1 Overview of the Code

The 2010 Code begins with Qu'ranic verses, not about *jihad* as might be expected, but about obedience and settling disputes. Believers are enjoined to obey God, his Prophet and those in authority and to settle disputes among themselves according to God's law, rather than resorting to false deities.²⁵ Apart from this, almost no other references are made to the Qu'ran, Hadith or specific aspects of *shari'a*, which is quite remarkable for a document written by a group of mullahs.

A preamble to the Code speaks about the glory of jihad and the necessity of having a code of conduct so that the jihad can be fought according to (unspecified) *shari'a* principles.

The Code is then split into 14 sections:

1. Those who surrender; also on inviting²⁶ those with the Afghan government to join the mujahedin (Articles 1–8)
2. Prisoners (Articles 9–16)
3. Spies (Articles 17–22)
4. Contractors (Articles 23–26)
5. Booty (Articles 27–33)
6. Organisational structures (*tashkil*): chains of command and duties of provincial and district commissions, courts and spokesmen (Articles 34–39)
7. Internal issues for the mujahedin: chains of command and duties of the military commission, the formation of fighting groups, advice on attacking the enemy, rules on suicide attacks, dispute resolution (Articles 40–58)
8. Education (policy left unspecified) (Article 59)
9. Private companies and NGOs (policy left unspecified) (Article 60)
10. Health (policy left unspecified) (Article 61)

²⁵ 4:58–59 (*Sura an-Nisa', The Women*).

²⁶ The word used for invite is *dawat* which has an everyday meaning in Dari, Pashto and Arabic and also has an Islamic resonance as it is the term used for inviting people to the faith.

11. Issues concerning the people: dealing with people's disputes, protecting the common people (Articles 62–66)
12. Prohibitions: including bans on smoking, forced collection of religious taxes, kidnapping for ransom and mutilation (Articles 67–73)
13. Advice: including on prayer, fighters' education, tribalism and book-keeping (Articles 74–81)
14. Recommendations on using the *Layha* (Articles 82–85)

On the back cover of the pamphlet, some motivational advice for the 'mujahed brothers' is shared, supposedly from Amir ul-Mu'minin. This is clearly intended to be stirring and was possibly added with an eye to a wider audience.²⁷ It encourages Taleban fighters to be compatriots and true to their religion; to stand 'like steel' against the enemy, not letting his propaganda shake their resolve; to be unified, clever, cautious, faithful and brave and to keep their comrades and nation in their hearts. Some of the themes of the *Layha* are made explicit here: fighters are urged not to punish anyone based on personal grudges, carelessness or the urgency of the situation. It urges the 'brothers' not to 'allow those opportunists and materialists, those armed people who are interested in material gain, to harm or bother the people or destroy their assets.' Instead, they are called on to carry out 'one of the main responsibilities of a mujahed', taking care of public property and the lives and property of the people.

In terms of language, the Code refers to Taleban as 'mujahedin' and uses the Taleban-government-era term, the 'Islamic Emirate of Afghanistan' to refer to the movement and the current administration where it has governing powers. Mullah Omar is generally referred to as the *Imam*, a term usually used in Afghanistan for the person who leads communal prayers or to religious-political leaders in early Islam and the major scholars. This usage stresses Mullah Omar's supposed religious mandate to rule. Afghans who are not fighting and are non-aligned or Taleban-aligned are referred to as 'Muslims' or 'the people', or 'the common people'.²⁸ The Afghan state, its army, police and workers are referred to as 'the opposition', the

²⁷ It reads as the most propaganda-like part of the *Layha*.

²⁸ The use of the term, 'common people', has implications when looking at the Code in the framework of the laws of conflict, something which will be looked at in detail in Section 4.

‘enslaved administration’, and the ‘puppet government’. Foreigners are simply called ‘infidels’.

The Code is analysed below, according to its main themes. These include (1) those who surrender; (2) prisoners, crimes and punishments; (3) dealing with the people, disputes and money; (4) organisational structure and hierarchy and (5) miscellaneous injunctions. Numbers in brackets in the text refer to articles from the 2010 Code. Articles from earlier Codes are referred to by date and number (for example, 2006:12 refers to version 2006, article 12).

3.2 Dealing with those who surrender (Articles 1–8)

Facilitating surrender and the switching of sides is crucial to the Taleban’s war and, from the 2006 version onwards, the rules on surrender appear first in each *Layha*. They have become progressively more detailed, as the Taleban lay out their own appeal to reconcile and reintegrate.

Any mujahed (art. 77), indeed any Muslim (art. 1) can invite ‘enslaved workers’ and those in authority in the corrupt government to cut themselves off from it. Anyone accepting the invitation to switch sides, especially Afghan soldiers bringing weapons (art. 14), is to be welcomed, and ‘if a mujahed kills or harms him, he will be punished in accordance with Islamic principles’ (art. 2). Greater safeguards – as well as enticements – now exist for those coming over. The *Layha* offers a wide-ranging amnesty, including for murder and damage to property. It enjoins anyone surrendering to compensate their victims out of piety, but stresses that he cannot be forced to do this. If he looted property, the owners can go to court to get it back, but if he no longer has it, again they cannot force compensation out of him. Acknowledging that amnesties can be abused, the 2010 Code says that common thieves must answer for their crimes and appear in court (art. 3). Debts from normal transactions – buying, selling, etc. – must also be honoured.

Those switching sides should receive letters setting out their new status and, if they are well known, the mujahedin should be informed, so that they are not attacked by mistake (art. 2). However, they should only be allowed to fight when they have won the trust of their new comrades and have received permission from the provincial official (art. 6). If they have committed ‘hateful acts’ or killed Muslims while with the government, they may have to provide a surety or be put under

observation; but if they carry out a worthy task which proves their loyalty, such as ‘killing a foreign occupier or a high-ranking governmental official’, they should be rewarded with privileges (art. 5).²⁹ Fifth columnists – those who go over to the Taleban but stay in their government jobs – are offered a more limited protection; the provincial governor must agree to their new status, but because their new allegiance cannot be made public, if they are killed by a mujahed out of ignorance, he cannot be blamed (art. 8).

The execution of police and soldiers who surrender is illegal. However, a new article in the 2010 Code addresses an issue problematic for international military forces fighting in Afghanistan, as well: those who appear to be surrendering but who may still be hostile:³⁰

It is not allowed to intend to kill an armed opposition soldier who has become separated from his comrades and has come to you in a place where he cannot defend himself, unless you are fully sure that he is not really surrendering, but intends to attack and trick you (art. 7).

The rules on what to do with someone who goes back to the government and then switches sides a second time, have become more lenient: if the mujahedin are unsure about his loyalties, ‘they shall take a surety,’ says article 4. The 2006 Code stipulated: ‘Whoever accepts the invitation and

²⁹ The 2006 version, as always, was harsher: ‘Anyone with a bad reputation, or who has killed Muslims while working with the infidel administration, who has searched the houses of the common people, or recruited labourers for the infidels will not be accepted into the ranks of the mujahedin. If the highest leader has personally forgiven him, he will be placed at home in the future’ (2006:21).

³⁰ The international military has similar dilemmas when faced with a combatant who is wounded or appears to be surrendering, as they try to assess whether he is actually *hors de combat* (outside the fight) or still has ‘hostile intent’, a concept not present in standard interpretations of international humanitarian law, but apparently being used by the US military in Afghanistan to mean that the person can still be targeted and killed. Author’s interviews with senior US Special Forces commanders, December 2010, February 2011. For discussion of this, see Kate Clark, *The Takhar Attack: Targeted Killings and the Parallel Worlds of US Intelligence and Afghanistan*, AAN thematic paper, (May 2011), especially pp 30–33, <http://aan-afghanistan.com/index.asp?id=1691>.

then breaks his promise and clearly abuses his commitments becomes a traitor and forfeits our protection. He will be given no second chance' (2006, art. 4).

3.3 Prisoners, crimes and punishment of enemies

The *Layha* talks about detention and execution, thus cloaking acts of killing in judicial terms. Many Afghans would see these actions as abduction and murder, and the threat of killing as a particularly pernicious form of intimidation.

Explicit permission to kill – whether in an attack or by ordering an execution – and who to kill is very restricted, according to the text of the *Layha*. Only Mullah Omar (the *Imam*), his deputy or the provincial judge (if one has not been appointed, the provincial governor) can authorise an execution (art. 10).³¹ At the same time, in apparent contradiction, article 5 suggests as an example of a commendable action the killing of 'high-ranking government officials or preparing the ground for capturing them'.

Some attempts at judicial safeguards are present in the *Layha*. It specifies that all captives, 'whether foreign or national', must be handed over to provincial officials immediately (art. 9). If the situation becomes dangerous and transporting prisoners is impossible, they must be left behind, unless the prisoner is a proven high-ranking government official or was captured during fighting (art. 13). The *Layha* also orders a *shari'a*-based court to be set up in every province with one judge and two knowledgeable *ulema*; they shall be introduced by the provincial governor and approved by the leadership (art. 38). The back cover urges mujahedin not to base a decision on whether to punish someone on 'personal grudges, sensitivities, carelessness or the urgency [of the situation]'

For the first time, torture, including torture as punishment, is explicitly banned:

Captives shall not be tortured, whether with hunger, thirst, cold or heat, even if they deserve execution. Rather, whatever verdict has been decided upon, according to *shari'a* law, shall be implemented (art. 15).

³¹ In the 2009 Code, this had been even more narrowly restricted to only Mullah Omar and his deputy.

As to executions, they must now only be done by shooting (art. 21), which implicitly bans beheading or other methods. Filming and photographing executions is also forbidden (art. 21). Another new article states that the relatives of an executed person must be informed of the date of the execution 'because the death of a human being has many *shari'a* laws attached to it' (art. 22). Mutilation is specifically banned (art. 70).³²

Some enemies get more protection than others, but almost all of those whose 'crimes' deserve execution should first receive a trial. The exceptions are drivers and contractors who can be attacked and killed; although with the latter the implication is that this is only when they are 'on the job'.

3.3.1 Different kinds of enemies

The Code differentiates between categories of opposition. The list below details how they should be dealt with, starting with those who enjoy the least protection under the *Layha*.

- **Contractors (*tekadaran*) and drivers** (Section 4, 23–26). Being a contractor and providing 'logistical support or constructing military bases for the infidels and their enslaved administration' is a capital offence. If captured and found guilty by the provincial judge, contractors should be executed.³³ Other capital offences include transporting supplies for the infidels and their 'enslaved administration', supplying labour to the enemy, translating for the infidels and working for a private security company, of whatever grade (arts. 11, 24, 25, 26).

Drivers and contractors whose guilt is 'well-known' to the mujahedin can also be attacked directly (arts. 23, 24, 25), although it suggests they may be only legitimate targets while working:

³² In March 2011 the Taleban complained about media reports that attributed a case of ear-mutilation in Zherai district of Kandahar to their fighters. A statement cited the *Layha* as evidence of their opposition to mutilation, before blaming criminals who, according to the statement, had been brought in as Afghan Local Police (ALP) and, 'as they have no uniforms . . . are committing a variety of crimes in civilian clothing so that they defame the mujahedin of the Islamic Emirate.'

'Statement by the Islamic Emirate spokesman on ear-mutilation incident in Kandahar,' Taleban Voice of Jihad website (12 March 2011), translated by BBC monitoring.

³³ Or, if one has not been appointed, the provincial governor.

Drivers who transport supplies for the infidels – during that transportation . . . [they] shall be killed and their vehicles burned (art. 24).

Contractors who are known for certain to build bases or transport fuel or other materials for the infidels or their puppet administration, the mujahedin shall burn their equipment [vehicles] and kill them (art.25).

Compared with the 2009 Code, fewer and less-graded options are given for punishment and action, with no mention of warnings: in 2009, drivers captured while on the road could be punished (*ta'zeer*³⁴), exchanged or released, or if arrest was not possible, mujahedin could shoot at their vehicles (2009:20). As for recalcitrant contractors, the order was to kill them anywhere:

[Those,] who despite being warned by the mujahedin, continue [in this action], if they are arrested, the provincial official has the authority to punish [ta'zeer], sentence them to prison, exchange or release them in return for a strong surety from his relatives or local people. If mujahedin consider that he must be killed, they must ask the Imam or his Nayeab for permission . . . if these people persist in their course, wherever the mujahedin get the chance, they should shoot and kill him (2009:21, emphasis added).

- **Spies** (Section 3, 17–22). The fact that spies gets a whole section and that it keeps getting longer indicates how much of a problem spying and false or malicious allegations of spying are for the movement. In this section the *Layha* lays down rules for interrogation and admissible evidence. Interrogators must be pious and wise in order to avoid forced confessions, 'meaning by beating, threats or

abuse'. These, says the Code, 'have no credibility in *shari'a* and cannot be used to prove a crime . . .' It also says that 'mujahedin must not promise anything to a prisoner in return for a confession which they do not intend to fulfil.'

Evidence should be put before a court (or if there is no court, in front of expert scholars, wise men or pious officials). If the evidence is judged indisputable – specified as voluntary confession, the testimony of two trustworthy witnesses or the possession of specialist spying equipment – and if Mullah Omar or his deputy (or in another clause, also the provincial judge) consider an execution necessary, the spy shall be executed. However, if the evidence is weak, the sentence must be weak. If someone is suspected but not proven of being a spy, the district governor can, in consultation with experts, expel him to where he is no longer a danger. Or he can get a guarantee (which is not money or other transportable goods) for his good behaviour. The testimony of a spy cannot be used to implicate someone else of spying.

The successive Codes have sought to restrict who makes decisions about suspected spies and to institute some sort of due process. In 2006, mujahedin were banned from taking matters into their own hands. Instead, decisions were to be made by the senior district official and punishments only implemented after a trial with credible witnesses (2006:27).³⁵ The authorisation to execute in 2009 was restricted to Mullah Omar and his deputy alone. Lesser punishments could only be ordered by the provincial governor, but again only after a trial (2009: 12–17).

- **Captured Afghan soldiers, police officers and government officials** may meet a variety of fates, to be determined by the provincial governor. They can be used in prisoner exchanges, released in goodwill gestures or after receiving a guarantee, or executed (on the orders of the Imam, his deputy or the provincial judge). Exchanging them for money is banned (art. 10).³⁶

³⁴ *Ta'zeer* or discretionary punishments are not fixed by divine law (fixed or *hudoob* punishments are given for a few specific crimes, such as adultery and blasphemy). The *Layha* specifies that *ta'zeer* punishments cannot consist of a fine (explanatory note ii, 2010).

³⁵ 'Witnesses who testify in a procedure must be in good psychological condition, possess an untarnished religious reputation, and not have committed any major crime' (2006:27).

³⁶ In the 2009 Code, prisoners of minor importance – listed as those working for the Interior Ministry or other

- **Captured infidel soldiers** can be executed, exchanged (for Taleban prisoners) or released out of expediency, in order to help Muslims or for money. The decision is only to be taken by Mullah Omar or his deputy, *not* by the provincial judge or governor. Foreign soldiers who embrace Islam can be released, as long as no risk exists of them renouncing their new faith (art. 12).

The 2010 Code, as with previous versions, does not mention **foreign civilians**.

3.4 Mujahedin behaviour: Dealing with the people, disputes and money

The general 'hearts and minds' policy of the Taleban is summed up in article 78:

Mujahedin are obliged to adopt Islamic behaviour and good conduct with the people and try to win over the hearts of the common Muslims and, as mujahedin, be such representatives of the Islamic Emirate that all compatriots shall welcome and give the hand of cooperation and help.

Protecting the people in warfare, not abusing them in the name of the jihad for criminal gain and not getting involved in their disputes, are all strong and recurring themes in the *Layha*.

3.4.1 Protecting the common people

Several injunctions specifically aim at protecting the 'common people': all officials and ordinary mujahedin must 'with all their power . . . be careful with regard to the lives of the common people and their property' (art. 65); they must 'avoid casualties among the common people' when conducting suicide attacks (art. 57) and anyone who harms people in the name of the mujahedin shall be punished (arts. 65, 66). Taleban fighters and officials are also told: 'Taking care of public property and the lives and property of the people is considered one of the main responsibilities of a mujahed' (back cover).

departments, Afghan soldiers and local contractors – could be released as part of a prisoner exchange, after being punished or in a goodwill gesture (execution is not mentioned), while the fate (options not specified) of more important prisoners – landlords, militia commanders, provincial or district governors and foreign Muslims – could be decided by Mullah Omar and his deputy alone (2009, Section 2).

Mujahedin who commit crimes or repeatedly violate the Code, or who are 'bad people', should be sent by the provincial or district commissions to the governor (art. 47). In general, offending mujahedin are given a chance to repent and reform, but they can also be punished, disarmed and expelled (art. 50).

3.4.2 Dealing with disputes

The injunction against getting involved in the people's disputes becomes ever more insistent since 2006.³⁷ According to the 2010 Code '[it] is a waste of time' and 'can also create suspicion and difference between the mujahedin and the people' (art. 46). The ban on getting involved in disputes is repeated four times (arts. 46, 62, 64, 76).

Mujahedin are banned from intervening, recommending anyone to a court or taking sides in disputes (arts. 64, 76), even if people bring them petitions (art. 62). The only, partial, exception is that the provincial official or the district governor or his deputy are allowed to consider petitions, but must refer them for a solution to a 'legitimate jirga', to a court or, if no court, to prominent *ulema* (art. 62).³⁸

Disputes among mujahedin and between the mujahedin and people should be resolved by the district or the provincial commissions and, if necessary, referred upwards to the military commission or the leadership, who will then hand the case on to *ulema* who will take a decision in the presence of both sides (art. 46). Any member of these commissions who is involved in the

³⁷ The 2006 Code says, 'No official has the authority to interfere in resolving disputes which have been brought to the mujahedin. Of course, only a senior district official or the council of *mahaazes* [possibly the military council] in very important cases can intervene. First they must solve the case peacefully through [ordinary] *ulema* or tribal elders. If there is no agreement on a peaceful solution, the decision must be made by well-known, local *ulema*.' (2006:28)

³⁸ Lutz Rzehak notes that Article 62, which advocates sorting disputes by *jirga* and as a last resort by the *ulema*, appears to be a reversal from Emirate-era orders which privileged aspects of *shari'a* over Pashtunwali customary law (eg bans on *bad* marriages where a girl or girls are given in marriage to a victim's family to absolve the need for revenge and the obligation for a widow to be married to the brother of her dead husband). That being said, the Code does still specify that *jirgas* must not resolve disputes in ways contrary to *shari'a*. See Lutz Rzehak, *Pashtunwali – Tribal Life and Behaviour among the Pashtuns*, Afghanistan Analysts Network thematic report (March 2011), p 17, <http://aan-fghanistan.com/index.asp?id=1567>.

dispute is banned from playing a role in deciding the case (art. 48).

3.4.3 Money

A whole slew of disparate articles seek to restrict the exploitation of the jihad for material advantage. Such closing of loopholes and bans on various potentially corrupt, criminal or predatory actions include the following:

- *Ta'zeer* (discretionary) punishments cannot be interpreted as fines.³⁹
- A surety (*tazmin*) cannot be interpreted as financial, but must be a guarantee from a person or non-transportable property.⁴⁰
- Kidnapping for ransom remains a serious offence, risking disarmament and 'severe punishment' (art. 73).
- The forced collection of religious taxes and charitable donations is banned, with an injunction to spend any alms collected on the jihad (art. 71).
- Exchanging prisoners (art. 10) or contractors' vehicles for money or using such vehicles (art. 23) remains banned (although apart from burning vehicles, the *Layha* does not suggest what should happen to them).
- Disarming the population is banned (art. 36).
- Searching people's homes is forbidden, unless in urgent need and then only with 'the permission of the district official and [in the company of] the *imam* of the mosque and two elders of the area' (art. 72).

The one exception to the separation of jihad from material gain is taking booty, a right that is enshrined in Islamic law from the time of the Prophet. The welter of rules (Section 5, 27–33) suggests that disputes over spoils remain highly problematic.

Booty is defined as property that has been seized during battle from either the foreigners (art. 31) or the government (art. 33); it includes money in the public treasury and wages for civil servants and NGO workers that has not yet been paid out (once paid out, it cannot be seized, although workers can be given a *ta'zeer* punishment by senior officials) (art. 33). However, if the property was not seized in battle, it is considered the public property (*beit ul-mal*) of the Islamic Emirate (art. 27).⁴¹

³⁹ Explanatory note ii, 2010. See also FN 33.

⁴⁰ Explanatory note iii, 2010.

⁴¹ These rules have been simplified since 2009 when all government property was considered *beit ul-mal* and arbitration was needed to determine if the property had

Booty must be split, with one-fifth going to the provincial governor as a *khums* or religious tax to be used in administration and for the benefit of the mujahedin, and four-fifths to those who fought (art. 27). New details describe who else can share in booty: mujahedin who participated in several specified ways in the battle (art. 27), local villagers if they fought (art. 29) and the heirs of anyone who was martyred – not as a right, but because of the martyr's comrades' sympathy for his heirs (art. 30).

3.5 Organisational structure and hierarchies

Reading through the many new articles over sections 6 and 7 that deal with internal discipline, disputes and a complex hierarchy of bodies and commissions,⁴² the impression is of an organisation extremely concerned about fragmentation and maintaining control.

Command and control, and responsibilities over appointments, deployments and disputes are carefully delineated, with each level required to obey the orders of their superiors as a religious duty (*wajib*). At the same time, consultation on decisions and appointments is repeatedly insisted upon (the preamble; arts. 2, 21, 39, 42, 51 and 60 and back cover advice).

Those in leadership roles must display 'wisdom, piety [*taqwa*], courage, mercy and generosity' (art. 41), so that they can 'carry the responsibilities well and neutralise the plots of the enemy' (preamble).

The most-senior bodies in the Emirate – the High Leadership Council (also known as the Quetta Shura) and the Waziristan and Peshawar shuras – are not mentioned by name. Instead, this hierarchy is given (art. 40):

- The *Iman* (Mullah Omar)
- His deputy (*nayeb*)
- Commanders of zones (*tanzim rais*)
- Senior provincial officials

originally been paid for by the foreigners, in which case it could be shared out as booty (2009:24). Materials seized from a convoy could also be distributed only if the convoy had an armed escort and the guards had fought (2009:26).

⁴² See also a recent outlining of the structure of the Taleban by Ikram Mayundi, 'The Islamic Emirate of Afghanistan and Its Successful Administrative Policy,' *Al-Sumud Magazine* (55, 1 Dec 2010), http://shahamat.info/English/index.php?option=com_content&view=article.

- District leaders
- Group leaders
- Ordinary mujahedin

3.5.1 *Institutions and positions*

The Code gives detail about the duties of the following bodies:

- **Group leaders** are responsible for educating their men in jihad, religion and morals (art. 74).
- **District governors** should be appointed where the mujahedin are strong. Each district governor should, in turn, appoint a **deputy** who is mainly concerned with the affairs of the people, rather than military affairs; the deputy should have a good manner in dealing with the public and be accessible (art. 35).
- **Provincial Commissions** must be established, with at least five competent persons; they, in turn, should establish **district commissions**. All district commissioners and at least three provincial commissioners should be people who normally live in the area (art. 34). The duties of the district and provincial commissions include
 - monitoring the fighting fronts to prevent 'bad people' from joining and reporting them to the governor, if necessary (art. 47);
 - implementing the *Layha* (art. 47) and
- giving guidance on obedience, piety and morals to mujahedin in their bases (art. 49).
- **Provincial governors** are mentioned repeatedly as the officials who may order the death penalty for certain crimes if a provincial judge has not been appointed (arts. 10, 11, 16, 17, 24, 25) and who decide or must be informed or consulted on
 - enemy captives (art. 9);
 - whether a person within government will be permitted to work secretly with the Emirate (art. 8);
 - whether a person who has killed many Muslims will be allowed to come over to the Emirate;
 - in some situations, dispute resolution between the mujahedin and the population (art. 46);
 - internal discipline (art. 47), including deciding whether to expel a mujahed who has repeatedly committed crimes or violated the Code (art. 50), dealing with unregistered (and therefore illegal) fighting groups (art. 36) and expecting the

- obedience of fighting commanders in their provinces who were senior figures in the past (art. 53) and
- some appointments (art. 39), including of judges (art. 38).

- The **military commission** gets more detail in the 2010 Code (arts. 42–45). Made up solely of commanders (art. 44), it is responsible for
 - planning, while taking into account mujahedin strength, geographic locations and successful techniques, and getting plans to fighters (art. 42);
 - deploying fighters between provinces (art. 42);
 - developing and disseminating successful military techniques (art. 42);
 - identifying mujahedin who are working well and introducing them to the leadership for commendation (art. 43) and
 - sending representatives to collect reports on operations from provincial officials and encouraging the development of military affairs (art. 45).

Apart from presenting a hierarchy of command, other injunctions aim to control how the cadres are structured: the establishment of new *mahaaz* (large, semi-autonomous military groupings) is banned (art. 53), as are new groups and sub-groups:

[This] is forbidden except in emergency circumstances and must be requested by a provincial official, agreed to by the head of the zone, and approved by the leadership. The [provincial] governor shall combine unofficial and unregistered groups with official and larger groups. If these unofficial groups do not obey, they shall be disarmed (art. 36).

Any mujahedin deployed to another province cannot stay, and commanders cannot move to a new district or province, without permission from the officials of both provinces (arts. 52, 54). Group leaders must not poach members of other groups. If a fighter wants to move, he can, but he must leave any equipment given to him and any shared booty (art. 55).

3.5.2 *Policy on NGOs, schools and clinics*

The *Layha* presents the Emirate as having some of the trappings of state. The minimal nature of this

will be no surprise to anyone familiar with the Islamic Emirate pre-2001 when, for example, ministers would frequently be away from their desks fighting at the various frontlines. As in the 1990s, the Taleban concentrate overwhelmingly on the military and judicial functions of a state. However, the *Layha* also mentions three other quasi-state bodies: Commissions for Health, which is new to the 2010 Code (art. 61), Education (art. 59) and Companies and NGOs (art. 60). It says guidance from these commissions must be followed and mujahedin are banned from making independent decisions in these areas. However, the Code gives no details of the actual policies or how NGOs, schools, companies and clinics should be dealt with. The author is also not aware of the existence of any other written policies on these issues, although reference to the opening of schools has been made new policy in some public statements.⁴³

Nevertheless, this is a radical shift from the outright hostility towards schools and NGOs in 2006. In the 2006 Code, teaching in government schools was deemed illegal and punishments were harsh. Teachers were to be warned and if necessary beaten: ‘. . . if a teacher or mullah continues to instruct contrary to the principles of Islam, the district commander or group leader must kill him’ (2006:25). Education was allowed, but only in a mosque or similar institution, using jihad⁴⁴ or Emirate-era textbooks and by someone with religious training. Schools were to be closed and if necessary burned (2006:25). Any contract with an NGO, in exchange for money or materials, had to be authorised at the highest level, by the leadership *shura* (2006:8). NGO’s were described as ‘tools of the infidels’:

In the guise of serving, they are destroying Islam, so all their activities are banned, whether it is [building] roads or anything else, or clinics or schools or a madrassa or anything else. If a school fails to heed a warning to close, it must be burned. But all religious

⁴³ See FN 103.

⁴⁴ This probably refers to school books which were developed by the University of Nebraska to give ideological support for the anti-Soviet jihad of the 1980s. They were still in use during the Emirate; this author saw them being taught from in a large, clandestine girls school in Kabul in 2000 where the head teacher explained they gave the school some protection from being shut down. This was at a time when educating girls was officially illegal, but often tolerated.

books, for the sake of respecting them, must be secured beforehand (2006:26).

Despite the absence of any specific injunctions on schools or NGOs in the current *Layha*, policy has clearly shifted, something which will be discussed in more detail in Section 4.

3.6 Miscellaneous injunctions

The 2010 *Layha* has a variety of miscellaneous injunctions, for instance, new advice on attacking the enemy:

Those fighter mujahedin who enter as a group into an enemy’s base to target the enemy . . . should be well-trained and each should be [able to] identify their targets well. They should be fully supported and equipped so they can inflict severe damage on the enemy. Before any attack, they or their commanding officers must have complete information about the area and must identify the way towards the target (art. 56).

Mujahedin are urged to use ‘consultation, caution, planning and cleverness’ when carrying out their jihadi activities and operations (back cover). Advice for those carrying out suicide attacks aims at maximising military benefit, minimising the pointless loss of fighters and civilians and restricting attacks to only those officially authorised:

The martyr mujahed shall be well-trained before the attack. Martyrdom operations shall take place against important and major targets. The Islamic nation’s sacrificing heroes shall not be used against minor and valueless targets . . . Take great efforts to avoid casualties among the common people. Except those who have been given permission and private programmes by the leadership, mujahedin are obliged to get their orders from the provincial officials to carry out martyrdom operations (art. 57).

The *Layha* also gives orders on what might be called ethical or social matters:

- beardless youths cannot be kept in barracks or military bases (art. 69);⁴⁵
- mujahedin should pray together, preferably in a mosque, and recite the Qu'ran (art. 75);
- mujahedin should refrain from tribalism and ethnic prejudice: fighting because of this is considered *jahil* (the ignorance of the unbeliever)⁴⁶ and will invalidate martyrdom and any merits accruing from fighting in the jihad (art. 79);
- mujahedin should match their appearance to the local people (art. 81);
- every group leader is obliged to dedicate time for the group to receive jihadi training and education in religion and morality: 'Except during times of fighting and emergency, they shall not quit education' (art. 74) and
- mujahedin must fiercely avoid smoking cigarettes (art. 68).

3.7 Potential of the *Layha* to reduce suffering

Despite the ambiguous nature of the *Layha* and the inclusion of injunctions that actually encourage brutality, in a number of areas the *Layha*, if implemented, could clearly reduce the suffering of civilians in the conflict. These areas include the following:

- The lives and property of the common people should be protected (arts. 57, 65 and 66, back cover).
- Extra-judicial killing of captives is generally banned and captives must be handed over to provincial authorities (art. 9) – although obvious questions remain about the fairness of trials in Taleban-controlled areas.
- Safeguards aimed at improving the delivery of justice: forced confessions (arts. 18, 19), torture (art. 15) and mutilation (art. 70) are banned; a spy's testimony may not be used to implicate someone else (arts. 15, 18); who is

⁴⁵ For a recent reference to this rule, see 'Remarks of the Spokesman of the Islamic Emirate Regarding the Baseless Claim of Presence of Children in the Ranks of Mujahedin,' http://shahamat-english.com/index.php?option=com_content&view=article&id=7182:remarks-of-the-spokesman-of-the-islamic-emirate-regarding-the-baseless-claim-of-presence-of-children-in-the-ranks-of-mujahideen&catid=4:statements&Itemid=4.

⁴⁶ *Jahil* is a religious term used first to describe the ignorance of the Arabs in the Arab peninsula before the revelation of the Qu'ran. By extension, it applies to all those who are ignorant of the divine guidance of Islam.

- permitted to order executions for what are deemed capital offences is severely limited (arts. 10, 11, 12, 16, 17);
- Mujahedin should keep on good terms with the population, including not taking sides and not getting involved in their differences (arts. 48, 62, 64, 76), especially in tribal or linguistic-based disputes (art. 79);
- Orders that curb what could be called criminal activities and scams committed under cover of the jihad (back cover), with specific bans on fining those found guilty of offences and taking a monetary guarantee (explanatory notes ii, iii), forcibly taxing people (art. 71), disarming them (art. 67), kidnapping for money (art. 73), using contractors' vehicles (art. 23) and so on;
- Various complaints mechanisms and command and control structures are put in place to help mitigate abuses by Taleban against the population;
- Finally, although the Emirate's current policies on NGOs, public health facilities and schools (arts. 50, 60, 61) are not specified, the vague wording is a substantial shift from the movement's outright and murderous hostility to schools and NGOs in 2006 (2006:24, 25, 26). It potentially offers the protection necessary for teachers and NGO and health workers to live, work and serve the local population.

4. HOLDING THE TALEBAN TO ACCOUNT

4.1 Upholding the *Layha*

Aspects of the *Layha* might be useful for helping regulate the horrors of the conflict in Afghanistan, although, as with IHL, only if they are correctly and consistently applied and proper accountability regimes persist when violations occur.⁴⁷ Indeed, as with any rules, the *Layha* is only as good as the accountability systems which underpin it – both in terms of internal discipline and procedures for civilians seeking redress. Although by Afghan standards, the Taleban remain an unusually coherent armed group, control of their fighters is still much weaker than when the movement was in power. One long-term Afghan researcher on the

⁴⁷ This point was made by Erica Gaston (written communication, March 2011) and Matthias Vanhullebusch (email communication, May 2011).

Taleban explained how he saw the dissemination and enforcement of the *Layha* work in practice:

The *Layha* is like a decree from Amir ul-Mu'minin. Seniors send it to the mid-level commanders and they describe it to the juniors and then to foot soldiers. But it changes a lot by the time it reaches the fighters' level. Of course, it's not delivered to the fighters or even the junior commanders, who are illiterate. However, if they know the rules, they will obey Amir ul-Mu'minin. The hierarchies outlined in the *Layha* are taken seriously as is [the concept of] *wajeb* [duty or obligation]. According to shari'a, it is a sin not to obey. This is known. Taleban do obey their seniors, according to the hierarchy and they do not criticise the leadership, unlike other groups since 1978. They are with the leadership in its primary aim – to stand against the government and to fight it and NATO forces. However, as to details, the further you get from the Quetta leadership, the more colourless the grade of obedience becomes. It is different from when the Taleban were in power. Fighters now are also thinking about materialist opportunities.⁴⁸

Just how 'colourless' obedience can become is illustrated by the statements of a Taleban jailer in Baghlan which were reported by a journalist whom he had detained. The jailer happily refers to several violations of the Code (below in bold):

Many people had passed through this cell in the past few months, the jailer said. There was a truck driver whose crime was to transport goods for NATO from the northern border of Afghanistan to Kabul. His truck was burned along with several others when the Taleban ambushed the convoy on the road. **'We released him after 10 days, but he paid a big fine.'** Then there was an Afghan National Army officer who was also released after his

tribesmen pledged that he wouldn't go back to the army. **But not all of the prisoners were let go. 'We don't beat the prisoners unless we get orders to question them,' he said solemnly. 'Then we beat them to get them to tell us the truth.'** Before the truck driver we had a spy who stayed here for two months. **We beat him every day until he confessed and finally he was executed. I hanged him myself.'**⁴⁹

Similar instances of beatings, detention and releases for money and executions are reported from other parts of the country. It is unclear whether the perpetrators, such as this jailer, or their commanders are unaware of the rules or whether they choose to circumvent them.

Within the movement, discipline is the responsibility of the various military commissions that operate at district and provincial levels as well as centrally and that are charged with assessing operations, both successes and losses.⁵⁰ Civilians in areas under the movement's control or influence may be able to seek redress by complaining to the visiting Taleban complaints commissions, sent by either the Quetta or Waziristan shuras.

Alternatively, they can seek help directly if they have the contacts to do so, either by going to the leadership in person or sending a mediator. People in the south will complain to the Quetta shura, while people in the east go to the Waziristan shura. Just as when dealing with the Afghan state, civilians use both formal and informal procedures.

A certain bureaucratisation of assassination occurs in parts of the country, which provides some opportunity for mediation, appeals and complaints. The Taleban often warn those deemed guilty of working with the government or the

⁴⁹Ghaith Abdul-Ahad, 'Five Days Inside a Taleban Jail: Special Report,' *The Guardian* (25 November 2010). Rules broken were: releasing a prisoner for money, forcing a confession, torture, execution by hanging rather than firing squad and it looks unlikely that the executions were properly commissioned by Mullah Omar, his deputy or the provincial judge for Baghlan, <http://www.guardian.co.uk/world/2010/nov/25/Taleban-afghanistan-prison-special-report>.

⁵⁰The central Military Commission is currently headed by Mawlawi Ismael. (Author's interviews with Afghan researcher, March, May and June 2011; email communication with Anand Gopal, April 2011.

⁴⁸ Author's interview, March 2010.

foreigners. In some cases, they send formal letters with a case number and date, apparently issued by a judge, and sometimes include a telephone number so that recipients can check if the letter is genuine. The letter may offer the defendant a chance to defend himself in court.⁵¹

This could be viewed as an attempt by the Taliban leadership to regulate behaviour and to introduce a judicial element in accordance with the Code,⁵² thus casting the killings as executions rather than assassinations. However, many Afghans see this 'judicial' bureaucratisation as actually a way of amplifying the intimidation and spreading terror. Moreover, efforts to establish accountability are by no means effective or lasting. Although in Kandahar 'mediation commissions' are generally seen as a 'proper institution' expected to give people three warnings before acting,⁵³ Kandahar has been confronted with waves of assassinations in 2010 and 2011 – often with little apparent rhyme or reason, or evidence as to who exactly was behind them. People were being gunned down or having their throats slit without warning. An Afghan researcher of the Taliban described a similar system that existed in Paktia, but that broke down in 2010:

In 2009, for example, a new [Afghan] Taleb came from Pakistan and accused one of my

⁵¹ The Kandahar-based researcher, Alex Strick van Linschoten, gives the example of a night-letter delivered in the city in September 2010 warning all those working on the parliamentary elections that they might be subject to assassination: 'The letter said, "If you believe you may be on this list wrongly, here is the telephone number of the head of our assassination committee." People do follow these things up and go to the committees and get things sorted out. There is some flexibility.' Author's interview, September 2010.

⁵² One human rights defender pointed out that the Taliban's use of capital punishment is not inherently inconsistent with IHL, although it is difficult to imagine Taliban courts fulfilling the necessary criteria to make them consistent with the clause of Common Article 3 which bans 'The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.' (Author's interview, September 2010)

However, such executions would undoubtedly be illegal (murder) under Afghan *domestic* law – unless the judge had gone over to the government side, been officially reconciled and thereby secured a legal amnesty for himself. (See FN 132, on the amnesty law).

⁵³ Author's interview with Alex Strick van Linschoten, September 2010.

friends of being a spy for the government, because he has an NGO. He fixes water pipes and buildings. The shura⁵⁴ met; he went; he wasn't too frightened; he had good support – from the people, from former Taliban and the elders and commanders [who] knew him. He was found innocent. That was in Zurmat. But this summer [2010] in Zurmat, six people, supposedly spies . . . had their throats slit like sheep (*halal shudand*⁵⁵). No bullets. No court. Afghan Taliban blamed the foreigners [that is, foreign fighters: Waziris, Pakistanis or others], but this may have been to protect themselves against future enmity. During Ramadan, representatives from the Waziristan shura came, but there were no results.⁵⁶

The researcher put the change down to US military operations, especially the strategy to 'kill or capture' insurgent leaders and field commanders, weakening the command-and-control structure of the local leadership and the Waziristan shura. In the wake of these operations, he said, Paktia had seen an influx of what he called 'bad Taliban' – criminally-minded fighters wanting to exploit the 'jihad' for gain – and especially Pakistani Waziris and other foreign fighters who were independently powerful and could not be disciplined.⁵⁷ He said they also had fewer links and

⁵⁴ The researcher said the *shura* had been mainly made up of local elders, with a couple of Taliban representatives on it. Author's interview, September 2010.

⁵⁵ This verb is normally used to describe killing livestock according to Islamic law; the butcher declares, 'Allahu akbar,' slits the animal's throat and allows the blood to drain; this makes the meat *halal*, ie ritually clean for eating.

⁵⁶ Author's interview, September 2010.

⁵⁷ 'If there is a problem between local people and local Taliban, there is a chance it can be sorted out,' said the researcher. 'With Taliban from further afield, it is less easy. There is no comeback against the foreign fighters. . . People have gone to Waziristan to complain [to the *shura*] but there they just shrug their shoulders. It is like when NATO commits a crime, what can Karzai or the ANA do?' The journalist Anand Gopal also gives an example from summer 2010 in Zurmat of how systems of command and control had broken down, describing a case where the Taliban sent a famous *alim* (Islamic scholar), to reprimand commanders who were acting

therefore felt fewer constraints towards abusing the local population. This pattern has been noted elsewhere, although the international military sees the 'kill or capture' strategy as a means of protecting the population.⁵⁸

Generally, Afghan civilians are weak compared with all armed groups, including the Taliban, as they are also weak in dealing with the state and with international armed forces. However, even though the population is often unable to stand up to the Taliban, in this war, winning the support of local people is seen as crucial – for all sides. Discipline can have military costs, if violators who may be needed in the fight are instead punished or dismissed. However, indiscipline also costs. This realisation is what sometimes compels the leadership to act against its commanders. For example, in Reuters and Younis' account of the rise of the Taliban in Ghazni, disgust replaced initial popular support, in 2007, over the oppressive behaviour of the Taliban in that area.⁵⁹

outside *shari'a* law. One of the commanders killed him (author's interview, September 2010).

⁵⁸ On concerns over the strategy, see Alex Strick van Linschoten and Felix Kuehn, *Separating the Taliban from al-Qaeda: The Core of Success in Afghanistan*, New York University, Centre on International Cooperation (February 2011), especially pp 9–11, http://www.cic.nyu.edu/afghanistan/docs/gregg_sep_tal_alqaeda.pdf. See also Antonio Giustozzi and Christoph Reuter, *The Insurgents of the Afghan North: The Rise of the Taliban, the Self-abandonment of the Afghan Government and the Effects of ISAF's "Capture-and-Kill campaign"*, Afghanistan Analysts Network (6 May 2011), p 3, <http://www.aan-afghanistan.org/uploads/AAN-2011-Northern-Insurgents.pdf>. For ISAF's position, see General Petraeus' counterinsurgency guidance: 'Pursue the enemy relentlessly. Together with our Afghan partners, get our teeth into the insurgents and don't let go. When the extremists fight, make them pay. Seek out and eliminate those who threaten the population. Don't let them intimidate the innocent . . .' ('Gen. Petraeus' Counterinsurgency (COIN) Guidance', Afghanistan ISAF (1 August 2010), <http://www.isaf.nato.int/from-the-commander/from-the-commander/comisaf-s-counterinsurgency-guidance.html>. The crucial factor may be whether degrading the local Taliban leadership leads to areas passing into firm government control or to greater instability and also how well the Taliban and the government actually govern.

⁵⁹ Christoph Reuter and Borhan Younus, 'The Return of the Taliban in Andar District, Ghazni,' in *Decoding the New Taliban, Insights from the Afghan Field*, edited by Antonio Giustozzi (New York/Chichester: Columbia University Press/Hurst, 2009), p 113. 'All [insurgent] groups became tougher and more aggressive . . . burning aid material donated by US troops . . . Sentences [from

A popular backlash against the Taliban, say the authors, brought changes in the following year: one commander was disarmed and dismissed, schools were allowed to reopen and the Taliban said they would be more cautious in dealing with alleged spies.

The need to keep the population on side may have spurred more-accurately targeted suicide bombings in 2010, compared with 2009,⁶⁰ as well as the movement's more lenient approach to NGOs and (boys) schools. Both changes on the ground paralleled changing guidance in the *Layha*. Sensitivities to popular opinion are also revealed by the lies and denials the Taliban generally issue following 'spectacular' attacks, whether from IEDs, suicide attacks or targeted killings causing particularly horrific loss of life.⁶¹ For example, when 27 labourers travelling from Laghman to Iran in October 2008 were shot dead, the Taliban spokesman claimed they were 'Afghan National Army soldiers . . . travelling to Helmand wearing ordinary clothes'.⁶² They gave a similar response in June 2010, when a suicide bomber blew himself up at a wedding in Arghandab in Kandahar, killing forty people, including not only the head of a pro-government militia, Haji Mohammad Naji Kako, and other militiamen (including the groom), but also, and in the main, ordinary people. The

Taliban courts] were applied to people in the form of torture and beating. People were forced to feed the Taliban and pay for filling their motorbikes' tanks. Bribery also started to operate . . . Abductions that ended up in ransom payments also started targeting suspected opponents of the fighters.'

⁶⁰ In 2010, compared with 2009, the number of civilian deaths due to suicide attacks was down by 15 per cent, this during a period when the number of attacks remained at the same level. For details and analysis, see UNAMA and AIHRC, *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict* (Kabul, March 2011), p 9. <http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf>.

⁶¹ See also International Crisis Group, *Taliban Propaganda: Winning the War of Words?*, Asia Report No. 158 (July 2008), www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/158-Taliban-propaganda-winning-the-war-of-words.aspx and Tim Foxley, *The Taliban's Propaganda Activities*, Stockholm: SIPRI Project Paper (June 2007) <http://www.sipri.org/research/conflict/publications/foxley>.

⁶² Bashir Ahmad Nadem, 'Dead Bodies of 27 Killed by Taliban Recovered', *Pajhwok Afghan News* (19 October 2008), <http://www.pajhwok.com/en/2008/10/19/dead-bodies-27-killed-Taliban-recovered>.

Taleban spokesman blamed the attack on a NATO air strike.⁶³

In private, the Taleban may acknowledge responsibility for attacks they deny in public. The Taleban authorities in Quetta were said to have sent a commission to investigate the killings of the Laghmani labourers, and the commander involved, Mullah Adam, was ordered to Quetta where a court stripped him of his position and disarmed him. However, rumours are that he may be active again.⁶⁴ As for the wedding attack, the leadership has continued to deny responsibility, even in private. Yet at least one senior Taleban official in Kandahar was furious enough to threaten to resign if such an attack was repeated.⁶⁵

Desire and ability to carry out internal discipline and respond to civilian grievances are fundamental to the usefulness of any code of conduct. Assessing how robust or weak procedures actually are is difficult because public admissions of guilt by the Taleban are rare and accounts of commanders being disciplined, disarmed or summoned to Quetta are anecdotal. For every account of a civilian successfully complaining against Taleban misbehaviour, many more exist of civilians being too frightened or too weak to complain.

The hierarchies set out in the *Layha* form an explicit schema of command-and-control responsibilities that may or may not be a reflection of *de facto* power. Assessing who is responsible among the Taleban when violations of the laws of war take place – not just who actually carried out the act, but who in a command position ordered or failed to prevent it – may be important if there is ever a chance for recourse to the courts.⁶⁶

⁶³ See Bashir Ahmad Nadem, 'Car Bomb Kills 40 at Wedding in Anti-Taleban Village,' *Pajhwok Afghan News* (10 June 2010), <http://www.pajhwok.com/en/2010/06/10/car-bomb-kills-40-wedding-anti-taleban-village>. See also Alissa J Rubin and Taimoor Shah, 'Blast Tears Through Afghan Wedding Celebration,' *New York Times* (9 June 2010), <http://www.nytimes.com/2010/06/10/world/asia/10afghan.html>.

⁶⁴ Anand Gopal, author's interview, September 2010.

⁶⁵ Interview with the Taleban official conducted after the bombing, reported by researcher to author, February 2010.

⁶⁶ Under IHL, the responsibility of superior officers (both civil and military) for crimes committed by their subordinates is known as 'command responsibility'. Superiors may have direct responsibility for ordering what is unlawful, eg ordering rapes, massacres or intentional attacks on civilians. All combatants also have a duty to disobey unlawful orders. (Compare this with

However, in the meantime, there are possible ways of encouraging the implementation of positive aspects of the *Layha*.

4.2 The *Layha* and advocacy

This is a war of public opinion, as well as of violence and intimidation and this provides the context for the possible use of the *Layha* to call the Taleban to account, in particular, by journalists – in their role of questioning those with power – and human rights defenders – in advocacy.⁶⁷ Journalists would find it relatively straightforward to cite the *Layha*. They are accustomed to using whatever is at hand to get answers from those in power – whether policy, rules or an interviewee's own words – in their bid to uncover discrepancies, lies and hypocrisy and add pace to a story. At the moment, journalists tend to passively report on Taleban claims of responsibility for attacks, repeating the claim *verbatim* with government comment and 'colour' from the ground providing a semblance of balance. The *Layha* could be used to sharpen reporting, providing journalists with better tools to demand explanations and clarifications and point out contradictions and double standards.

Naming Taleban commanders whom investigations indicate routinely order reckless attacks could help pinpoint accusations against those who fail to protect the population, as well as those within the hierarchy who are responsible for (a lack of) discipline and command and control. Cases of kidnapping for ransom, torture, harming the population, extra-judicial killings and forced

the obligation outlined in the *Layha* where obeying superiors is '*wajeb* [a religious duty] if [the order] is in accordance with *shari'a*' (art. 40)). Under IHL, a superior may also have 'imputed responsibility' for war crimes if s/he fails to prevent or punish crimes committed by a subordinate who was not acting under orders. The superior must have known or had reason to know of the subordinates' crimes and was in a position to stop and punish them, but did not. See Rule 152, 'Command Responsibility for Orders to Commit War Crimes,' 153, 'Command Responsibility for Failure to Prevent, Repress or Report War Crimes' and 151, 'Individuals are criminally responsible for war crimes they commit.' Jean-Marie Henckaerts and Lousie Doswald-Beck (eds), *Customary International Humanitarian Law*, online study, CUP/ICRC, Cambridge (2005), <http://www.icrc.org/customary-ihl/eng/docs/>.

⁶⁷ This section draws on discussions with Afghan and foreign human rights workers and journalists, especially those with human rights or war crimes portfolios working in Afghanistan, August and September 2010.

collection of religious taxes could also be reported with reference to the fact that they are violations of the Taleban's own rules.

Some human rights defenders are already citing the *Layha* in advocacy, but others feel considerable unease about referring to it at all.⁶⁸ They point out that minimum standards already exist that legally bind how the Taleban, international military and Afghan government forces conduct themselves during the conflict,⁶⁹ in addition to whatever rules they might set for themselves. Some human rights defenders worry that using the Code would dilute what one activist called the 'gold standard' of IHL.⁷⁰ They also see risks of confusing what is actually legal and illegal under international law and of being seen to legitimise the Taleban and their Code of Conduct. 'This is the rule book of a group which beheads teachers!' was the comment of one human rights worker.⁷¹ She was not alone in thinking that this Code should not and could not be treated seriously. Leaving aside the Emirate's changing policy on schools, which, since 2006, has become less hard-line, the point is valid. The Taleban continue to commit serious abuses, as defined by IHL, some of them permitted by this Code, some in breach of it. Using the *Layha* on its own may result in legitimising the indefensible. If the Taleban are condemned for slitting a person's throat,⁷² for example, does that imply that shooting the person instead (as per article 21) would have made the killing legitimate?

For those human rights defenders and journalists who see merit in deploying the *Layha*,⁷³ some practical problems remain. Often it is not clear

⁶⁸ Author's interviews, August and September 2010 (see FN 45).

⁶⁹ The current conflict in Afghanistan is classed as a non-international armed conflict, ie one which is 'restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other'. A more-limited range of rules apply than in international conflicts, and can be found primarily in Article 3 common to the four Geneva Conventions, Additional Protocol II to the Geneva Conventions, and other principles which have risen to the level of customary international law. See ICRC, 'What is International Humanitarian Law?' (July 2004), accessed at <http://www.scribd.com/doc/53274556/What-is-IHL>.

⁷⁰ Author's interview, September 2010.

⁷¹ Interview Kabul, September 2010. This exact point was made by several interviewees.

⁷² See FN 54.

⁷³ Author's interviews, August and September 2010 (see FN 45).

who has carried out an operation; some attacks are attributed wrongly to the Taleban and, in other cases, they deny responsibility for operations which may have adverse consequences or violate the Code.⁷⁴ Nevertheless, despite these reservations, the advantages of referring to the *Layha* where it reinforces IHL are clear: it is the movement's own rule book. Or, as argued by one human rights worker in Afghanistan,

The Code isn't an attempt to implement IHL, so there is no reason to praise the Taleban where it overlaps with IHL or criticise them where it doesn't. But there is a separate question: whether it is useful to use this Code as a basis for advocacy – why not hold the Taleban to account for the norms which they do hold?⁷⁵

4.3 The *Layha* and international humanitarian law: Protecting civilians

Protecting civilians during conflict is the area where referring to the *Layha* may be most relevant. This principle is central to IHL and is also an issue which everyone – Afghan civilians, government, the Taleban and international forces alike – says is important to them. IHL stipulates the minimum standards required from those participating in hostilities and therefore provides a useful baseline from which to discuss whether and how the *Layha* could be useful for advocacy. Moreover, although 'the Code doesn't track the language of IHL . . . it plausibly points in the same direction,'⁷⁶ as can be seen in several of its injunctions:

⁷⁴ For example, Taleban have denied to this author that particular kidnappings for ransom could possibly have been carried out by 'real' Taleban because that would be illegal for their fighters (author's interviews, August 2008). See also Mullah Omar's response to a UN allegation that a seven year old boy was executed for spying, 'We should also say that in accordance with the laws of the Islamic Emirate, which are enforced, no commander or judge can execute anyone on their own accord,' and 'Taleban Accuse UN of Double Standard over Civilian Casualties in Afghanistan,' Voice of Jihad website, (16 February 2011), translated by BBC monitoring.

⁷⁵ Author's interview with a human rights worker, September 2010.

⁷⁶ Author's interview with IHL lawyer, September 2010.

In carrying out martyrdom operations, take great efforts to avoid casualties among the common people (art. 57).

. . . all mujahedin with all their power must be careful with regard to the lives of the common people and their property . . . (art. 65).

Taking care of public property and the lives and property of the people is considered one of the main responsibilities of a mujahed; you must try very hard to carry out this responsibility and not allow those opportunists and materialists, those armed people who are interested in material gain, to harm or bother the people or destroy their assets (on back cover).

If an official or an ordinary person in the name of the mujahedin harms the common people . . . the leadership will punish him accordingly or expel him from the mujahedin's ranks (art. 66).

These injunctions may at first appear to mirror the language of IHL, but there is one crucial difference. The *Layha* uses the terms *aam khalq* or *wulusi khalq* or 'the common people' when referring to ordinary people who are not mujahedin or fighters and who are not with the government either. In Pashto, as in English, the term is almost, but not quite, a synonym for civilian.⁷⁷ The distinction is critical: civilian status is fundamental to IHL and carries all sorts of legal protections. Under IHL, the key distinction is between those who are directly

⁷⁷ At other times, the Taleban use a different term, *mulki* which corresponds more closely to the IHL notion of a civilian, someone who is not fighting; this is the term they generally use when discussing 'civilian casualties'. See for example, the press statement posted on their el-Emarah website on 22 December 2010 condemning the August-December 2010 UNAMA civilian casualty report, in Pashto, http://alemarah-ia.net/index.php?option=com_content&view=article&id=6928:2010-12-22-10-12-34&catid=6:official-statmenst&Itemid=7, and in English, 'Response of the Islamic Emirate in Reaction to the UNO Recent Report on Civilian Casualties' (23 December 2010), http://shahamat.info/english/index.php?option=com_content&view=article&id=3897:response-of-the-islamic-emirate-in-reaction-to-the-uno-recent-report-on-civilian-casualties&catid=4:statements&Itemid=4.

participating in hostilities (who may be lawfully killed) and those who are not (who enjoy protected civilian status).⁷⁸ The Taleban draw the line differently – between those who are with them and those who are against. There is a mass of people whom IHL would consider unequivocally civilian, who are not considered 'common people' by the Taleban and who have been subject to brutal intimidation campaigns and attacks during the insurgency. They include pro-government or non-aligned Afghan politicians, religious and tribal leaders, government officials, tribal leaders, NGO workers, election workers and candidates, teachers, women's rights activists, labourers building roads and international civilians.⁷⁹

This issue of who is a civilian runs through the whole uneasy debate about the usefulness of working with the *Layha*, or engaging with the Taleban on civilian casualties, given the gap between ideas of who should be protected or who can be targeted.⁸⁰ Nevertheless, it seems enough

⁷⁸ Ongoing dilemmas exist in IHL over how direct participation in hostilities (DPH) should be judged, but these debates mainly focus on status – how to determine whether a person is a member of an armed group – and tricky temporal issues (for instance a farmer who picks up a gun and fights may become a legitimate target, but arguably only as long as he is fighting, because he is not generally participating in hostilities). The US military appears to rely more on a 'membership criteria' to determine 'continuous combat function' and therefore DPH status (author's interviews with IHL lawyers dealing with civilian casualties in Afghanistan, December 2010, March 2011). For discussion of these issues, see for instance, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009)' *International Review of the Red Cross* (No. 872, December 2008), <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

⁷⁹ Whether police are classed as having protected civilian status under IHL would depend on whether they carrying out civilian policing duties or are directly participating in hostilities. One human rights practitioner suggested contractors supplying military bases might also be considered to have lost their civilian status under IHL, because they are supporting armed conflict: 'Convoys and contractors are tricky, but we would say *prima facie*, they are civilian and then we would have to look at the exact situation.' In IHL terms, one could say that the Taleban categorize certain types of material, financial and political support for their enemy as 'direct participation in hostilities', making them military targets, in a way that even the most extreme IHL interpretation would not. Author's interview, September 2010.

⁸⁰ See 4.3.1 and especially FNs 111 and 112.

overlap exists between IHL and the Code to make discussion and the teasing out of common ground useful for advocacy.

4.3.1 IHL, the *Layha* and Taleban tactics

The three methods of attack used by the Taleban that were the most deadly for civilians in 2010 were IEDs (44 per cent of civilian deaths carried out by armed opposition groups), execution and assassination (23 per cent) and suicide attacks (11 per cent).⁸¹ The *Layha* gives no specific advice about IEDs and its guidance on suicide attacks is also relatively limited, focusing as much on ensuring real military gain and preventing pointless loss of mujahedin life, as on protecting civilians.⁸² Even so, both types of attacks should be covered by the repeated injunction for mujahedin to do all in their power to protect the lives and property of the common people. Under IHL, the same rules apply regardless of the method of attack⁸³ – whether IED or rocketing, suicide bombing or drone – and are largely aimed at protecting civilians: military forces must distinguish at all times between civilian and military targets and must not target civilians or their property; they must take all feasible precautions to spare the civilian population; for example, they must not carry out indiscriminate attacks and, when they do attack a military target,

any expected civilian losses must be proportional to the direct military gain.⁸⁴

Suicide and IED attacks may be problematic under both IHL and the *Layha* because they are inherently difficult, although not impossible, to carry out *and* at the same time protect against the loss of lives of civilians or the common people.⁸⁵ In the case of IEDs, if they are hand-operated or if Taleban warn the population that roads are ‘closed’, this may be seen as a precaution to protect civilians. However, at their worst, IEDs are, as one interviewee described them, ‘unsophisticated and victim-operated, a first-come-first-served type of weapon, effective at denying movement to military forces, but just as likely to explode under the tractor of a farmer who just happens to be driving along the mined road’.⁸⁶ As someone working in human rights in the south said, ‘I do believe the Taleban try to avoid civilian casualties, but they’re pretty reckless. Their measures to avoid civilian casualties are demonstrably insufficient.’⁸⁷ In June 2011, UNAMA took an even stronger position: ‘the large majority [of IEDs] . . . are indiscriminate . . . [and] often placed alongside

⁸¹ Twenty-two per cent were from ‘other tactics.’ UNAMA and AIHRC, *Protection of Civilians in Armed Conflict*, p 2 (FN 58).

⁸² As well as breaking IHL rules on protecting civilians, suicide attacks frequently involve ‘perfidy’ which is a serious violation of IHL: it involves treacherously injuring or killing an adversary after deceiving him into thinking he must give you protection, for example pretending to be injured or of having surrendered (thus becoming *hors de combat*) or being a civilian, for example by dressing up as a woman. See Rule 65, Perfidy, from Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (FN 68), which catalogues the 161 rules of customary international humanitarian law, together with commentary. This is ICRC’s guidance on IHL, rather than the law itself, but citations to original conventions and treaties can also be found here. For the study itself, see <http://www.icrc.org/customary-ihl/eng/docs/v1>. For the guidance on perfidy, see http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65.

⁸³ Unless the method is specifically banned, usually because it is deemed inherently indiscriminate, eg poison gas or chemical weapons; Rules 72 and 74, cited in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (FN 64).

⁸⁴ The International Committee of the Red Cross (ICRC) has summarised these rules as follows: **Distinctions:** ‘Civilians are protected against attack, unless and for such time as they take a direct part in hostilities,’ and ‘Attacks must not be directed against civilian objects’ (ICRC Study Rule 6). **Precautions in attack:** ‘In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event minimise, incidental loss of life, injury to civilians and damage to civilian objects’ (ICRC Study Rule 15).

Proportionality: ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advance anticipated, is prohibited’ (ICRC Study Rule 14). Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (FN 64).

⁸⁵ However, Van Linschoten notes that, in Kandahar at least, the common perception with regard to IEDs and civilian casualties is that the foreign forces are at fault for driving through civilian areas, rather than the Taleban for planting the IEDs (written comment February 2010). See also Open Society Foundations, *The Trust Deficit: The Impact of Local Perceptions on Policy in Afghanistan*, Policy Brief No. 2 (October 2007), http://www.soros.org/initiatives/mena/articles_publications/publications/policy-afghanistan-20101007/perceptions-20101007.pdf.

⁸⁶ Author’s interview, September 2010.

⁸⁷ Author’s interview, September 2010.

roads and in busy commercial areas . . . the widespread use by anti-government elements of these weapons is a violation of international humanitarian law.⁸⁸

Suicide attacks remain controversial in Afghanistan. When first used, many were surprised because they were generally viewed as un-Islamic, barbaric and un-Afghan.⁸⁹ The journalist Anand Gopal reports that heated discussion took place in the Quetta *Shura* on whether they were permissible according to *shari'a*, with Mullah Omar coming down against the tactic. However, Gopal concludes, 'the realities on the ground eventually won out . . . and today the leadership appears to have made a virtue of necessity. The number of suicide attacks skyrocketed after 2006.'⁹⁰ In other words, since the disastrous attempts at full-frontal attacks on Kandahar and elsewhere in 2006 and facing ISAF's overwhelming firepower, suicide attacks seem to have proven too effective not to be used.

In 2010, compared with 2009, civilian casualties resulting from suicide attacks were substantially reduced, and UNAMA and AIHRC concluded that the Taliban may be implementing guidance in the *Layha* to target military objects more carefully.⁹¹ However, 2011 began with what looked like a shift to easier or more-dramatic targets, using suicide attackers, bombs and direct fire on a bank in Jalalabad, a supermarket and shopping centre in Kabul and a government office in Kunduz, among others. Civilians were deliberately, recklessly and indiscriminately killed and the Taliban's claims to have been attacking military targets and their attempts to play down civilian casualties were

⁸⁸ 'May Deadliest Month for Afghan Civilians,' UNAMA press statement, 11 June 2011, http://unama.unmissions.org/Portals/UNAMA/Press%20State%20ments/June09_%202011_UNAMA%20POC_Eng.pdf.

⁸⁹ During the melt-down of post-invasion Iraq when suicide bombing became famous as a tactic, this author had many discussions with Afghans who basically said this would never happen in Afghanistan. If Afghans had not resorted to suicide bombing during the jihad, it was reasoned, when times were really tough, why would they do so now? Even today, many Afghans believe suicide bombers must be Pakistani or, at most, Afghans trained in Pakistan who do not know their own country.

⁹⁰ Anand Gopal, *The Battle for Afghanistan: Militancy and Conflict in Kandahar*, Counterterrorism Strategy Initiative Policy Paper, New American Foundation (November 2010), p 36, http://www.newamerica.net/publications/policy/the_battle_for_afghanistan.

⁹¹ UNAMA and AIHRC, *Afghanistan Annual Report 2010*, p 9 (FN 57).

unconvincing.⁹² There was a popular backlash, particularly after footage from security cameras inside the bank in Jalalabad was broadcast on national television and showed a gunman casually killing without any apparent attempt at discrimination. The disgust and anger among the Afghan population may have contributed to turning the Taliban away from attacks on such blatantly civilian targets,⁹³ as will be looked at in more detail below.

As for targeted killings – now making up more than one fifth of total civilian deaths in the conflict – rates have soared. Twice as many civilians were assassinated or executed in 2010 as in 2009. In Kandahar, that rose to three times as many civilians and in Helmand almost six times as many.⁹⁴ The Taliban use targeted killings, and the intimidation and abductions that go along with them, to seek out those they believe oppose them – government officials, workers, mullahs, tribal leaders, teachers, election workers, politicians and human rights and women's rights activists. It has been one of the most effective strategies to create distance between populations and the Afghan

⁹² The attack on the Kabul bank in Jalalabad in February 2011 was, according to the Taliban, aimed at 'policemen, intelligence agents and other government employees' who were drawing their wages from the bank; yet an estimated half of the casualties in the bank were non-policemen. See video at <http://www.youtube.com/watch?v=9hpJZ7Yhjzo>. The attack on the Finest Supermarket in Kabul, also in January 2011, supposedly targeted the head and workers of the private security company Blackwater, but the nine killed in the supermarket were all Afghan civilians, including a family (mother, father and four children). Similarly, the Taliban had claimed to be targeting 'foreign officials' meeting in the Safi Landmark shopping centre in Kabul in February 2011 (they killed two guards) and, in Kunduz, men registering for the Afghan local police in February 2011 (of the several dozen killed, many had simply been trying to renew their IDs and were far too young or too old to be conceivably trying to join the ALP).

⁹³ The more-recent attack on the 400-bed military hospital in Kabul on 21 May 2011 is an exception to this. However, the Taliban clearly believed they were attacking a military target. A statement emailed to AAN and media agencies praised the 'sacrificing heroes' who had killed and injured 'Afghan hireling military medical staff and a couple of their foreign teachers'. For a discussion, see Kate Clark, 'Killing Civilians: Taliban and International Law,' *Afghanistan Analysts Network* blog (23 May 2011), <http://aan-afghanistan.com/index.asp?id=1733>.

⁹⁴ UNAMA and AIHRC, *Afghanistan Annual Report 2010*, Executive Summary (FN 58).

state, forcing individuals and communities to either comply, leave an area or risk being killed.⁹⁵ This tactic has also disgusted the population; militarily, it is by no means an unambiguously effective method of warfare.

‘Targeted killing’ is not defined under international law, but, says the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, it occurs when

... lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force.

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.⁹⁶

In Afghanistan where targeted killings by both the Taliban and the international military (largely US Special Forces) take place during armed conflict, the same questions should be asked to determine if any particular operation was legal: Was the target participating in hostilities? Was constant care taken to spare civilians? Were all feasible precautions taken to avoid or, in any event, minimise incidental loss of life, injury to civilians and damage to civilian objects; if it could be expected that civilians would be harmed killed or civilian property damaged, was the military gain proportional to those civilian losses?⁹⁷ An additional question is whether operations were

⁹⁵ Compromises are often made, as families hedge their bets and try to balance contradicting pressures, with one brother bringing home a government salary and another supporting the Taliban, or with the same person working *and* fighting or contributing with money or in kind (phone cards, petrol, logistics). For examples of such compromise, see Kate Clark ‘Afghanistan’s “Weekend Jihadis”,’ 11 September 2009, BBC, <http://news.bbc.co.uk/1/hi/8248101.stm>.

⁹⁶ For a useful look at targeted killings and possible IHL violations, especially vis-à-vis US policy, see *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: Study on Targeted Killings*, UN Human Rights Council (May 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

⁹⁷ See FN 83.

‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’. This would be illegal.⁹⁸

The *Layha*’s imprecise clauses on killing and execution simply do not reflect the actual scale and ferocity of the Taliban campaigns that, indeed, seem precisely aimed at spreading terror. The Code actually gives extremely limited explicit authority to assassinate. Language-wise, it differentiates between ‘execution’ (*i’dam*), used for those found guilty following a court case, and killing (*wažel*). Of the many types of enemies working for the ‘puppet regime’ or the ‘infidels’, permission is only explicitly given to kill (*wažel*) soldiers in battle and contractors and drivers of supply trucks to military bases (and here as well, the implication is that this should be during an attack on their vehicles and while they are driving or actually on the job). The clauses that gave explicit permission to kill in earlier versions have largely been dropped or changed.⁹⁹ The Code bans the extra-judicial killing of prisoners (in almost all circumstances) as well as of soldiers and police who surrender. Executions are allowed or ordered against specific categories of ‘criminals’, but these can be ordered by only a very few people and then only after a trial. At the same time – in what looks like a contradiction – the *Layha* presents the killing of ‘a high-ranking government official’ (art. 5) as a very favourable action.

The rules appear to be deliberately obfuscatory. After reading the plethora of articles dealing with who can kill or execute whom, how and when, the reader is left still wondering what exactly the rules on assassinations are and whether the Taliban’s targeted killings are in accordance with the *Layha* or not. It seems that assassinations probably largely should be illegal, but the Code skirts round the issue. Assassination may simply be too useful a method to ban while at the same time perceived by the wider population as too un-Islamic and inhuman a method to promote openly. Uncertainty and unpredictability can also be part of terrorising a population.

Occasionally, the Taliban explain their targeting in ways which go beyond that detailed in the Code of Conduct. For example, in an angry response to a

⁹⁸ Rule 51, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (FN 64).

⁹⁹ Clauses that were dropped include the order to kill ‘recidivist’ teachers and pro-government mullahs (2006:25) and contractors who persist in supplying foreign military bases ‘wherever the mujahedin get a chance’ (2009:21).

BBC Pashto report in June 2011 that quoted a 'Taleban representative' as saying Mullah Omar had ordered a halt to the killing of those building roads, the Taleban spokesman Zabihullah Mujahed said (emphasis added by author):

We are clearly saying that whoever is working with the infidels under the name of 'reconstruction' to achieve [the infidels'] ominous goals of weakening our nation's feelings of freedom, who have funds coming from the Pentagon and [the funds] are spent by the PRTs and charity organizations, this is a process of un-armed [i.e., non-military] occupation of the country. These people will never be permitted to work. Any company or mu'assasa (NGO) which has an armed group with it and the armed group might have attacked the mujahedin several times; *they* are considered to be fighting soldiers and can be killed.¹⁰⁰

The original Pashto and Dari texts of the statement are not clear on whether it is just 'armed groups' accompanying reconstruction projects – presumably a reference to armed guards – or the workers as well who are considered 'fighting soldiers' and therefore 'targetable'. Nor is it clear whether the injunction to kill applies to all those working with foreign-associated, reconstruction companies and NGOs or just ones funded by the Pentagon. Nevertheless, Mujahed's statement is not incompatible with orders in the 2010 *Layha* (see Section 4 on those who provide logistical support and construction for the enemy and Section 9 on NGOs and companies) and what is now happening on the ground. Those building and guarding roads continue to come under attack.¹⁰¹

¹⁰⁰ 'The Statement of the Spokesman of IEA against the Irresponsible Statements of BBC Network', 6 June 2011, Shahamat website, http://www.shahamat-farsi.com/index.php?option=com_content&view=article&id=7954:1390-03-16-08-00-18&catid=5:official-statmenst&Itemid=6. For original BBC article, see Emal Parsaly, 'Mufti Rahmani: We Won't Attack the Road Builders,' 5 June 2011, BBC Pashto website, http://www.bbc.co.uk/Pashto/afghanistan/2011/06/110605_hh-taliban-policy-change.shtml.

¹⁰¹ See, for example 'Blast Kills 11 Road Construction Workers, Wounds 19 Others in Afghan South,' Afghan Islamic Press news agency, (24 May 2011). The article

What is also interesting is that although levels of violence generally rose against the Afghan government, the Afghan and international military, and private development contractors during 2010 (compared with 2009), according to the Afghanistan NGO Security Office (ANSO), there was a 27 per cent *decrease* in attacks against NGOs (with the exception of de-mining NGOs) during the same period.¹⁰² Schools, especially boys' schools, in some areas are also finding it easier to stay open.¹⁰³

ANSO believes the Taleban policy towards NGOs has changed, just as the *Layha* changed between 2006 and 2009 and 2010 and in tandem with the movement's capacity to consolidate its hold on areas. Once in control, the Taleban can co-opt 'service providers' – NGOs, schools and government departments – so that instead of being 'tools of the infidels' (2006:26), their work reflects well on the Emirate. ANSO believes the Taleban do not see NGOs 'as complicit in the international military forces campaign, as they do contractors for instance, but rather see them as an element of the local community . . . We suggest that the decrease in violence being deployed against NGOs results from the anti-government elements' immediate need to appear legitimate in the eyes of the community rather than from an improved opinion of the NGO itself.'¹⁰⁴ The capacity to keep (especially boys') schools, health and other government services and NGOs running,

also mentions an attack on 19 May, in which 35 workers of a road construction company were killed in Wazi Zadran District of Paktia Province. Accessed via BBC Monitoring.

¹⁰² ANSO Quarterly Date Report Q.4 2010. For all their Quarterly Data Reports, see: <http://www.afgnso.org/>. It also pointed out that NGOs had become more security conscious. See ANSO Quarterly Date Report Q.2 2010, 1.

¹⁰³ In March 2011, the Afghan Ministry of Education welcomed what it said was a decree from Mullah Omar instructing Taleban to stop attacking schools and intimidating school children. IRIN 'Afghanistan: Government hails Taleban decree on schools', 29 March 2011. <http://www.irinnews.org/report.aspx?reportid=92312>. See also Khan Mohammad Danishju, 'Taleban Try Soft Power', IWPR Institute for War & Peace Reporting, 8 Apr 2011 <http://www.irinnews.org/Report.aspx?ReportID=92312>.

¹⁰⁴ ANSO Quarterly Date Report: Q.2 2010, pp 1, 5, notes that in 2010, compared with 2009, abductions of NGO staff by Taleban and other 'anti-government elements' was up by 7 per cent, but all were released quickly (average detention time was down from weeks to days) and without harm; the main purpose, it said, appeared to be 'information gathering' about the NGO concerned.

or to re-open them, then depends on the strength and inclination of local communities with respect to the Taliban. This pattern has also been noted in Kandahar by Gopal,¹⁰⁵ in 2009 and 2010 in the north by a researcher on the Taliban¹⁰⁶ and by Antonio Giustozzi and Christoph Reuter. The latter describe how in areas the Taliban controlled and influenced (most of which are now back in government hands or are contested),

. . . the Taliban established their shadow administration, starting in the fields of justice and taxation, followed (in some cases) by education and health, with a significant impact on the lives of sections of the population . . . While in general, the Taliban do not tolerate any employment within the Afghan government, health and education staff were explicitly exempted from this rule, at least in Kunduz province. In Kunduz, the Taliban's attitude concerning education became clear: . . . girls were banned from participating in schooling despite occasional protests by village elders, boys' schools remained open.¹⁰⁷

¹⁰⁵ Gopal on Kandahar: 'Attacks on schools began to intensify by 2005 . . . By 2009, most of the schools operating outside firmly-held government territory had been shuttered. This should not be seen, however, as opposition to education as such . . . Rather, this was an effort to block one of the few services that the state had attempted to provide to rural communities, and in doing so further the separation between the population and the government. For the same reason, there was a discreet but concerted campaign to attack or force the closure of clinics. In the case of both schools and clinics, however, the Taliban (particularly the older generation) appeared willing to negotiate their existence with the community, so long as the inviolable principle of independence from the government and foreigners was upheld.' Gopal, *The Battle for Afghanistan*, p 37 (FN 86).

¹⁰⁶ The researcher said, 'There are agreements. You work for an NGO, you don't spy or work against the Taliban. They take a tax on your salary.' He also described the Taliban in Chahr Dara district of Kunduz in 2010 organising the payment of electricity bills after two to three years of non-payment by the government (interview September 2010).

¹⁰⁷ Giustozzi and Reuter, *The Insurgents of the Afghan North*, p 2 (FN 55). They also reported a more permissive attitude to NGOs as linked to pressure from local communities, with NGOs being asked to register

A human rights defender working in the south, who did not want to be named, reported similar patterns:

In 2009, we saw [NGO and government workers who had been kidnapped] released after agreeing to conditions – the abductions were aimed at turning people, not killing them. Sometimes, there was money involved, but not always. For example, a group of workers working with the government were captured; [the Taliban] agreed that they could carry on working so long as there were no police or escorts and that they would notify the local Taliban commander, and then they were set free. So, they were trying to turn people, not kill them.¹⁰⁸

However, such situations may not be stable, as he went on to say: 'Last month [August 2010], I started to wonder if tactics had changed: assassinations have absolutely surged.' ANSO also warned: 'The risk of course is that enlightened self-interest can disappear rapidly, unexpectedly and violently.'¹⁰⁹

4.4 Deploying the Code

The rest of this section presents two case studies involving the protection of civilians. The first looks at how UNAMA's human rights section has successfully used the Code, in support of IHL, to put pressure on the Taliban to abide by its commitments to protect civilians. The second examines whether citing the Code could have enabled journalists to report the killing of ten aid workers in Badakhshan in August 2010 more accurately and in a way that did not serve the interests of Taliban propaganda.

4.4.1 Case Study 1: Human rights advocacy and civilian casualties

Criticism based on the *Layha* seems to hit a raw nerve with the Taliban. The UNAMA mid-year report on civilian casualties, released in August

with 'Taliban authorities' across the north. USAID-funded projects, however, were 'strongly opposed.'

¹⁰⁸ Author's interview, September 2010.

¹⁰⁹ ANSO *Quarterly Data Report Q.2, 2010*, 5. Released mid-July 2010. Accessible at [http://www.afgnso.org/2010Q/ANSO per cent20 Quarterly per cent20Data per cent20Report per cent20\(Q2 per cent202010\).pdf](http://www.afgnso.org/2010Q/ANSO%20per%20Quarterly%20Data%20Report%20(Q2%202010).pdf).

2010, for example, headlined the statistic that armed opposition groups were responsible for more than 70 per cent of all civilian casualties.¹¹⁰ UNAMA cited IHL, as well the *Layha*, to urge the Taliban to keep to its own rules (emphases added):

The Taliban should withdraw all orders and statements calling for the killing of civilians, including civilian government officials; **adopt and enforce Codes of Conduct or other directives** that prohibit any and all attacks on civilians; accept that civilians cooperating with the Afghan government and International military forces are protected against any attack and immediately cease targeting those civilians . . . The Taliban should prevent civilian casualties by complying with international humanitarian law, rules and principles **including those rules publicly committed to in the 2009 Taliban Code of Conduct and other documents on preventing civilian casualties** when planning suicide attacks and acts of perfidy.¹¹¹

The UNAMA report was widely carried by the media and the response from the Taliban spokesman, Zabihullah Mujahed, was swift: a denunciation of the statistics as ‘partial, one-sided and incorrect’, ‘biased and subjective’, ‘dogmatic’ and likely to encourage and exacerbate more civilian deaths by ISAF. Quoting the Universal Declaration of Human Rights that all human beings are born free and equal, he urged the UN and ‘other related organisations’ to come up with an ‘optimistic and positive decision’ in response to a proposal to ‘clarify’ the situation:

¹¹⁰ UNAMA calculates casualties from the various armed opposition groups together; they include Taliban, Hezbe Islami, the Haqqani network and others. UNAMA, *Afghanistan Mid Year Report 2010: Protection of Civilians in Armed Conflict*, Kabul (August 2010). Can be accessed at: http://unama.unmissions.org/Portals/UNAMA/Publication/August102010_MID-YEAR%20REPORT%202010_Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf.

¹¹¹ UNAMA, *Afghanistan Mid Year Report 2010*, p 16 (FN 106).

A committee, consisting of special representatives of Islamic Conference, UN’s human rights organizations as well as representatives from ISAF forces and Islamic of Emirate of Afghanistan, should be formed to assess the very issue and conduct investigations into the civilian casualties across the country. The stated committee should by [sic] given a free hand to survey the affected areas as well as people in order to collect the precise information and the facts and figures and disseminate its findings worldwide.¹¹²

The Taliban’s suggestion to set up a joint civilian casualties committee was widely reported and responses were both positive¹¹³ and sceptical.¹¹⁴

¹¹² Statement in English by Zabihullah Mujahed, Voice of Jihad website, ‘Response of the spokesman of the Islamic Emirate of Afghanistan about civilian casualties survey’ (15 August 2010), http://alemarah-ia.com/english/index.php?option=com_content&view=article&id=1181:response-of-zabihullah-mujahid-the-spokesman-of-islamic-emirate-of-afghanistan-about-civilian-casual&catid=4:statements&Itemid=4. Statement in Pashto can be found here: http://www.loyafghanistan.af/index.php?option=com_content&view=article&id=2298:2010-08-16-02-05-44&catid=71:movies&Itemid=270.

¹¹³ See for example, the statement of the Afghanistan Rights Monitor (ARM). Their twelve point proposal included a call for the Taliban to ‘provide accurate definitions as to who [they] consider as “combatant” and a legitimate target and who the Taliban consider as “civilian people” and immune from deliberate harm.’ See the Reliefweb: <http://reliefweb.int/node/364365>. The UN and NATO were said to be ‘cautiously considering’ the proposal; see John Boone, ‘Taliban Call for Joint Inquiry into Civilian Afghan Deaths Considered,’ *The Guardian* (16 August 2010), <http://www.guardian.co.uk/world/2010/aug/16/taliban-afghan-civilian-deaths-nato-un>.

¹¹⁴ See for instance Erica Gaston’s reaction to the Taliban statement and ARM proposal: The Taliban, ‘has a fundamentally different view of who is a civilian to the UN, other international human rights monitors and many Islamic scholars, for that matter . . . The tragicomic suggestion by one Afghan monitoring group, the Afghan Rights Monitor – that the Taliban would have to agree not to kill the investigating committee – highlights the absurdity of negotiating common definitions given such fundamental differences.’ Erica Gaston, ‘An Unlikely Consensus on Civilian Casualties,’ *The Guardian* (17 August 2010), <http://www.guardian>

The proposal's unorthodoxy, its nugget of practicality and the small scrap of common ground it created – the common stated desire not to harm civilians – provided entry points for greater advocacy and even for a possible shared issue of substance for those on the Afghan government or international side who may be talking to the Taliban. The scale and duration of the Taliban reaction to the UNAMA report – which went on for months¹¹⁵ – suggests that the accusation that they were failing to protect Afghan civilians hit home.

In the latest annual report on civilian protection, covering 2010 and published in March 2011, UNAMA, along with AIHRC, ratcheted up their criticism of the Taliban based on their violations of the *Layha*.¹¹⁶ Compared to previous reports, it made many more pointed and detailed references to the Code: failing to protect civilians (pp. 19, 23, 33), using children in suicide attacks (p. 40), the treatment of prisoners and suspected spies and the use of beheading (all on p. 42). The report acknowledges that the reduced number of civilians killed in suicide attacks, 'may reflect guidance in the

Taliban Code of Conduct . . . to concentrate the use of these strategic weapons on very important targets' and possibly to 'avoid casualties among the common people'. However, it also said civilian targets were still being attacked and, even when the target was military, many attacks were disproportionate and indiscriminate, killing and injuring far more civilians than either international or Afghan security forces:¹¹⁷

Although the publication of the Taliban's updated . . . Code of Conduct in May 2010 includes provisions aimed at reducing civilian casualties . . . the AIHRC and UNAMA Human Rights did not observe any concerted effort by the Taliban to implement these orders or to take action against those commanders or members who disobeyed them. UNAMA Human Rights and the AIHRC also documented numerous indiscriminate or disproportionate attacks in 2010 that resulted in civilian casualties for which the Taliban claimed responsibility.¹¹⁸

As yet, the Taliban has not formally responded to the March 2011 report.¹¹⁹ However, their debate about civilian casualties with the wider world, and possibly within the movement, remains ongoing and fierce.¹²⁰

.co.uk/commentisfree/cifamerica/2010/aug/17/Taliban-civilian-casualties/print.

¹¹⁵ See Mullah Omar's Eid address to the nation in November 2010: 'Pay attention to the life and property of the civilians so that, may Allah (swt) forbid, your Jihadic activities will not become a cause for destruction of property and loss of life of people. Anything that is not permissible in Islam, has no place in our military policy.' 'Message of Felicitation of the Esteemed Amir-ul-Momineen on the Occasion of Eid-ul-Odha' (15 November 2010). English translation (as posted): <http://jihadology.net/2010/11/15/message-of-felicitation-from-mullah-mu-per-centE1-per-centB8-per-centA5mmad-per-centE2-per-cent80-per-cent98umar-on-the-occasion-of-per-centE2-per-cent80-per-cent98id-al-a-per-centE1-per-centB8-per-cent8D-per-centE1-per-centB8-per-centA5a/>. See also 'Response of the Islamic Emirate of Afghanistan in Reaction to the UN Report on Civilian and Children,' Shahamat website (17 February 2011), http://shahamat.info/english/index.php?option=com_content&view=article&id=5146:response-of-the-islamic-emirate-of-afghanistan-in-reaction-to-the-un-report-on-civilian-and-children&catid=4:statements&Itemid=4. Also see 'Statement of the Islamic Emirate of Afghanistan Regarding the Martyrdom of Innocent Afghan,' Shahamat website (22 February 2011), http://shahamat.info/english/index.php?option=com_content&view=article&id=5233:statement-of-the-islamic-emirate-of-afghanistan-regarding-the-martyrdom-of-innocent-afghan&catid=4:statements&Itemid=4.

¹¹⁶ UNAMA and AIHRC, *Afghanistan Annual Report 2010* (FN 58).

¹¹⁷ UNAMA and AIHRC, *Afghanistan Annual Report 2010*, 9 (FN 58).

¹¹⁸ UNAMA and AIHRC, *Afghanistan Annual Report 2010*, iv, Executive Summary (FN 58).

¹¹⁹ A spokesman did make some brief remarks, saying the report was untrue and was intended to defame the Taliban; see 'Afghan Taliban Reject Receiving UN Report on Human Rights,' Afghan Islamic Press News Agency website (16 March 2011), translated by BBC Monitoring.

¹²⁰ See for example, 'Statement of the Islamic Emirate Regarding the Martyrdom of Demonstrators in Takhar' which was released after the US Special Forces' killing of two men and two women during a night raid in Takhar on 18 May 2011 and included a list of recent alleged civilian casualties. It said, 'The human rights organizations of the world should not harm their credibility at the hands of NATO invading forces by turning a blind eye to these atrocious activities. They should courageously expose the atrocities of the tyrants and should not opt to publish biased reports and figures as they did in the past – and thus embolden the invading forces in their brutal acts. Similarly, we call on independent and neutral media outlets, not to remain

4.4.2 Case Study 2: Journalism and targeted killings

References to the *Layha*, whether by journalists or human rights defenders, when dealing with targeted killings are more problematic, partly because murders are often not claimed and partly because of the non-explicit nature of the *Layha* itself. As one human rights advocate working in southern Afghanistan said, 'The Taleban kill many non-combatants and the Code is not preventing that . . . The rules on assassination are simply too ambiguous.'¹²¹ However, when the Taleban claim killings that are in clear violation of the *Layha*, referring to it could make for much more robust reporting. Such was the case in August 2010, when ten members of a medical team – eight foreigners and two Afghans – who worked for an NGO, the International Assistance Mission (IAM), were ambushed in a remote district of Badakhshan and shot at point blank range as they were driving back to Faizabad.¹²² The killing was claimed by the Taleban through their spokesman, Zabihullah Mujahed, who accused the group of proselytising and later on made a further accusation that they had been spying.

The few details from the scene available to journalists, together with the absence of close questioning of the spokesman as to inaccuracies in his account, meant that little was available to refute the Taleban's spin. In particular, the spokesman's claim that the ten had been preaching hung over the story, appearing to make sense of this brutal killing. The claim, reported with little questioning as to its veracity,¹²³

silent about these brutal carnages. Meanwhile, we are grateful to media outlets that raised the voice of the oppressed people regarding the yesterday's incident' Shahamat website (20 May 2011), http://shahamat-english.com/index.php?option=com_content&view=article&id=7621:statement-of-the-islamic-emirate-regarding-the-martyrdom-of-demonstrators-in-takhar&catid=4:statements&Itemid=4.

¹²¹ Author's interview, September 2010.

¹²² The murders were covered extensively by AAN in a series of blogs entitled '10 Dead in Badakhshan: 1–7,' Afghanistan Analysts Network. The first can be accessed at: <http://aan-afghanistan.com/index.asp?id=949>.

¹²³ See for example, al-Jazeera's report 'Taleban Kills Foreign Aid Workers', *Al-Jazeera* website (7 August 2010): 'The Taleban has said it shot dead eight foreign aid workers in a remote northern region of Afghanistan, accusing them of being "Christian missionaries". "Yesterday at around 8am, one of our patrols confronted a group of foreigners. They were Christian

effectively shut Afghans up because of a reluctance at being seen to defend dead Christians. Only a few braver Afghans spoke out,¹²⁴ including, eventually, a number of senior local Taleban commanders who contradicted the spokesman's claim and denied the killings:

The killing of these people was a crime. I know they were working for the health of poor people in our region. By claiming responsibility for the killing, the Taleban spokesman has changed the dynamic. He has made it impossible for anyone else to speak out, even if the Taleban have not done the killing . . . In our area, we are completely in favour of the work of the NGOs. We have multiple disagreements with the Kandaharis in the movement, but they give us no importance and are happy to sell us out.¹²⁵

By the time these commanders spoke, however, the news cycle had moved on and it has been the

missionaries and we killed them all," Zabihulla Mujahed, a spokesman for the Taleban movement, said on Saturday. "They were carrying Persian language bibles, a satellite-tracking device and maps," he said. Mujahed said the group was lost and the victims were killed as they tried to escape. . . .'

<http://english.aljazeera.net/news/asia/2010/08/20108784511663351.html>

¹²⁴ These included the opposition politician, Dr Abdullah, but not President Karzai.

¹²⁵ Interview with senior northern Taleban commander, who asked not to be named because he was contradicting the official claim, 16 August 2010. On the record, the shadow governor of Badakhshan also denied the Taleban had carried out the killings, as did the commander of the western Nuristan front, Qari Malang, who said: 'We have checked the facts regarding these foreigners and our people in the area have confirmed that they were bona fide aid workers and had been providing assistance to the population. Furthermore, we have learnt that among the killed foreigners was Dan Terry, who had a long history of helping our people, including in Kunar and Laghman provinces and that he had previously provided welfare assistance to the families of those civilians martyred in bombardments . . . We pass on our condolences to the families of those killed.' See Kate Clark, 'Ten Dead in Badakhshan 6: Local Taleban Say it was Murder,' Afghanistan Analysts Network (28 August 2010), <http://aan-afghanistan.com/index.asp?id=986> and 'Ten Dead in Badakhshan 5: Condemnation from a Taleb; Silence from the Palace' (17 August 2011), <http://aan-afghanistan.com/index.asp?id=971>.

Taleban leadership's opportunistic claim that has stuck in the historical record.¹²⁶

Whether the Taleban or another group carried out the killings is not yet clear. Nevertheless, Mujahed's claim of responsibility made it necessary for journalists to question him and his statement much more closely. The *Layha* could have helped them pick apart inconsistencies in his claim and provide the means to question Mujahed about several clear violations of the *Layha*:¹²⁷ Why did he praise illegal summary killings, particularly as they were of medical staff and women? Why, even if they had been accused of preaching Christianity or spying, were the ten not handed over to the provincial Taleban authorities? Why was there no trial? Instead, the straight reporting of Mujahed's story effectively closed down space for discussion of what was one of the worst attacks on humanitarians of the war. In effect, this ceded ground to the Taleban.¹²⁸

¹²⁶ See, for example, the following governmental, news and Christian websites reporting on the awarding of the US Congressional medal to one of the murdered team members, Tom Little, all of which stated categorically that the Taleban were the murderers:

<http://www.whitehouse.gov/search/site/tom%20little%20taleban>, <http://www.thenorthstarnews.com/issue.aspx?id=2011-02-22>, <http://www.cbn.com/cbnnews/us/2011/February/Slain-US-Missionary-Receives-Medal-of-Freedom-/> <http://gretawire.blogs.foxnews.com/2011-presidential-medal-of-freedom-awards/> <http://www.cbn.com/cbnnews/us/2011/February/Slain-US-Missionary-Receives-Medal-of-Freedom-/>

¹²⁷ Mujahed (like Hezb-e Islami) only made the claim after the murders became public knowledge. Both spokesmen also got basic details wrong, such as the number, nationalities and genders of the victims. It may still have been the case that Taleban carried out the attack but Mujahed was not in a position to know this. Later denials from local commanders further undermined his claim.

¹²⁸ For an analysis of the Taleban's highly successful media strategy, see Kate Clark 'Ten Dead in Badakhshan 3: The Dubious Taleban Claim,' *Afghanistan Analysts Network* (11 August 2010), <http://aan-afghanistan.com/index.asp?id=969>. 'The Taleban get in quickly with their claims and they get in dirty. Spy, whore, preacher – Taleban accusations stick, regardless of who they are aimed at, Afghan or foreigner, and regardless of the truth of the matter.'

5. HOLDING THE TALEBAN TO ACCOUNT: PEACE TALKS AND WAR CRIMES

One of the two Taleban spokesmen, Zabihullah Mujahed, has begun to occasionally use the language of IHL, albeit inconsistently and with bias. For example, after four people including two women were killed by US Special Forces during a night raid in Takhar on 18 May 2011, he described the killings as 'a huge, unforgivable crime against humanity'.¹²⁹ In April, he issued an apology after the Taleban used an ambulance in a suicide attack and also took the opportunity to complain about the government violating medical neutrality,¹³⁰ yet just few weeks later, he praised what was actually a gross breach of medical neutrality, the Taleban attack on the military hospital in Kabul.¹³¹ In April, he made a very precise claim in lauding a suicide attack on a military base in Laghman (emphasis added):

'Today [the suicide bomber] got a very good chance to attack because Afghan and foreign military officials had a meeting at the base,' said Mr Mujahid, adding that 'This kind of attacks are very useful for us — recruiting someone and working inside the Afghan forces — **these attacks inflict more casualties to the enemy and does not inflict any civilian casualties.**'¹³²

¹²⁹ See 'Statement of the Islamic Emirate Regarding the Martyrdom of Demonstrators in Takhar' (FN 119).

¹³⁰ Taleban had broken the rules on perfidy and violating medical neutrality. 'This will not happen again,' said the Taleban spokesman, Zabihullah Mujahed. He complained about the government using a clinic for a district governor and his armed men in Badbakh in Laghman. See 'Taleban Rue Ambulance Attack,' IRIN (12 April 2011), <http://www.irinnews.org/Report.aspx?ReportID=92446>.

¹³¹ See FN 92.

¹³² Alissa J Rubin, 'Blast Kills 9 at Afghan Base, Including 5 from NATO,' *New York Times* (16 April 2011). http://www.nytimes.com/2011/04/17/world/asia/17afghanistan.html?_r=1. 'I thought it was a very shrewd comment and showed their sensitivity to this issue,' said Rubin. 'I think they were quite surprised and really listened to the blowback on the Nangarhar Kabul Bank attack.' Email communication with author, April 2011. See also Kate Clark, 'Taleban "Spring Campaign Starts": More Suicide Attacks, Fewer Civilian

Mujahed's use of the arguments of IHL was unmistakable¹³³ and should not be dismissed as just an appropriation of IHL language for propaganda. As one human rights defender who works on civilian casualties in Afghanistan commented, 'Language is important. Getting the rules into the public discourse, so people know what they are, is actually very important. It creates some expectations and gives a chance that the rules may be carried out.'¹³⁴ The same argument could be made with regards to the *Layha*. Afghan civilians have come to have very low expectations from armed groups, whether Taleban, other non-state groups and even some state armed forces. Knowing that the rules exist is the first step for expecting their implementation.

The reporting of the Badakhshan murders shows how a Taleban claim presented at face value can fit in with and reinforce a discourse that sees the Taleban as beyond the pale. This sort of reporting lets the movement off the hook because it precludes condemnation of specific abuses which are committed. Metaphorically pigeon-holing the Taleban with the Devil, in effect places them beyond criticism, except in the most black and white terms, and actually minimises the horror that an attack like the one on the IAM staff should have provoked.

Dealing with war crimes is a difficult topic in Afghanistan. Impunity is provided for by law, both for war crimes committed before 2001 and for those currently committed or that will be committed, so long as the person stops fighting and reconciles with the government.¹³⁵ Moves by the government in 2010 to rebrand the Taleban from 'terrorists' to 'upset brothers' present the clear dangers of white-washing the crimes Taleban are currently committing.¹³⁶ President Karzai's

Casualties?' (18 April 2011) <http://aan-afghanistan.com/index.asp?id=1635>.

¹³³ For discussion, see Kate Clark, 'Killing Civilians: Taleban and International Law,' blog, Afghanistan Analysts Network, <http://aan-afghanistan.com/index.asp?id=1733>.

¹³⁴ Author's interview, May 2011.

¹³⁵ Officially known as the *National Reconciliation, General Amnesty and National Stability Law*, the amnesty law was published in the Official Gazette in December 2009.

¹³⁶ Example of re-branding include statements by delegates and from the podium at the National Consultative Peace Jirga in Kabul in May 2010; for reporting on this, see Kate Clark, 'Peace Jirga 8: The Afghan Jungle's Big Beasts and "Lively Debate"', AAN website (4 June 2010), [opening speech at the peace jirga in May 2010 is a case in point. He described Taleban as having been forced to take up arms and fight because of 'cruelty, misbehaviour or other wrongdoings of the Afghan government and the foreigners' \(although he also claimed personally not to have known that such wrongdoings were being carried out\).¹³⁷ Karzai also spoke about those Taleban who are *committing* abuses, those who have, 'trampled, killed and bothered this land's sons and closed their schools . . . martyred religious scholars, tribal elders and innocent government employees and faced the nation with sorrow . . .' Yet, even here, Karzai blamed foreigners, this time the 'hotbeds and terrorist training centres in neighbouring countries,' where, he alleged, Taleban learn their deadly skills and come home to kill in the name of al-Qaeda or others. In the end, he invited all Taleban to come home:](http://aan-</p>
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I call upon you again that my brother, my dear, Taleb Jan, this is your land. Come back! I will blame myself if it is my mistake in some part, but if it is your mistake, I will not blame you, but you should stop your destruction. Do not kill children, and accept the invitation for peace. Release yourself from the control of outsiders.¹³⁸

The recognition that the motivation to fight may be political, rather than just an irrational adoption of jihadi ideology,¹³⁹ and specifically that insurgency can be a reaction to wrongs committed since

afghanistan.com/index.asp?id=751 and Kate Clark, 'More on the Resignation of Atmar and Saleh – and Who Might Replace Them,' AAN website, (7 June 2010), <http://aan-afghanistan.com/index.asp?id=812>. Also see the various drafts of the plan to reconcile and reintegrate Taleban; commentary on this can be found in Kate Clark, 'New Bureaucracies to Welcome Back "Upset Brothers"', AAN website (14 May 2010), <http://aan-afghanistan.com/index.asp?id=751>.

¹³⁷ 'I came to Kabul, but back in my homeland, what I thought and the government thought was not implemented. Our government officials, bullying individuals would break into people's houses by force. . . .' Speech by President Karzai at the National Consultative Peace Jirga, May 2010, text of report taken from BBC monitoring.

¹³⁸ Speech at the National Consultative Peace Jirga, May 2010 (see FN 135).

¹³⁹ Less is heard these days of the 'they're fighting because they hate freedom' sorts of arguments heard during the days of the Bush administration.

2001,¹⁴⁰ is an acknowledgement of reality. However, it easily slides into a failure to take Taleban crimes seriously. There is a risk of turning a blind eye to abuses that break IHL, Afghan norms and the Taleban's own *Layha*, crimes which even the Taleban cannot publicly defend. The Taleban should be treated as any other party to the conflict – which is what UNAMA has tried to do with its reporting on civilian casualties – who are bound by international laws, as well as their own rules. With negotiations and attempts at reconciliation in the air, expecting more from the Islamic Emirate and having a far clearer approach that specifically condemns the abuses the Taleban commit seems important. Speaking after the killing of his colleague in the supermarket attack in Kabul in January 2010, the Afghan Independent Human Rights Commissioner, Nader Naderi, made this point well:

When the government ignores all the actions that are a clear crime against mankind and the war crimes by the armed opponents of the government, it can never take a strong stance to make a decision for talks and reconciliation.¹⁴¹

President Karzai, the Afghan government and the international powers, the different sections of the media and human rights organisations shift between treating the Taleban as outlaws, victims, or a group that is capable and responsible. It is a difficult issue: the Taleban promote themselves as bringers of justice while at the same time committing widespread abuses.

The *Layha* could be used as part of an approach that was tougher and fairer – neither white-washing the crimes of the Taleban nor seeing the movement as uniquely evil. The Code provides a language and framework for condemning specific operations, as well as aspects of the way the movement generally wages war, and might even help those within the movement who would like a more honourable 'jihad' to differentiate themselves from the more cruel and criminal commanders. The Taleban has produced a wide-ranging Code of Conduct and cared enough to update it twice. The *Layha* is not a substitute for international humanitarian law, but it creates an

opportunity, by using the Taleban's own words, to hold the movement to some form of account.

¹⁴⁰ For discussion of this, see Gopal, *The Battle for Afghanistan* (FN 86). Also Carter and Clark, *No Shortcut to Stability*, pp 4–9 (see FN 13).

¹⁴¹ Speaking on Tolo TV 21 February 2011; text of report from BBC Monitoring.

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After 2002, Clark covered stories in the Middle East, but also continued to return to Afghanistan, making radio and television documentaries about the insurgency, the political economy of weapons smuggling and opium, and war crimes. Her previous publications include joint authorship of the Chatham House paper *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan*.