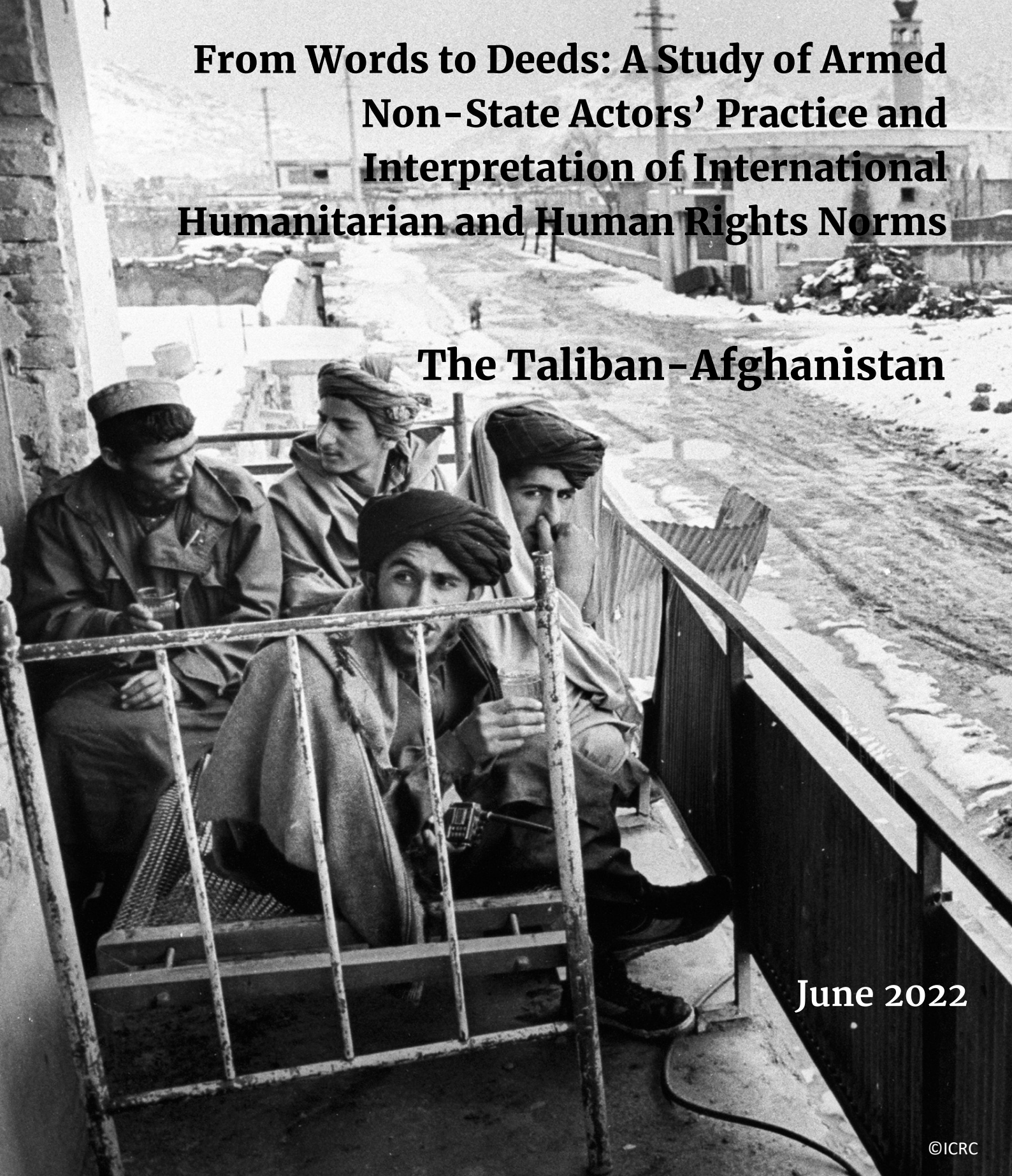


From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms

The Taliban - Afghanistan



June 2022

©ICRC



**UK Research
and Innovation**

PARTNERS AND STAKEHOLDERS



Launched in April 2018, UK Research and Innovation (ukri.org) brings together seven disciplinary research councils, notably the Art and Humanity Research Council and is responsible for supporting research and knowledge exchange at higher education institutions in England. UKRI AHRC is the main funder of the project.



The CCDP is the Graduate Institute's focal point for research in the areas of conflict analysis peacebuilding and the complex relationships between security and development(<https://www.graduateinstitute.ch/ccdp>). It hosts the principal investigator of the project, Dr Annyssa Bellal as well as the project's Co-investigator, Pascal Bongard.



Founded in 1919, AUC (aucegypt.edu) is a leading English-language, American-accredited institution of higher education and center of intellectual, social and cultural life of the Arab world. It is the main academic partner of the project in charge of the research on Al Qaeda and the Islamic State.



Established in 2007 by the Faculty of Law of the University of Geneva and the Graduate Institute, the Geneva Academy of IHL and Human Rights (geneva-academy.ch) is a research and teaching center which focuses on clarifying IHL, strengthening human rights protection, and developing the areas of complementarity between IHL and international human rights law. It hosted the principal investigator until December 2021.



Geneva Call is an NGO partner of the project. Geneva Call has a leading position in the field of humanitarian engagement with armed non-state actors (ANSAs). A neutral, impartial and independent humanitarian organization dedicated at promoting respect for IHL, Geneva Call has engaged more than 150 ANSAs worldwide since its establishment in 2000. It hosts the Co-investigator Dr Ezequiel Heffes.



The Norwegian Refugee Council (nrc.org) is an independent humanitarian organization working to protect the rights of displaced and vulnerable people during crises. It is widely recognised as a leading field-based displacement agency within the international humanitarian community and it also plays a leading role in protection coordination. Since 2018, NRC is committed to working in hard-to-reach contexts, a strategic ambition which in part requires engagement with ANSAs. NRC is an NGO partner of the project.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
ACKNOWLEDGMENTS.....	4
List of acronyms and abbreviations.....	5
Executive Summary.....	6
Introduction.....	7
Methodology.....	7
Taliban Profile.....	10
BOX 1: Timeline of Key Events in the Conflict, 2001– 2021.....	10
BOX 2: International Humanitarian Law Applicable to the Taliban	14
Taliban Policy and Practice on IHL and IHRL	14
BOX 3: The Layha	15
BOX 4: Taliban Media Operations	18
A. Mechanisms of Implementation.....	19
B. Dialogue with Humanitarian and Human Rights Actors	21
C. Main IHL/IHRL Violations and Response of the Group.....	23
Taliban Policy and Practice With Regard to Selected IHL Norms	23
1. Protection of Civilians From Attacks.....	23
A. Principle of Distinction.....	23
B. Principles of Proportionality and Precautions.....	25
C. Suicide Attacks.....	28
2. Landmines and other Explosive Devices	29
3. The Special Protection of Certain Objects, Such as Cultural Property and Heritage.....	31
4. Humanitarian Access	32
A. Understanding of Humanitarian Access, Criteria or Conditions for Allowing or Facilitating Humanitarian Access	33
5. Displacement	35
6. Sexual Violence and Gender-Based Violence	35
7. The Prohibition of Using and Recruiting Children in Hostilities	37
8. Access to and the Protection of Education	39
A. Attacks on Education	39
B. Access to Education.....	41
9. Access to and the Protection of Health Care.....	43
A. Provision of and Access to Health Care for Civilians.....	43
B. Care for the Wounded and Sick, Either Enemy Combatants, Own Forces or Civilians.....	44
C. Military Occupation of and Attacks on Medical Facilities	45
D. Use of Distinctive Emblems.....	45
10. Detention, Fair Trial and Administration of Justice	46
A. Policy and Practice Regarding Conflict-Related Crimes.....	46
B. Policy and Practice Regarding Common Crimes (Penal Offences)	48
C. Policy and Practice Regarding Detention	51
Conclusions.....	53
Selected References	54

ACKNOWLEDGMENTS

This report was authored by Ashley Jackson and Rahmatullah Amiri, with support from Dr Annyssa Bellal, Pascal Bongard and Dr Ezequiel Heffes. The authors would like to thank Omar Kakar for his insights and support, as well as several other individuals in Afghanistan who prefer not to be named but provided invaluable assistance with research, analysis and translation.

The authors would also like to thank those who reviewed the report, notably Hendrik Lohuis, and several others who prefer not to be named. Myriam Hunfeld provided background research and Munizha Ahmad-Cooke edited the final report.

This study was made possible with the generous support of UK Research and Innovation (UKRI) and the UK Foreign, Commonwealth and Development Office (FCDO).

The views expressed in this study are the authors' own and do not necessarily reflect those of the project's supporters or anyone who provided input to, or commented on earlier drafts.

LIST OF ACRONYMS AND ABBREVIATIONS

AP	Anti-personnel
AV	Anti-vehicle
HRW	Human Rights Watch
ICRC	International Committee of the Red Cross
IEA	Islamic Emirate of Afghanistan
IHL	International humanitarian law
IHRL	International human rights law
ISAF	International Security Assistance Force
NGO	Non-governmental organization
PCCIC	Commission for Prevention of Civilian Casualties and Inquiry of Complaints
Pro-government forces	Afghan Republic and international forces
UNAMA	United Nations Assistance Mission to Afghanistan
UNICEF	United Nations Children's Fund

EXECUTIVE SUMMARY

This case study has been conducted as part of the research project ‘From Words to Deeds: A research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms’, which aims at providing tools for an effective engagement of armed non-State actors to improve humanitarian protection. From a legal perspective, while armed non-state actors (ANSAs) are bound by international humanitarian law (IHL), how they perceive, understand and act upon their obligations has remained insufficiently explored. Through a comparative analysis of selected norms, the research project aims to advance understanding of ANSAs’ perspectives and behaviour, enhance strategies to promote their compliance with IHL as well as inform future international law-making processes.

By assessing the Taliban’s practice and interpretation in relation to a selection of IHL rules, this case study aims to fill that gap. It only looks at the Taliban’s views as an insurgency, stopping prior to their full takeover of Afghanistan in August 2021. It concentrates on the period from roughly 2014 onwards, when the Taliban progressively began to exert influence in more of the country and were ultimately the de facto governing authority in a small number of districts before their full takeover. Compiling and analysing the Taliban’s views enables an understanding of how they perceived internal law, the norms that enjoyed greater acceptance and those that were disputed. This case study responds to several inquiries, notably how Taliban internal dynamics and policies evolved and what factors might explain the gap between internal policies and public statements on the one hand, and practice on the ground on the other.

Key findings include:

- Before their takeover of Afghanistan in August 2021, the Taliban insurgency articulated a relatively comprehensive set of guidelines and public statements relevant to IHL. Their normative framework was not crafted in relation to IHL per se, but instead based on a mixture of Sharia and cultural norms. The Taliban insurgency’s relationship to IHL was ambiguous: it is clear from internal documents and Taliban public statements that the movement was familiar with both IHL and international human rights law (IHRL), and some policies, statements and documented behaviours reflect this. Yet the insurgency also routinely violated many norms, even those embodied in written Taliban policies and statements.
- Part of the reason appears to be that the Taliban leadership saw these rules as broad guidance, not always as specific operational protocols. Top-down policy guidance provided general parameters for action, but much was historically left up to the discretion of military commanders on the ground. A certain vagueness exists, for example, around issues like targeting and suicide attacks.
- Additionally, rules were disregarded in cases where they conflicted with ‘military necessity’. This was left for local commanders to determine. Local discretion tended to be particularly pronounced in areas being actively contested, or in other instances where the official rules might obstruct the attainment of military objectives. Violations of this kind consequently tended to be more common in frontline and government-controlled areas.
- There was a public relations aspect to some Taliban statements and policies. As the Taliban sought international legitimacy, it more frequently referenced international norms in public statements. There was also a self-image aspect: to both external audiences and their fighters, they presented an idealized version of the Taliban’s aspirations as accountable, disciplined and religiously pure. But it is also important to note that, linked to these concerns, and as the movement matured, its policies became more intentional, strategic and more likely to be implemented in practice.

INTRODUCTION

This case study has been conducted as part of the research project ‘From Words to Deeds: A research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms’,¹ which aims at providing tools for an effective engagement of armed non-State actors to improve humanitarian protection. During the life of the project, funds were received from UK Research and Innovation, the UK Foreign, Commonwealth and Development Office, the Swiss Department of Foreign Affairs and the Humanitarian Aid Department of the European Commission.²

The research builds on three interrelated trends. First, as most armed conflicts today are non-international,³ ANSAs tend to play prominent roles, exerting a growing influence over the lives of individuals worldwide. Because of the humanitarian consequences their actions entail, especially for the civilian population, the international community has called for a more sustained engagement with ANSAs toward IHL compliance.⁴ Second, from a legal perspective, though it is undisputed that ANSAs are bound by IHL, how they view, interpret or implement their international obligations has remained insufficiently explored.⁵ While a number of studies have analysed states’ practice, notably the 2005 study by the International Committee of the Red Cross (ICRC) on customary IHL,⁶ A comprehensive

1 The issue of human rights obligations of armed non-state actors (ANSAs) under international law remains controversial both at the theoretical and policy levels. Therefore, the present research project focuses on collecting and analysing ANSAs’ practice and interpretation of international humanitarian law (IHL) rules. Nevertheless, norms related to human rights, such as gender equality or the 18-year age limit for recruitment and participation of children in hostilities have been included in the interviews. Indeed, even if the issue of human rights obligations of ANSAs is controversial, ANSAs themselves often refer to human rights in their policies and regulations. This is a good indication of what some ANSAs feel bound by and thus deserves to be considered in the analysis, notably because it can be indicative of what could be included in future law-making processes.

2 For further information on the project, see A. Bellal, P. Bongard and E. Heffes, *From Words to Deeds: A Research of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms*, Research Brief, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), December 2019, <https://www.geneva-academy.ch/joomlatools-files/docman-files/From%20Words%20to%20Deeds%20A%20Research%20of%20Armed%20Non-State%20Actors%E2%80%99Practice%20and%20Inter.pdf> (last accessed 9 August 2022).

3 Despite widespread recognition that the majority of armed conflicts today are non-international in nature, there are divergent views on the precise number. See A. Bellal (ed), *The War Report: Armed Conflicts in 2018*, Geneva Academy, 2019, p 19, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf> (last accessed 9 August 2022), p 19; International Committee of the Red Cross (ICRC), *The Roots of Restraint in War*, 2018, pp 13–14.

4 United Nations Security Council, *Protection of Civilians in Armed Conflict: Report of the Secretary General*, UN doc S/2019/373, 7 May 2019, §66 (affirming that ‘enhancing respect for the law requires changing the behaviour and improving the practices of non-State armed groups. Key to this is principled and sustained engagement by humanitarian and other relevant actors that is, moreover, strategic and based on a thorough analysis of the group(s) concerned’).

5 Several authors have referred to this knowledge gap. See, among others, M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, 2019; H. Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015; D. Petrasek, *Ends & Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, <https://reliefweb.int/attachments/2d260b8d-64fa-32ce-97ad-3d639c95f777/3DCC2D9C95FC0BCFC1256C14004E55A1-EndsandMeans.pdf> (last accessed 9 August 2022).

6 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005. See also the ICRC Customary IHL Database (ICRC CIHL Database), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last accessed 9 August 2022). It should be noted that the 2005 ICRC study on customary IHL does not focus entirely on issues of compliance with IHL, but on the identification

analysis of existing humanitarian norms from the perspective of ANSAs has yet to be made. Only then will one ‘know how the existing rules and possible future development of IHL ... would change if they were taking the perspective of non-State armed groups into account’.⁷ Finally, the state-centric approach to ANSAs’ international obligations may explain to some extent the lack of ownership of, and compliance with, international law by these actors. Indeed, there is an increasing sense that ANSAs’ compliance with international law is likely to improve if they are consulted about the development and implementation of the rules that are binding upon them.⁸

This research project aims to increase our knowledge of ANSAs’ practice and interpretation of selected international norms, notably in IHL.⁹ It focuses on the following main questions:

- Are ANSAs familiar with these norms and how do they understand them?
- Do they agree with their content?
- What factors influence their policy and practice?
- Are there new issues that ANSAs would be willing to regulate in the future?

By compiling and analysing ANSAs’ views and interpretation on a comparative basis (the sources include unilateral declarations, public statements, codes of conduct, command orders, penal codes, ‘legislations’, decrees, memoranda of understanding, special agreements, as well as peace and ceasefire agreements), the research provides a better sense of how ANSAs perceive IHL, which norms are more accepted or disputed and why. It also sheds light on the causes of violations or, *a contrario*, the actors that are conducive to compliance or restraint. Altogether, the results of the research advance our understanding of ANSAs’ behaviours during armed conflicts and inform strategies to promote their compliance with IHL as well as future international law-making processes.

of customary norms within this realm. Of course, an argument can be made that the practice and *opinio juris* needed for the latter serves as an indicator to measure the level of acceptance of, and respect for, the applicable legal framework. A study on the correlation between both is beyond the scope of this case study.

7 M. Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’, 1 *Journal of International Humanitarian Legal Studies* 1 (2010) 19.

8 Ibid; S. Sivakumaran, ‘Implementing Humanitarian Norms Through Non-State Armed Groups’, in H. Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons From the African Great Lakes Region*, Cambridge University Press, 2015; S. Sivakumaran, *The Law of Non International Armed Conflict*, Oxford University Press, 2012.

9 The research examines ANSAs’ perspectives on the following core norms: i) protection of civilians from attacks; ii) the prohibition of sexual violence and gender discrimination; iii) the prohibition of using and recruiting children in hostilities; iv) the protection of education; v) humanitarian access; vi) protection of health care; vii) the prohibition of forced displacement; viii) use of landmines and other explosive devices; ix) detention, fair trial and administration of justice; x) the special protection of certain objects, such as cultural property and the environment. The choice of these norms has been dictated by three factors: First, the violation of these norms represents a current challenge identified by various humanitarian actors when dealing with ANSAs. The second factor is related to ANSAs’ perceptions of these norms, as some of them represent the most contentious and challenging humanitarian provisions from their perspective. Finally, some of the selected norms may be part of future legal developments.

METHODOLOGY

The present study focuses on the case of the Taliban insurgency that emerged after 2001 (alternately referred to as the Islamic Emirate of Afghanistan, or IEA). In the time period examined in this study, the Taliban can be categorized as an armed opposition movement¹⁰ that was party to an armed conflict against the Islamic Republic of Afghanistan and international forces in Afghanistan. Since the overthrow of the Taliban government in 2001, the violence in Afghanistan has moved through at least three phases:

- The first phase covers the situation leading up to the United States-led invasion of Afghanistan in October 2001; the violence between the Taliban government and the Northern Alliance forces at that time constituted an armed conflict of a non-international character.
- The second phase began with the US-led attacks against the Taliban on 6 October 2001, which constituted an international armed conflict governed by applicable customary and treaty rules.
- Subsequently and until August 2021, the armed violence in Afghanistan constituted an armed conflict of a non-international character.¹¹

While reflecting on how the Taliban's positions concerning IHL evolved more broadly, the study focuses on the time period between 2014 and 2021. This, we believe, is when the policies they developed on issues relevant to this study are more prominent and their implementation is more easily discerned on the ground.

Focusing on the post-2001 insurgency (with an emphasis on 2014–2021), the methodology used for this case study has consisted of two main parts: an extensive literature review and interviews. The literature review includes the analysis of the various documents collected during the research, which reflect Taliban policy or doctrine on international humanitarian norms. In addition, an extensive desk review of relevant literature was also undertaken, primarily reports of human rights NGOs, UNAMA Human Rights and the United Nations Secretary-General on conflict-related sexual violence and children and armed conflict. The goal was to have a general overview of the norms that the Taliban agreed or committed to respecting as well as those that were the most problematic in terms of compliance.

This study is also informed by interviews conducted by the researchers. Researchers drew on prior semi-structured interviews conducted as part of their fieldwork with the Taliban and civilians living under their control, which occurred between 2011 and 2020. Because this case study was written after the Taliban's August 2021 takeover, access to historical interview data was essential. On-the-ground perspectives from the period under examination (i.e., pre-August 2021) were ultimately more likely to

¹⁰ For the purpose of this research, 'armed opposition movements' typically aim at destroying the power and legitimacy of a ruling government of a state. They can also fight for the secession of a region or for the end of an occupational or colonial regime. In this sense, they pursue a political, mostly social-revolutionary or ethno-nationalistic agenda. See U. Schneckener, 'Armed Non-State Actors and the Monopoly of Force', in A. Bailes, U. Schneckener and H. Wulf (eds), *Revisiting the State Monopoly on the Legitimate Use of Force*, Policy Paper no 24, Geneva Centre for the Democratic Control of Armed Forces, 2006, <http://www.wulf-herbert.de/DCAFP24Wulf.pdf> (last accessed 22 May 2022).

¹¹ A. Bellal, G. Giacca and S. Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan', 93 *International Review of the Red Cross (IRRC)* 881 (2011) 51–52.

be accurate on some specific issues than interviews with Taliban officials after they had assumed power. The researchers already had significant interview data on relevant issues, much of which had not been previously used publicly.

TALIBAN PROFILE

BOX 1: TIMELINE OF KEY EVENTS IN THE CONFLICT, 2001–2021

11 September 2001	Al Qaeda launches coordinated attacks on the US
7 October 2001	US launches a military intervention in Afghanistan
5 December 2001	An Afghan interim government is formed at the Bonn Conference
9 December 2001	Taliban surrender their last stronghold in Kandahar
June 2002	Transitional government is named, with Hamid Karzai selected to lead
1 May 2003	US declares an end to major combat operations
8 August 2003	NATO International Security Assistance Force (ISAF) mission assumes control over security countrywide
January 2004	A new Afghan constitution is agreed
9 October 2004	First presidential election is held; Hamid Karzai declared the winner
July 2006	Violence surges over the summer; intense fighting erupts in the south
November 2009	Afghan presidential elections held; an electoral crisis ensues; the incumbent president Karzai ultimately secures a second term
1 December 2009	US orders a troop surge, nearly tripling US troop presence
1 May 2011	Osama bin Laden is killed
22 June 2011	President Obama orders the beginning of troop drawdown
January 2011	Taliban establish a political presence in Doha, Qatar
June 2013	Drawdown is complete; responsibility for security is transferred from NATO to Afghan National Security Forces
5 April 2014	Presidential elections held; electoral crisis ensues; Ghani declared President and his opponent, Abdullah, made Chief Executive
27 May 2014	President Obama announces that most US forces will be withdrawn from Afghanistan by the end of 2016
July 2015	Mullah Omar declared dead, although he is believed to have died in 2013; he is replaced by Mullah Akhtar Mohammad Mansour

21 May 2016	Mullah Akhtar Mohammad Mansour killed in a US drone strike; he is later replaced by Mullah Haibatullah Akhunzada
15–17 June 2018	Taliban and Afghan Republic declare unilateral ceasefires for the Eid al-Fitr holiday, the first of such ceasefires since the start of the conflict
28 July 2018	US openly acknowledges it is bilaterally meeting with the Taliban
13 October 2018	US begins pre-negotiations with the Taliban in Doha
21–28 January 2019	US and Taliban officially begin bilateral talks in Doha
7 September 2019	President Trump calls off US–Taliban talks via Twitter
28 September 2019	Presidential elections held; electoral crisis ensues; Ghani re-elected
December 2019	US–Taliban bilateral talks resume in Doha
22–9 February 2019	US–Afghan Republic and Taliban agree to a seven-day violence reduction
29 February 2019	US and Taliban sign the Doha Agreement
12 September 2020	Intra-Afghan talks begin between the Republic and Taliban in Doha
15 August 2021	Taliban take control of Kabul
30 August 2021	US forces complete their withdrawal from Afghanistan

The Taliban as a movement was initially founded sometime in 1994 in southern Afghanistan, in reaction to the lawlessness and chaos wrought by the civil war. They harshly punished alleged criminals and eliminated predatory checkpoints.¹² They swiftly seized control of 80 percent of the country between 1994 and 1996, but remained at war with the Northern Alliance.¹³ The Taliban exercised government functions in Afghanistan from 1996 to 2001 and then lost effective control following the US intervention. During their rule, the Taliban came to be defined by their religious extremism and brutality towards civilians, and their alliance with Al Qaeda. After the 9/11 attacks, the Taliban's continued refusal to hand over bin Laden and his Al Qaeda associates to US authorities became a pretext for war.

The Taliban leadership began to regroup in Pakistan in 2002 and 2003, and quickly began launching small-scale attacks against international forces and the Afghan government, and reactivating their networks inside Afghanistan.¹⁴ Violence sharply increased from mid-2006 onwards, as the Taliban gained greater capacity for violence and recruits. They also gradually sought to establish a shadow administration.¹⁵ The first evidence of this was the presence of provincial military commanders and shadow provincial governors (alongside military and, later, civilian commissions, who provided advice and counsel to these positions, and later similar district structures). Some early military positions were slowly civilianized, or became a hybrid military-civilian role. Judges and Sharia courts, some of the earliest signs of Taliban shadow governance, restarted sometime around 2006.¹⁶ These early advances were set back by the US-led military surge that began in late 2010, and a subsequent US assassination campaign against Taliban commanders. It was not until after 2014 (following the drawdown of international forces and the transition to Afghan forces taking the lead on security) that the Taliban were able to regenerate as well as hold significant territory.

The Taliban are a deeply conservative Islamist movement, with an ideology rooted in their specific version of Sunni Hanafi and Afghan cultural norms. But as an insurgency, the movement had to reconcile their traditionalist ideology with both the demands of securing the population and exposure to a much broader field of ideas and influences.¹⁷ There were resulting tensions amongst the leadership, as well as between the leadership and Taliban fighters across the country.¹⁸ Often described

12 A. S. Zaef, *My Life With the Taliban*, Hurst & Company, 2010.

13 This report does not cover their IHL violations during this period, although others have documented that Taliban soldiers executed prisoners, slaughtered civilians and enacted blockades that obstructed food and necessities from reaching civilians. See Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978–2001*, 2005, <https://reliefweb.int/attachments/cdbe08d5-7d6b-3fef-aebb-0d05ec317b18/B7C09154CD3E144EC12570430049F76A-ajp-afg-18jul.pdf> (last accessed 22 May 2022); Human Rights Watch (HRW), *Afghanistan: Massacre in Mazar-i-Sharif*, 1998, <https://www.hrw.org/legacy/reports98/afghan/Afrep080.htm> (last accessed 22 May 2022).

14 S. Yousafzai, 'The Taliban's Oral History of the Afghanistan War', *Newsweek*, 25 September 2009, <https://www.newsweek.com/talibans-oral-history-afghanistan-war-79553>.

15 A. Jackson, *Negotiating Survival: Civilian-Insurgent Relations in Afghanistan*, Hurst, 2021.

16 A. Jackson, *Life Under the Taliban Shadow Government*, Overseas Development Institute (ODI), 2018, <https://cdn.odi.org/media/documents/12269.pdf> (last accessed 22 May 2022).

17 A. Gopal and A. Strick Van Linschoten, *Ideology in the Afghan Taliban*, Afghanistan Analysts Network (AAN), 2017, <https://www.afghanistan-analysts.org/wp-content/uploads/2017/06/201705-AGopal-ASvLinschoten-TB-Ideology.pdf> (last accessed 22 May 2022).

18 A. Jackson and R. Amiri, *Insurgency Bureaucracy: How the Taliban Makes Policy*, *Peaceworks* no 153, US Institute of Peace, 2019, https://www.usip.org/sites/default/files/2021-08/pw_153-insurgent_bureaucracy_how_the_taliban_makes_policy.pdf (last accessed 22 May 2022).

as a ‘network of networks’, various personality based and other contingents came together to comprise the Taliban, including the networks associated with the Haqqanis, Mansur, Baradar, Fazal, Dadullah and others.¹⁹ This was reflected in disparities between the Taliban’s stated rules and observed practices. They sought to develop overarching rules and policies to guide and unify the movement, particularly in the later years of the insurgency. Nevertheless, the implementation of these policies – particularly in contested and frontline areas – was variable and subject to commanders’ views and military imperatives.

The Taliban are led by the Amir ul-Mu’menin (currently Mullah Haibatullah Akhunzada), who acts as a spiritual and political leader. Haibatullah was preceded by Mullah Akhtar Mohammad Mansour, who served as Amir from 2015–2016 but is believed to have been the acting Amir for years prior, whilst the death of the first Amir, Mullah Omar, was concealed.²⁰ The Amir is advised by two deputies and a leadership shura (or council). Beneath this, the Taliban established first a Military Commission and later various sectoral commissions, akin to government ministries. At provincial level, there was a shadow government structure with a shadow governor, appointed by the leadership shura, representatives of the commissions and a Provincial Commission comprising local elders and religious scholars advising the governor. Shadow governors and commissions were not strictly ‘civilian’, and governors served military functions to varying degrees depending on context. The provincial structure was replicated in the districts, with a district governor, usually a local, appointed by his provincial counterpart. District governors often played a role in civilian security and dispute resolution. There was also a Sharia courts system at district and provincial level, with a supreme court and an associated commission in Pakistan. The degree to which each of these functions and commissions was present and functioned at provincial and district levels varied.²¹

Much of this depended on territorial control. Estimating Taliban territorial control at various points in the conflict has been politically and conceptually fraught,²² as there were few clearly demarcated or stable frontlines, and the Taliban exercised influence alongside the government in most areas. The Taliban began to significantly gain control after 2014, with a marked expansion beyond their strongholds predominantly in the south and east between November 2015 and 2016, and again from 2019 onwards. But at the same time, the Taliban were also seeking international legitimacy. Then acting Amir, Mullah Mansour, steered the group toward greater openness toward aid agencies on the ground as well as the wider international community. Taliban representatives engaged in a series of informal talks with the US and others, and the movement established an official presence in Qatar in 2013.²³

19 T. Ruttig, *How Tribal Are the Taleban? Afghanistan’s Largest Insurgent Movement Between Its Tribal Roots and Islamist Ideology*, AAN, 2010, <https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20100624TR-HowTribalAretheTaleban-FINAL.pdf> (last accessed 22 May 2022).

20 Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

21 Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18; Jackson, *Life Under the Taliban Shadow Government*, supra fn 16; A. Jackson and F. Weigand, *Rebel Rule of Law: Taliban Courts in the West and North-West of Afghanistan*, ODI, 2020, https://cdn.odi.org/media/documents/Rebel_rule_of_law_Taliban_courts_in_the_west_and_north-west_of_Afghanistan.pdf (last accessed 22 May 2022).

22 See T. Ruttig, ‘More Violent, More Widespread: Trends in Afghan Security in 2017’, AAN, 29 January 2018, <https://www.afghanistan-analysts.org/en/reports/war-and-peace/more-violent-more-widespread-trends-in-afghan-security-in-2017/> (last accessed 22 May 2022).

23 Jackson, *Negotiating Survival*, supra fn 15.

The group had two stated objectives: to eject foreign forces from the country and establish what they deemed a truly Islamic government. With the objective of the US and allied military presence in Afghanistan, the Taliban began direct talks with representatives from the US Government in Doha, Qatar. The nine rounds of talks focused on the US and NATO troops' withdrawal, counter-terrorism measures and a ceasefire. Parallel talks led by Russia took place between Taliban representatives and members of the Afghan political opposition, although not the government. On 29 February 2020, the US and Taliban signed the Agreement for Bringing Peace to Afghanistan (referred to as the Doha Agreement).

The US agreed to withdraw its troops from Afghanistan in exchange for counter-terror pledges from the Taliban, amongst other provisions.²⁴ After repeated delays, mostly

focused on the negotiation of prisoner release, representatives from the Taliban and the Islamic Republic of Afghanistan initiated intra-Afghan talks in Doha in September 2020 with the aim of ending violence between the two sides.

The Taliban meanwhile escalated their attacks on government targets while US forces continued their withdrawal as agreed. In May 2021, the Taliban began a military advance and captured hundreds of districts. They continued to gain territory throughout the summer, finally capturing key provincial capitals in early August. President Ashraf Ghani and close advisors fled the country, and the capital of Kabul fell to the Taliban on 15 August 2021.

BOX 2: INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO THE TALIBAN

Throughout their existence, the Taliban have been a party to various armed conflicts. During the period examined in this case study, the armed conflict in Afghanistan was governed by the customary and treaty rules applicable to armed conflicts of a non-international character. The two sets of treaty rules generally applicable to such conflicts are Article 3 common to the four Geneva Conventions (Common Article 3) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II). Afghanistan ratified the four Geneva Conventions in 1956 and adhered to the two Additional Protocols in June 2009, with AP II coming into force for that country on 24 December 2009.

TALIBAN POLICY AND PRACTICE ON IHL AND IHRL

The Taliban insurgency did not endorse IHL or IHRL *per se*, and their positions contain significant divergences. Islam (Sunni Hanafi) is their normative touchstone, most frequently embodied in references to 'Islamic rights', Sharia and specific Hadith. The Taliban insurgency outlined its positions toward IHL and human rights norms through numerous public statements and internal documents, which form the basis of this research. The general Layha (typically referred to as a 'code of conduct', although the word 'layha' might be more accurately translated as 'policy') is an important document in this respect (see Box 3).

²⁴ Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, 29 February 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> (last accessed 22 May 2022).

BOX 3: THE LAYHA

The initial issuing of the general Layha, sometime in or around 2006, was the first apparent effort to set boundaries on fighter behaviour and communicate a clear organizational structure. The first general Layha consisted of 30 articles but was later expanded in or around spring/summer 2009, and again in or around spring/summer 2010. None explicitly reference IHL or IHRL, and are instead normatively oriented toward Islamic principles, beliefs and law.

– The 2006 edition

The primary motive for the creation of the Layha was the need to control fighter behaviour and begin to build clear command structures and normative boundaries as the movement gained greater military capacity and presence. The 2006 edition underscores the obligations of fighters to behave in line with Islam and the Taliban mission to restore ‘true’ Islamic values to Afghan society. Several articles are geared toward curbing corruption and theft, reflecting the need to address the increasingly problematic behaviour of some commanders at the time.

The 2006 edition lays out clear rules about who can be detained, killed and forgiven, although not all of these are in line with the laws of war. There are various provisions outlining civilian protection, limiting the arbitrary nature of civilian killings and prohibiting Taliban fighters from stealing from civilians. There is also an article prohibiting Taliban from taking ‘underage boys with no facial hair onto the battlefield or into their military bases’. This could be interpreted as banning child recruitment, but also as an attempt to prevent the practice of *bacha bazi* (‘boy play’, shorthand for sexual abuse by older men of boys), or other forms of child sexual exploitation.

– The 2009 and 2010 editions

The 2009 and 2010 editions – largely similar in content and tone²⁵ – significantly expand upon the 2006 edition. These editions elaborate policies and directives on a range of new issues, from taxation to education to the execution of ‘spies’. The Layha, previously a simple code of conduct for fighters, became a values-based operational framework and a propaganda tool.²⁶ It also alludes to Taliban shadow governance structures, including the Military Commission, commissions at the provincial and district levels and sectoral commissions, including the Education Commission. Few of these bodies were then operational, but gradually came to govern Taliban operations and policy.

While many key IHL issues are not addressed, the 2009 and 2010 editions are notable for a change of attitude toward education and aid work. In the 2006 Layha, education and aid work are seen as an extension of the government and the international community. The beating and execution of teachers and attacks on schools are condoned, and engagement with NGOs, described as ‘tools of the infidels’, are to be avoided. The 2009 and 2010 editions allude to procedures and rules for dealing with NGOs and the education system. The exact rules are not spelled out but (again) foreshadow the more concrete policies in these sectors.

By the 2009 edition, the Layha had also become an outward-facing document.²⁷ A former Taliban official involved in drafting the Layha explained that ‘with the Layha, we needed to show we could be

25 Of the 85 articles in the 2010 edition, 47 are repeats of 2009 provisions, 14 are modified or altered and 24 are new. See T. Johnson and M. C. DuPee, ‘Analysing the New Taliban Code of Conduct (Layeha): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban’, 31 Central Asian Survey 1 (2012).

26 Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

27 Author interviews with Taliban senior officials and interlocutors, undertaken in 2018 and 2019 in Doha and Dubai, also suggest that by 2009, the Taliban was writing these rules with the knowledge they would be read and analysed by external audiences. See also K. Clark, *The Layha: Calling the Taleban to Account*. Appendix 1: The

accountable and could form an accountable government that everyone could accept'.²⁸ There was a public relations aspect to the dissemination and potentially the drafting of the Layha, communicating to external audiences an idealized version of the Taliban's aspirations as accountable, disciplined and religiously pure

- Commission-specific Layha

Following the introduction of the general Layha, the Taliban slowly began to develop specific layha for each sector governed by a relevant commission. These commissions evolved, eventually functioning akin to shadow ministries. Most of the sectoral layha are procedural and administrative and still allow a certain amount of local decision making and flexibility.

While not publicly available, researchers for this project obtained several relevant commission-specific layha from local sources, which were then translated and analysed, and are referenced throughout the report. These sectoral layha examined herein include:

- Military Commission
- Framework for Intelligence Officials
- Education Commission
- Commission for Prisoner Exchange and Release
- Commission for Prevention of Civilian Casualties and Inquiry of Complaints (PCCIC)
- Health Commission
- Commission of Martyrdom Battalions and Military Camps

It is clear from internal documents and Taliban public statements that the movement was familiar with both IHL and human rights norms. While Islam is the primary normative framework for the Taliban, some internal documents make more obvious references to IHL and IHRL norms. The Framework for Intelligence Officials, for example, states:

three things that are forbidden from one muslim to another:

- (a) Unjust bloodshed;
- (b) Unjust loss of property;
- (c) Violating honour and dignity.²⁹

That said, the opening caveat suggests that this is about only crimes committed amongst Muslims. There is also often a stated openness to collaborating or cooperating with international organizations on these issues. For instance, the layha for the Commission of the Management and Release of Prisoners endorses an attitude of openness to international organizations and a desire to comply with relevant norms.³⁰

Taliban Codes of Conduct in English, AAN, 2011, https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf (last accessed 22 May 2022).

²⁸ Quoted in Jackson, *Negotiating Survival*, supra fn 15, p 73.

²⁹ Framework for Intelligence Officials, Art 19.

³⁰ Commission for Management and Release of Prisoners Layha, Ch 3, Directorate's Authority Duties and Responsibilities, Arts 19 and 20 state: 'it is acceptable for the leadership authority to provide information to all organizations of the Emirate and other organizations regarding the prisoners of the Islamic Emirate', and 'with

As the Taliban sought international recognition they increasingly sought to align their public statements with key international norms. Taliban public statements occasionally referenced human rights norms and IHL, typically when it advanced their arguments. They typically frequently used IHL terminology and language, such as ‘precautionary measures’ and ‘civilian casualties’, and used international standards to condemn violations committed by international forces.³¹ One example from 2011 is a Taliban statement made in response to UN civilian casualty reporting. It seems to both acknowledge the Geneva Conventions but complains that expectations of adherence to them are unfairly applied to the Taliban and not their adversaries:

[The UN] said that Mujahideen should respect principles of the Geneva Convention about war. We have been urging from the beginning that all parties of the war should abide by the recognized laws of the war. But again, which principle of the Geneva Convention allows America to keep thousands of innocent detainees in Bagram, Kandahar and Guantanamo? Which law of human rights says to deprive them of access to self-defence and keep them imprisoned without trial?³²



the permission of the leadership it has the responsibility to participate in national and international gatherings that are about solving the challenges of the prisoners if possible’.

31 See also the analysis on this in Y. Nagamine, *The Legitimization Strategy of the Taliban’s Code of Conduct*, Palgrave Macmillan, 2015.

32 Islamic Emirate of Afghanistan (IEA), ‘Response of the Islamic Emirate of Afghanistan in Reaction to the UN Report on Civilian and Children’s Casualties in Afghanistan’, 17 February 2011.

The Taliban themselves were at times inconsistent about the application and interpretation of these norms. One example of this is their attitudes toward prisoners. The Taliban was eager to see their fighters in enemy custody be treated in accordance with the law but less forthcoming with regard to their own treatment of enemy detainees. The layha of the Commission of the Management and Release of Prisoners states that the commission ‘has a duty to prepare documents in advance and hand it over to the commission’s authority to meet the human rights national or international organization or with other national and international organizations relevant to prisoners and legally share the challenges’.³³

Yet this seemingly only applies to cases of Taliban prisoners in enemy custody – not prisoners in Taliban custody. The Commission of the Management and Release of Prisoners seems primarily concerned with monitoring and drawing attention to the treatment of Taliban prisoners in enemy detention, and outlining processes around prisoner exchange.

This in turn makes it difficult to discern how much of the Taliban’s guidance and statements were operational, aspirational or, alternately, driven by perception concerns (i.e., the desire to appear compliant with widely accepted norms or as otherwise behaving honorably). In various policies relating to civilian casualties, the Taliban’s focus on detecting instances of others causing civilian harm suggests that the Taliban’s motives might have been more about using IHL to affect the public image of its enemies.³⁴ The Taliban’s own periodic civilian casualty reporting initially referred to a very small number of ‘inadvertent’ casualties caused by Taliban fighters or, in later years, omitted casualties caused by their forces.³⁵

BOX 4: TALIBAN MEDIA OPERATIONS

Given the Taliban’s prolific media operations, a multitude of Taliban public statements reference relevant issues and at times shed light on internal policy. An official Taliban website has existed in some form since 2005, produced in at least five languages and frequently updated; in more recent years, this has been supplemented by social media, replacing the Taliban’s early DVDs and printed magazines. While the Taliban’s statements once mostly focused on attacks and the demonization of

33 Commission for Management and Release of Prisoners, Layha, Ch 6, Public Relations Duties and Responsibilities, Art 59.

34 Art 55, *ibid*, states: ‘this department has a responsibility to inform the international community of the cases that are in contradiction with international laws and have been identified by the Research and Audit Department through the Islamic Emirate’s media outlet under the framework of broadcasting policy with the direction of the Directorate’s Authority’. Art 58 states: ‘this department has the responsibility to point out those violations that occur considering the laws and announcements (pointing out reports of human rights and other international laws) with Taliban prisoners inside or outside the country or in regional prisons and release official announcements regarding it through the Emirate’s broadcasting agency’.

35 See IEA, Civilian Casualties Report 2016, 6 January 2017. The report states that ‘a total of 2,004 civilian countrymen (1540 male, 206 female and 258 children) died during the year 2016, of which 1,504 (76.84%) were martyred at the hands of America and the stooge administration, 380 (18.96%) at the hands of Daesh and unidentified gunmen and 120 (5.98%) inadvertently in the attacks by Mujahideen’. UNAMA’s report for that year finds that the Taliban were responsible for 1,618 civilian deaths. See UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2016, 2017, p 7, https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final280317.pdf (last accessed 22 May 2022). A similar discrepancy exists in the IEA’s 2017 civilian casualty report; in 2018, the Taliban stopped taking responsibility for any civilian casualties in its Commission for Prevention of Civilian Casualties and Inquiry of Complaints (PCCIC) reporting, advertent or otherwise. See IEA, Civilian Casualty Report 2017, 29 December 2017; IEA, Civilian Casualty Report 2018, 4 January 2019.

their adversaries, they now also highlight the Taliban's 'civilian' activities such as enabling (male) children to go to school and Quran recitation competitions.

The Taliban Media Commission based in Pakistan was established sometime around 2002 or 2003 to manage these efforts, with official spokesmen designated in the 2009 Layha as the only members of the movement authorized to speak to the media.³⁶ Press releases, distributed through the Taliban website and on social media and messaging apps, have affirmed the Taliban's stance on key IHL and human rights issues. Occasionally, they have articulated positions on issues not covered elsewhere, such as on the protection of cultural heritage. In later years, the Taliban's statements at informal dialogues and Track II meetings, such as the Moscow conference in 2019, also touched on their idea of rights and the permissibility of certain methods of warfare.

The Taliban's Eid statements, issued in the name of the amir since 2005, are among the most important public statements to consider in this regard. Eid statements melded policy directives with general messaging, religious guidance and battlefield encouragement. The Eid statements were widely disseminated to the rank and file as well as to the media and other external audiences.³⁷ Printed copies were distributed in Taliban areas, read in mosques before Eid prayers and later distributed via the internet, social media and messaging apps.³⁸ While relatively brief and even less specific than the general or sectoral layha, Eid statements have occasionally articulated policy shifts or denoted the importance of protecting civilians or other relevant priorities of the movement.

Finally, it is important to note that – despite the proliferation of guidelines and statements – a degree of autonomy was often built into Taliban 'rules'. The layha and other forms of top-down policy guidance provided general parameters for action, but much was historically left up to the discretion of military commanders on the ground and determined by local military imperatives.³⁹ Indeed, while the Taliban's public references to protecting the population increased over time within the layha and other documents and public statements, they were often vague, urging fighters to take care not to harm or misbehave with the population but not providing specific instruction or directives on implementation. Local discretion tended to be particularly pronounced where the official rules might obstruct the attainment of military objectives.⁴⁰ This has, at times, made it difficult to understand if, and to what degree, the insurgency was explicitly violating its own rules in a given instance.

A. MECHANISMS OF IMPLEMENTATION

The Taliban insurgency established mechanisms to enforce compliance with the layha and other rules. These included but were not limited to the following (which are explored later in further detail):

- Military Commission and associated bodies. This included the PCCIC, which investigated and tracked civilian harm, and was established – at least partly – in response to international criticisms of the Taliban's harm to civilians.

36 See Jackson, *Negotiating Survival*, supra fn 15.

37 Clark, *The Layha*, supra fn 27; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

38 T. H. Johnson, *Taliban Narratives: The Use and Power of Stories in the Afghanistan Conflict* (Kindle Edition), Oxford University Press, 2018.

39 See Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18; Jackson, *Negotiating Survival*, supra fn 15.

40 Jackson, *Negotiating Survival*, supra fn 15. HRW, 'You Have No Right to Complain': Education, Social Restrictions, and Justice in Taliban-Held Afghanistan, 2020, https://www.hrw.org/sites/default/files/media_2020/06/afghanistan0620_web_o.pdf (last accessed 22 May 2022).

- Internal disciplinary mechanisms, such as internal courts and investigations procedures
- Shadow justice mechanisms, primarily the Sharia court system
- Shadow governors and commissions at provincial level
- Sectoral commissions (see Box 3)
- Civilian complaints mechanisms, including complaints hotlines

According to Taliban documents, there were clear procedures for dealing with violations and disciplinary issues. The Taliban Military Commission was ultimately responsible for dealing with any violations or allegations of wrongdoing. In any instance, the first line of recourse was the provincial governor and provincial commissions. According to the Military Commission Layha, ‘the provincial commission should focus on taking care of the jihadi ranks and clearing them of undesirable and evil people, so that God forbid enemy individuals or the others that inflict damage to holy ranks of Mujahedeen could not find a place in Mujahedeen ranks’.⁴¹

In line with this, the layha for the PCCIC section on complaints reads:

“In some parts of the country, if Mujahideen and other officials are accused of ill-treating civilians, then the commission should advise such individuals not to perform such type of actions. In case of committing a major crime, the perpetrator should be referred to the concerned authority, and in case of non-execution of the case, the perpetrator and the concerned authority should be referred to the Military Court or if necessary should be introduced to leadership by the commission’s General Directorate.”⁴²

Interviews indicated that, in practice, the concerned authority in the first instance would likely be either the district or provincial governor and commissions for the Taliban (as the Military Commission Layha outlines). If the case was not resolved at either of those levels, it would then be elevated to the next level in the Taliban hierarchy (halqa or regional commander, and then the Military Commission). Additionally, the layha for the PCCIC also outlines provisions whereby those whose relatives were killed unjustly by the Taliban could file a petition to the PCCIC. The PCCIC was then responsible for investigating and dealing with the issue and providing a ‘safe environment’ in which survivors could file such petitions.⁴³

Finally, it is important to note that oversight structures evolved over time. Particularly after 2014, when the Taliban slowly began to gain greater presence and territorial influence, they increased attention and efforts to monitor and police the behaviour of their rank and file. In theory, these should have supported greater protection for civilians. For example, by 2019, military commanders had lost the right to arrest someone without prior approval from the Taliban district governor, provincial governor or another top-level commander. No Taliban fighter had the right to harm or kill a civilian unless they had been given explicit authority through a Taliban court verdict or other means. Unlike in the past, the military commanders were also forbidden from arbitrarily killing captured members of the Afghan security forces.

41 Military Commission Layha, Ch 8, Provincial Commission Layha, Art 74: ‘At the same time, the provincial commission should focus on taking care of the jihadi ranks and clearing them of undesirable and evil people, so that, God forbid, enemy individuals or others that inflict damage to holy ranks of Mujahedeen could not find a place in Mujahedeen ranks.’

42 PCCIC Layha, Ch 3, Complaints Section, Art 27.

43 Arts 29, 32, *ibid*.

Civilians' experiences with these mechanisms have not been well documented, but existing research suggests that adherence to these rules on the ground was extremely limited.⁴⁴ Human Rights Watch concluded in a 2020 report:

“Since 2015, the Taliban have made public statements about their intention to ensure internal accountability. In some cases, they have put measures in place to respond to complaints about abuse at the local level. However, these measures are very limited in scope, and rarely affect senior officials or address serious abuses. In most cases, communities fear retaliation if they report abuse. Residents who have criticized Taliban actions have been accused of spying and beaten.”⁴⁵



B. DIALOGUE WITH HUMANITARIAN AND HUMAN RIGHTS ACTORS

While the Taliban in the early years of the insurgency condoned the targeting of aid groups and international organizations, the group later reversed this stance (see section 5D for further discussion of this). Particularly as it sought international recognition and legitimacy, the movement ultimately engaged with an array of UN agencies, NGOs and international organizations to negotiate humanitarian access, provide access to prisoners and discuss human rights concerns.⁴⁶ In the later

⁴⁴ For more on this, see Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

⁴⁵ HRW, ‘You Have No Right to Complain’, supra fn 41, pp 6–7.

⁴⁶ A. Jackson and A. Giustozzi, *Talking to the Other Side: Humanitarian Negotiations With the Taliban in Afghanistan*, HPG Working Paper, ODI, 2012, <https://cdn.odi.org/media/documents/7968.pdf> (last accessed 22 May 2022); Jackson, *Negotiating Survival*, supra fn 15; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18; K. Haver and W. Carter, *What It Takes: Principled Pragmatism to Enable Access and Quality Humanitarian Aid in Insecure Environments*, report of the Secure Access in Volatile Environments research programme, November 2016, <https://www.humanitarianoutcomes.org/file/112/download?token=qQbVKV35> (last accessed 23 May 2022).

years of the insurgency, the Taliban regularly engaged with aid actors on the ground and through their Qatar office.

Some of the earliest humanitarian engagement with the Taliban focused on polio eradication campaigns. Through negotiations with Taliban leaders, the World Health Organisation, the UN Children's Fund (UNICEF) and their implementing partners gained permission to conduct polio vaccinations beginning in August 2007. Statements were issued in the name of the Amir, Mullah Omar, for the campaigns, urging fighters to allow vaccination and for parents to have their children vaccinated.⁴⁷ Statements like this one from 2014 typically accompanied polio campaigns: 'The only preventive treatment for polio according to the world's advanced medicine is to vaccinate children against the disease and give them polio drops. The Islamic Emirate of Afghanistan supports any programme which is for the health of the people of our poor country and for the benefit of the children.'⁴⁸ Obstacles were nevertheless occasionally encountered with command and control, and Taliban fears that the campaigns served as cover for spies.⁴⁹

The ICRC's longstanding interaction with the Taliban is also notable. While the relationship has at times been fraught (the Taliban attacked the ICRC on more than one occasion, and broke off relations on others), the ICRC has conducted aid access and prisoner release negotiations, visits to Taliban in pro-government force custody, visits to pro-government forces in Taliban custody, IHL training, body recovery and an array of other forms of dialogue and engagement.⁵⁰ The Taliban's Health Commission Layha also specifically mentions cooperation with the Afghan Red Crescent.⁵¹

The Taliban also established regular dialogue with UNAMA Human Rights and wider UN actors. In 2010, the Taliban released a public statement in response to UNAMA's investigations and called for a joint commission to investigate civilian casualties, comprised of members of the Taliban, members of the Islamic Conference, UNAMA Human Rights and the NATO-led ISAF.⁵² This joint commission never materialized but the exchange led to regular communication, which eventually expanded to encompass broader humanitarian and development concerns.

The Taliban claimed that they enacted policies geared toward protecting civilians that the UN has advocated for, and UN civilian casualty reports support these claims in some instances (i.e., temporarily reducing pressure-plate improvised explosive device (IED) use).⁵³ Finally, UNAMA

47 Jackson and Giustozzi, *Talking to the Other Side*, supra fn 47.

48 IEA declaration, Nunn Asia, January 2014, <https://www.nunn.asia/9441/>.

49 A. Paybarah, 'Taliban Allow Polio Vaccine Program to Restart in Afghanistan', *The New York Times*, 20 October 2021, <https://www.nytimes.com/2021/10/19/world/asia/taliban-polio-vaccines-afghanistan.html>.

50 F. Terry, 'The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action', 93 *IRRC* 881 (2011); DW, 'Taliban Lift Ban on Red Cross in Afghanistan', 15 September 2019, <https://www.dw.com/en/taliban-lift-ban-on-red-cross-in-afghanistan/a-50437550>.

51 Health Commission Layha, Ch 6, *The Triangular Centre's Duties and Responsibilities*, Art 98: 'In Red Crescent Society's medical meetings, with the permission of the director of the commission and in consultation with the relevant director, this group will represent the Islamic Emirate doctors in the meeting.' Art 99: 'All the medical and educational programmes of the Red Cross for the wounded of the Islamic Emirate will be established in the presence of and consultation with this group.' Art 100: 'They and the Red Cross Society will share information about the treatment.'

52 IEA, 'Response of the Spokesman of the Islamic Emirate of Afghanistan to Civilian Casualties' Survey', 15 August 2010.

53 The UN has pressed the Taliban to abandon pressure-plate IEDs (which they see as equivalent to landmines), arguing that their use frequently contravenes IHL rules on distinction, proportionality and the necessary precautions to prevent civilian harm. Civilian harm from pressure-plate IEDs reached a high in 2016 but decreased by 32% by 2018. The UN reported 1,102 civilians killed or injured by pressure-plate IEDs in 2016, and 753 in 2018. UNAMA Human Rights, *Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2016*, supra fn 36;

Human Rights reports also included responses from the Taliban (and later those from pro-government forces) as annexes to their annual protection of civilians reporting. The Taliban's statements typically reiterated previously established rules and positions, at times referencing internal directives and rules of engagement.

C. MAIN IHL/IHRL VIOLATIONS AND RESPONSE OF THE GROUP

There has been a significant gap between Taliban rules and rhetoric around IHL-relevant issues on the one hand, and independent monitoring and investigations on the other. UN reporting indicates that the Taliban was responsible for the majority of civilian casualties during the post-2001 conflict (which the Taliban dispute).⁵⁴ The International Criminal Court's preliminary investigation concluded that there was a reasonable basis to believe that the Taliban committed crimes against humanity (specifically murder, imprisonment or other severe deprivation of physical liberty, persecution against any identifiable group or collectivity on political grounds and gender grounds) and war crimes (specifically murder, intentionally directing attacks against the civilian population, directing attacks against humanitarian personnel, intentionally directing attacks against protected objects, conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities, and killing or wounding treacherously a combatant adversary) on a large scale and as part of a clear plan or policy.⁵⁵

TALIBAN POLICY AND PRACTICE WITH REGARD TO SELECTED IHL NORMS

1. PROTECTION OF CIVILIANS FROM ATTACKS

A. PRINCIPLE OF DISTINCTION

Under customary IHL,⁵⁶ the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants; they must not be directed against

UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2018, 2019, https://unama.unmissions.org/sites/default/files/unama_annual_protection_of_civilians_report_2018_-_23_feb_2019_-_english.pdf (last accessed 22 May 2022).

54 See UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Reports 2007–2020, <https://unama.unmissions.org/human-rights> (last accessed 22 May 2022).

55 International Criminal Court (ICC), 'Afghanistan', Report on Preliminary Examination Activities 2016, pp 43–51, https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (last accessed 22 May 2022). See also ICC, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, 27 September 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan> (last accessed 22 May 2022).

56 See Rule 1, ICRC CIHL Database,

civilians. Civilian objects are also protected against attacks.⁵⁷ Indiscriminate attacks are prohibited.⁵⁸ In addition, Article 13 of APII provides that:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

The Taliban demonstrated an understanding of some concepts related to distinction, at least at the leadership level, from early on in the insurgency. Yet the protections they offered to civilians – in policy and practice – consistently fell short of international norms.⁵⁹ The 2006 edition of the Layha extended a series of protections to certain individuals in specific circumstances. For example, the Taliban ‘guarantee[d] to any man who turns his back on the infidels, security for himself and his possessions’.⁶⁰ In the general Layha, there are significant divergences from IHL regarding people and objects entitled to protection. It does not refer to ‘civilians’ but to a term roughly translating to ‘common people’. As Clark points out, ‘there is a mass of people’ – which would include private contractors related to the construction of military bases, suppliers, translators, drivers and so on – ‘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’.⁶¹ In the 2010 edition of the Layha, one provision states: ‘If contractors who provide oil or other materials or construct military bases for the puppet administration and foreign infidels, the low- or high-ranking officials of private security companies, translators for the infidels or the drivers procuring [these materials] for the infidels, are arrested and if they are proven guilty of any of the aforementioned activities by the provincial judge, he shall order them to be executed.’⁶²

Elsewhere, in military directives, the Taliban referred not to common people but to the need to protect ‘women, children and the elderly’.⁶³ The Layha repeatedly enjoins Taliban fighters to do everything within their power to protect ‘common people’ and their property and assets, but rarely specifies concrete actions fighters and commanders should take in this regard. It does not elaborate, for example, on the criteria for the use of IEDs, or the targeting of military operations.

That said, the Taliban’s definition of who was ‘protected’ widened over time. Until the revised Layha of 2009, for example, anyone working for the government – including teachers – was considered a legitimate target. Civil servants were an acceptable target, but it later became broadly unacceptable to

https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last accessed 22 May 2022).

⁵⁷ Rule 7, *ibid.*

⁵⁸ Rule 11, *ibid.*

⁵⁹ See also I. Voudouri, ‘Who is a Civilian in Afghanistan?’, 102 *IRRC* 914 (2020).

⁶⁰ Translation from Clark, *The Layha*, *supra* fn 27, p 25.

⁶¹ *Ibid.*, p 21.

⁶² *Ibid.*, p 5.

⁶³ IEA, ‘Special Instructions of the Islamic Emirate’s Leadership Regarding Precautionary Means to Prevent Civilian Casualties in the Ongoing Jihad’, 4 January 2015.

target those working in service delivery ministries (such as health or education).⁶⁴ In May 2019, the Taliban released a statement declaring: ‘public welfare institutions, their workers, medical facilities, education facilities, and international humanitarian organizations are all not only categorized as non-targets by the Islamic Emirate but are given assistance in delivering services when needed’.⁶⁵

The Taliban insisted that targeting was limited to those ‘directly linked to the invaders or the stooge administration and can be defined as enemy Sharia-wise’ (‘Sharia-wise’ was not elaborated further, suggesting significant ambiguity).⁶⁶ The 2010 Layha, for example, states:

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.⁶⁷

It was, however, clear that those working in local government, the state justice system and the security forces remained targets (unless they surrendered, which then theoretically entitled them to protection).⁶⁸

There was persistent tension between military necessity (closely linked in the Taliban’s ideology to religious obligation), and the degree to which civilians received protection. There was also a prominent mention of (and at times a conflation between) innocent Muslims and civilians. As an example, one statement issued in advance of military operations in 2014, reads: ‘in the jihadi struggle, the well-being and safety of ordinary Muslims should always be in the forefront, and we must always try to save ordinary Muslims from the ravages of war’.⁶⁹ For much of the conflict, the Taliban’s emphasis on the protection of fellow Muslims tended to imply that non-Muslims were effectively infidels, leaving open the idea that they were not immune (or at least not as protected) as Muslim civilians.

B. PRINCIPLES OF PROPORTIONALITY AND PRECAUTIONS

Under customary IHL, it is prohibited to carry out an attack that may be expected to cause excessive harm to civilians and civilian property compared to the anticipated military advantage (principle of proportionality).⁷⁰ In addition, in the planning and conduct of military operations, the parties to the

⁶⁴ UNAMA Human Rights, Afghanistan: Annual Report 2012, Protection of Civilians in Armed Conflict, 2013, https://unama.unmissions.org/sites/default/files/2012_annual_report_eng_0.pdf (last accessed 22 May 2022).

⁶⁵ IEA, ‘Hitting Civilian Targets is Not the Policy of the Islamic Emirate’, 22 May 2019.

⁶⁶ Ibid.

⁶⁷ Clark, The Layha, *supra* fn 27, p 4.

⁶⁸ Interview with former Taliban spokesman, Dubai, January 2019.

⁶⁹ ‘The Taliban are Taking Drastic Measures to Prevent Civilian Casualties’ (in Pashto), Nunn Asia, 4 July 2014, <https://www.nunn.asia/17341/>.

⁷⁰ Rule 14, ICRC CIHL Database, *supra* fn 57.

conflict must do everything feasible to avoid or minimize collateral damage (principle of precautions).⁷¹

In theory, those who the Taliban considered ‘civilians’ were entitled to full protection. In numerous public statements, they urged that ‘strict attention must be paid to the protection and safety of civilians’ through ‘working out a meticulous military plan’.⁷² They also stated that they took specific measures to limit civilian harm. For example, they stated that they directed their forces to ‘not fire to or from civilian places, and always tried to conduct operations outside populated areas’.⁷³ The Taliban consistently disputed that the movement intentionally targeted civilians and denied responsibility for civilian harm inflicted by their operations. On the occasions they did admit their operations caused harm, they tended to deny that it was intentional. In a 2019 statement, they conceded that it was ‘possible that some losses are inflicted on civilians in attacks launched by Mujahideen’ but insisted that ‘no single attack has been carried out for the purpose of killing civilians’.⁷⁴

To respond to civilian casualties and broader civilian complaints, the movement established a complaints delegation around 2011, which transitioned into a sub-commission focused on civilian casualties under the Military Commission around 2013.⁷⁵ This then evolved into the PCCIC,⁷⁶ which reported to the leadership shura.⁷⁷ The PCCIC was governed by a separate layha which outlined the rules and procedures for investigating civilian casualties.⁷⁸ This layha articulates the Commission’s

71 Rule 15, *ibid*.

72 The Taliban statement on the 2011 spring offensive, for example, instructed fighters that ‘strict attention must be paid to the protection and safety of civilians during the spring operations by working out a meticulous military plan’, see IEA, ‘Statement of the Leadership Council of the Islamic Emirate Regarding the Inception of the Spring Operations’, 30 April 2011. In 2016, an Eid statement instructed fighters to ‘prevent civilian casualties, maintain justice and win hearts and minds of people; instruct them from time to time about people’s rights and dignity’, see IEA, ‘Message of Felicitation of the Esteemed Amir-ul-Momineen, Sheikhul Hadith Haibatullah Akhунzada on the Eve of Eid-ul-Adha’, 9 September 2016. See also IEA, ‘Rejoinder of the Islamic Emirate to the Recent Report of UNAMA Regarding Civilian Casualties’, 31 July 2014; IEA, ‘Statement of Islamic Emirate Regarding the Inauguration of Al-Fath Jihadi Operations’, 15 March 2019.

73 Taliban response to UN monitoring in UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2018, *supra* fn 54, p 77.

74 Quoted in UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict 2019, 2020, https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019.pdf (last accessed 22 May 2022). See also IEA, ‘Hitting Civilian Targets is Not the Policy of the Islamic Emirate’, *supra* fn 66.

75 According to an interview with the commissioner, the body’s objectives were as follows: ‘(1) The responsibility of this organ is to get information, evaluate and send the report to the leadership of the Islamic Emirate regarding those civilian losses which are ascribed to Mujahideen, whether they occur as the result of martyrdom attacks, landmines, rockets attacks or in the usage of other light or heavy weapons. (2) In-depth analysis and registration of those civilian losses which take place in the indiscriminate bombing, ruthless firing, raids or any other operations of the American invaders, the NATO trespassers or the indigenous stooges. The report of all these kinds of civilian losses is sent to the head of the Military Commission so that necessary steps should be taken for the avoidance of their future recurrence. (3) This organ bears the responsibility of thoroughly investigating those incidents which have occurred due to the negligence of Mujahideen and if the perpetrator is found guilty, he should be introduced to the Sharia court for due punishment.’ See IEA, ‘Interview with Mr. Sarhadi, Director of the Special Committee for the Prevention of Civilian Losses’, 17 June 2013.

76 IEA, Civilian Casualty Report 2016, 6 January 2017.

77 See Jackson and Amiri, *Insurgency Bureaucracy*, *supra* fn 18.

78 This commission was comprised, according to its layha, of a General Director, two Deputies, an Administrative Department, Central Members, a Finance Department, a Communications Department, a Research and Audit

role in devising policies that protect civilians and disseminating them to the movement's fighters.⁷⁹ The layha broadly lays out a procedure for investigating incidents of civilian harm,⁸⁰ and instructs the Taliban to 'cooperate and share sympathy with the civilian as much as possible'.⁸¹ Finally, it also elaborates a process by which civilians can lodge allegations of harm and complaints against Taliban fighters⁸² and notes that they should be protected from retribution.⁸³

The layha for the PCCIC indicates that 'civilian deaths and casualties are not acceptable at any cost and particularly, civilian casualties should be strictly prevented during military operations'.⁸⁴ It also states that this commission is responsible for 'educating' Taliban fighters on how to prevent civilian harm.⁸⁵ The PCCIC is also responsible for monitoring civilian casualties and sharing information with the media.⁸⁶ In practice, as discussed above, this has mostly applied to monitoring and publicizing civilian harm caused by the Taliban's adversaries – not by the Taliban.

Even as Taliban rhetoric and rules around the protections for civilians increased, and they gained greater internal capacity to implement these rules, there were widespread killings of civilians. Part of this can be explained through the Taliban's notion of military necessity. Adherence to the rules in areas

Department, an Advertising and Public Awareness Department, and – at the subnational level – provincial directorates.

79 PCCIC Layha, Ch 2, General Directives, Art 6: 'As a result of work experience, the commission will share such plans and strategies with officials and common mujahideen that will prevent civilian casualties and complaints during operations. Also, fellow citizens' lives and property should be protected.' Art 7: 'The Prevention of Civilian Casualties and Inquiry of Complaints Commission is responsible for educating the Mujahideen in every way possible, based on the instructions of the Islamic Emirate, that civilian deaths and casualties are not acceptable at any cost and, particularly, civilian casualties should be strictly prevented during military operations.'

80 Ibid, Art 12: 'In case of any unwanted incident, the mentioned commission is tasked with obtaining information from the spokespersons of the Islamic Emirate, local dignitaries, independent media, sympathizers of the victims, responsible Mujahideen of the region and common sincere Muslims, and also all aspects of the case should be confirmed.'

81 Ibid, Art 13.

82 Ibid, Ch 3, Complaints Section, Art 27: 'In some parts of the country, if Mujahideen and other officials are accused of ill-treating civilians, then the commission should advise such individuals not to perform such type of actions. In the case of committing a major crime, the perpetrator should be referred to the concerned authority, and in the case of non-execution of the case, the perpetrator and the concerned authority should be referred to the Military Court or if necessary should be introduced to the leadership by the commission's General Directorate.' Art 32: 'If it is substantiated that an individual has been unjustly murdered by the officials of the Islamic Emirate and the heirs of the deceased have filed a petition, then the commission is responsible for bringing the murderer to justice and following the proceedings. Additionally, if the heirs of the deceased cannot file a petition due to threats by the murderer, then the commission should create a safe environment for filing the petition of the heirs of the deceased.'

83 Ibid, Art 29: 'If a person complains to the commission regarding the procedure, then after the complaint, any official or other person threatens the complainant as to why he/she has complained, then the commission has the authority to refer that person to the Military Court.'

84 IEA Prevention of Civilian Casualties and Complaints Commission Working Procedure, Ch 1, Art 8.

85 PCCIC Layha, Ch 2, General Directives, Art 7: 'The ...Commission is responsible for educating the Mujahideen in every way possible, based on instructions of the Islamic Emirate, that civilian deaths and casualties are not acceptable at any cost and, particularly, civilian casualties should be strictly prevented during military operations.'

86 Ibid, Art 12: 'In case of any unwanted incident, the mentioned commission is tasked with obtaining information from the spokespersons of the Islamic Emirate, local dignitaries, independent media, sympathizers of the victims, responsible Mujahideen of the region and common sincere Muslims, and also all aspects of the case should be confirmed.'

firmly under Taliban control was typically greater than in areas of active contestation or government control, where the Taliban tended to allow the rules to be relaxed or disregarded.⁸⁷ Additionally, their definition of civilian allowed the Taliban to dispute accusations of violations (i.e., killing a Republic judge was seen as a ‘legitimate target because he is the one sentencing people to death or jail, he is part of this war’⁸⁸). Finally, Taliban public statements and directives often placed the onus of protection on civilians to avoid harm (i.e., frequent warnings that civilians should avoid convoys, government buildings and other likely targets of Taliban attacks).⁸⁹ So whilst the Taliban has long ‘warned’ civilians to avoid certain likely targets, the warnings are often unhelpfully broad and rarely timebound. In practice, the Taliban used these ‘warnings’ to shift blame onto the civilian population.⁹⁰

C. SUICIDE ATTACKS

The 2009 and 2010 editions of the general Layha indirectly address the issue of precaution in suicide attacks. This includes guidelines for ‘martyrdom’ operations that specify that the attacker be well trained and the attacker must ‘take great efforts to avoid casualties among the common people’. They also stipulated that the target be ‘important and major’ (as opposed to ‘minor and valueless’). Additionally, the general Layha outlines an approval process for these operations: ‘except those who have been given permission and a private programme by the leadership, mujahedin are obliged to get their orders from the provincial officials’ to carry out these attacks.⁹¹

The Taliban subsequently developed specific guidance for suicide attacks under the Commission of Martyrdom Battalions and Military Camps.⁹² Suicide attacks must be authorized by the Commission.⁹³ Attackers must be vetted and meet certain criteria.⁹⁴ The Military Commission Layha also encourages its provincial-level commissions to develop positive relations with civilians, although it does not

87 See K. Hirose, K. Imai and J. Lyall, ‘Can Civilian Attitudes Predict Insurgent Violence? Ideology and Insurgent Tactical Choice in Civil War’, 51 *Journal of Peace Research* 1 (2017).

Jackson, *Negotiating Survival*, supra fn 15; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

88 Interview with Taliban interlocutor and former media commission member, Dubai, October 2019.

89 IEA, ‘Statement of the Leadership Council of the Islamic Emirate Regarding the Inception of the Spring Operations’, supra fn 73. For a more recent example, see IEA, ‘Notice by Commission for Prevention of Civilian Casualties and Complaints Regarding Non-Participation by People in Fake Election Process’, 26 September 2019. See also Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

90 For earlier examples, see Afghanistan Independent Human Rights Commission (AIHRC), *Insurgent Abuses Against Afghan Civilians*, December 2008, <https://www.refworld.org/docid/4a03f7a82.html> (last accessed 22 May 2022).

91 Clark, *The Layha*, supra fn 27, p 11.

92 This layha is divided into 10 chapters and 52 articles, in which the commission is responsible for all the operations involving explosive devices. The commission is responsible for instructing martyrs and following appropriate procedures in the execution of these attacks.

93 Commission of Martyrdom Battalions and Military Camps Layha, Ch 8, Regarding Suicide Attackers Mujahideen, Art 37: ‘Without the permission of the commission, the person in charge of suicide attackers cannot send any suicide attacker to operations. It is necessary to get permission from the commission.’ Art 64: ‘The commander of the unit cannot carry out large-scale operations against the enemy on his own; however, with the advice and approval of the military circle and consent of the provincial governor, he can carry out operations.’

94 Ibid, Art 39: ‘If any suicide attacker is the only son, then he should not be sent to operations at any cost. And if any of the suicide attackers is married, or his brothers have been martyred, have high academic status or professional working talents, then care must be taken under consideration in sending them to the operations, and their family situation and general well-being should also be taken into consideration.’

specify how this should be done.⁹⁵ The layha instructs that ‘every effort should be made to prevent civilian casualties in suicide attacks’.⁹⁶

While Islam forbids suicide, the Taliban have justified and endorsed suicide bombings as an acceptable and honorable military tactic.⁹⁷ Part of this justification is ideological, in that the Taliban conflated suicide attacks with self-sacrifice in the service of jihad. The group also linguistically reframed these attacks, typically referring to them as ‘martyrdom operations’, not ‘suicide attacks’.

The nature of many Taliban suicide attacks appeared to inherently violate their own guidance on distinction and precaution. Attacks of this nature often either disregarded the safety of civilians, explicitly targeted civilians or targeted non-civilian objects in densely populated areas where civilians were highly likely to be harmed.⁹⁸ One of the deadliest such incidents occurred on 27 January 2018, in which an ambulance rigged with explosives killed at least 103 people, mostly civilians, and injured over 200 in downtown Kabul. The Taliban claimed responsibility and insisted that the ‘target was the enemy and the true brunt was also borne by the workers of this Ministry [of Interior]’.⁹⁹

Taliban suicide attacks also frequently involved perfidy, as Taliban attackers often disguised themselves as civilians to get close to their intended targets without detection. The Taliban’s consistent use of perfidy increased the risk that civilians might be mistaken for suicide attackers by pro-government forces and inadvertently injured or killed.¹⁰⁰

2. LANDMINES AND OTHER EXPLOSIVE DEVICES

The use of landmines – both anti-personnel (AP) and anti-vehicle (AV) – is not prohibited per se under customary IHL unless they are directly aimed at civilians. However, when landmines are used, particular care must be taken to minimize their indiscriminate effects.¹⁰¹ In addition, parties to the conflict using landmines must record their placement, as far as possible.¹⁰² At the end of active hostilities, they must also remove or otherwise render them harmless to civilians or facilitate their

95 Military Commission Layha, Ch 8, Provincial Commission Layha, Art 78: ‘The members of the Provincial Commission should try to build an atmosphere of trust and intimacy between the Mujahideen and the people in the jihadi areas by gaining the support and trust of the general public, religious scholars, tribal elders and influential people.’

96 Commission of Martyrdom Battalions and Military Camps Layha, Ch 9, Regarding Suicide Attacks, Art 42(c).

97 See, e.g., A. Z. Baryali, ‘Sheikh Dr Ahmad Tayyab of Al-Azhar, the Largest and Most Historic Islamic Centre of the Islamic world, on Martyrdom Attacks’ (in Pashto), Nunn Asia, 13 March 2013, <https://www.nunn.asia/6295> (last accessed 26 May 2022); A. Z. Baryali, ‘Sayyaf Khaneh! Martyrdom or Suicide?’ (in Pashto), Nunn Asia, 10 September 2012, <https://www.nunn.asia/5301> (last accessed 26 May 2022); Al-Samood, ‘Martyrdom and its Stipulations’, 2014.

98 UNAMA Human Rights consistently reported that this was the case throughout the years during which they monitored violations: See UNAMA Human Rights, Annual Reports on the Protection of Civilians in Armed Conflict, 2007–2020, <https://unama.unmissions.org/human-rights> (last accessed 22 May 2022).

99 IEA, ‘Clarification of the Islamic Emirate Concerning Attack on the Ministry of Interior’, 28 January 2018.

100 See HRW, Lessons in Terror: Attacks on Education in Afghanistan, July 2006, <https://www.hrw.org/reports/2006/afghanistano706/afghanistano706brochure.pdf> (last accessed 22 May 2022).

101 Rule 81, ICRC CIHL Database, *supra* fn 57.

102 Rule 82, *ibid*.

removal.¹⁰³ Although the total prohibition of AP landmines is not considered customary law yet, three-quarters of states today are parties to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. The Convention does not apply to ANSAs, but many of them have agreed through unilateral engagements such as Geneva Call's Deeds of Commitments to ban the use of AP mines.

In 1998, in support of the 1997 Mine Ban Treaty, the Taliban Government issued a public ban on the production, trade, stockpiling and use of landmines. It stated that 'the Islamic Emirate of Afghanistan would never make use of any type of landmines' and that 'those who use landmines in personal, political or any other differences in Afghanistan would be punished in accordance with the Islamic law'.¹⁰⁴ The post-2001 Taliban insurgency, however, systematically used IEDs in their military campaign against pro-government forces. While IHL does not prohibit the use of IEDs per se, the Taliban's use of them often violated the rules of distinction, proportionality and precautions.

The Taliban has engaged in, according to the UN, 'indiscriminate and unlawful use of IEDs such as suicide and pressure-plate devices in civilian populated areas' and 'deliberate targeting of civilians using IEDs'.¹⁰⁵ Of specific concern are suicide attacks (discussed above) and victim-activated IEDs. The latter were typically set off by an unsuspecting individual exerting pressure on the trigger. Typically, these kinds of devices were placed on roads, and vehicles triggered the initiator for the explosion (usually a pressure plate or tripwire). Victim-activated IEDs are less precise than command-activated devices that can be controlled from a distance.

The layha for the Military Commission talks only generally about explosives. It notes that there is a department within the commission tasked with preparing, transporting and providing to Taliban fighters explosive devices. The department is instructed to both prepare explosives in relation to their targets so that the movement is 'satisfied with its effect',¹⁰⁶ ensure that explosives are 'checked' before being dispatched¹⁰⁷ and keep all matters pertaining to explosives confidential.¹⁰⁸

The indiscriminate use of IEDs violated Taliban directives to take all precautionary measures to protect civilians. While the Taliban insisted, as discussed above, that it warned the civilian population of targets, there was little civilians could do to avoid attacks because they often occurred on commonly travelled roads and otherwise targeted busy public places.¹⁰⁹ A large share of civilian casualties from

¹⁰³ Rule 83, *ibid*.

¹⁰⁴ Quoted in International Campaign to Ban Landmines, 'Afghanistan: ICBL Concerned by Taliban Mine Use Allegations', 19 June 2008. For the original declaration, see http://theirwords.org/media/transfer/doc/sc_af_taliban_1998_02-d631e9853b6909a692f10408438eda18.pdf (last accessed 22 May 2022).

¹⁰⁵ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2018, *supra* fn 54.

¹⁰⁶ Military Commission Layha, Ch 9, Preparing and Transferring Explosives, Art 82.

¹⁰⁷ *Ibid*, Art 84.

¹⁰⁸ *Ibid*, Art 80: 'As this department's work is very sensitive, therefore, this department has the responsibility to take care and pay full attention to keeping secret its confidential information, formulas, factories, storages and other confidential documents.'

¹⁰⁹ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2020, 2021, https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_report_2020_revs3.pdf (last accessed 22 May 2022).

victim-activated IEDs occurred when they were placed on public roads and triggered by civilian vehicles.¹¹⁰

The Taliban denied indiscriminately using IEDs. In 2012, they stated that they ‘never place live landmines in any part of the country but each mine is controlled by a remote and detonated on military targets only’.¹¹¹ The UN, however, reported in 2012 that victim-activated IEDs were the most common type of IED used by the Taliban. It also reported that in most cases of civilian casualties from IEDs, there was no discernable military target and that such instances killed 393 civilians and wounded 520 others in 2012 alone.¹¹² After concerted UN-led advocacy, the Taliban’s use of victim-activated IEDs declined in 2018¹¹³ but subsequently increased by 2020. In 2020, 43 percent of civilian casualties from these devices were women and children, according to UNAMA.¹¹⁴

3. THE SPECIAL PROTECTION OF CERTAIN OBJECTS, SUCH AS CULTURAL PROPERTY AND HERITAGE

Under customary IHL, each party must respect and protect cultural property. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.¹¹⁵ All seizure, or destruction of, or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.¹¹⁶

The Taliban made few statements about cultural heritage. Where they were referenced, cultural artefacts were typically grouped with other national assets, as in this statement from 2012:

“Public utilities – such as roads, bridges, tunnels, dams, irrigation systems, power stations, power transmission lines, mining, oil refineries and equipment, educational institutions, madrassas, mosques, schools, universities, health centres, clinics, hospitals and more – all this is the common property of the nation, its benefits and harms reach the common people and its destruction is not only a crime against humanity, but also an illegal act according to Islamic Sharia, because public utilities are part of the nation’s treasury, and according to the rules of the holy religion of Islam, it is a great sin to neglect or destroy the public treasury.”¹¹⁷

¹¹⁰ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2020, *supra* fn 110.

¹¹¹ IEA, ‘Reaction of Islamic Emirate Regarding Accusation of UNAMA About Explosive Devices’, 22 October 2012.

¹¹² UNAMA Human Rights, Afghanistan: Annual Report 2012, Protection of Civilians in Armed Conflict, *supra* fn 65.

¹¹³ Jackson and Amiri, Insurgency Bureaucracy, *supra* fn 18.

¹¹⁴ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2020, *supra* fn 110.

¹¹⁵ Rule 38, ICRC CIHL Database, *supra* fn 57.

¹¹⁶ Rule 40, *ibid*.

¹¹⁷ S. Sadat, ‘Taliban: Protecting National Property is Our Sharia and National Duty’ (in Pashto), Nunn Asia, 17 March 2015, <https://www.nunn.asia/39759/>.

At some point, the Taliban established a Committee for Cultural Affairs, which was, among other things, responsible for safeguarding ancient artefacts. In February 2021, the Taliban released a public statement elaborating rules for their ranks around the protection of cultural property, emphasizing that ancient artefacts ‘form a part of our country's history, identity and rich culture’.¹¹⁸ They prohibited ‘all types of trade, contracts and transport and transfer of ancient goods’,¹¹⁹ and called on Taliban fighters to ‘prevent excavation of antiquities and preserve all historic sites like old fortresses, minarets, towers and other similar sites so as to safeguard them from damage, destruction and decay’.¹²⁰ Finally, they urged all other sections of the movement, ‘especially the Military Commission’, to ‘coordinate and cooperate with the Cultural Commission in protecting these artifacts’.¹²¹

Before this 2021 statement, there is little discernible evidence of the Taliban’s position or rules on these issues. The Taliban portrayed themselves as guardians of ‘truly’ Islamic and Afghan culture, but this was typically only vaguely defined. Whilst the Taliban’s pre-2001 desecration of cultural sites is well documented (such as the destruction of the Bamiyan Buddhas), they do not appear to have taken a similar stance in their years as an insurgency. Put differently, they did not target and desecrate sites they deemed ‘un-Islamic’, or at least not to the same degree as they did before 2001. They did however orchestrate attacks against suspected pro-government supporters or members of rival groups in places of religious worship.¹²²

4. HUMANITARIAN ACCESS

‘Humanitarian access’ is not regulated per se under IHL. Common Article 3, Paragraph 2, provides that ‘an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’. This provision is considered to be one of the legal bases on which impartial humanitarian organizations, other than the ICRC, may provide humanitarian aid to the parties to the conflict. In addition, Article 18, Paragraph 2 of AP II provides that ‘if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned’.

Under customary IHL, the parties to the conflict ‘must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.¹²³ Humanitarian relief personnel and objects must be respected and protected.

¹¹⁸ IEA, ‘Statement of Islamic Emirate Regarding Protection and Preservation of Ancient Artifacts’, 20 February 2021.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² See UNAMA Human Rights, Protection of Civilians in Armed Conflict: Attacks Against Places of Worship, Religious Leaders and Worshippers, 2017, https://unama.unmissions.org/sites/default/files/unama_report_on_attacks_against_places_of_worship_7_nov2017_0.pdf (last accessed 22 May 2022).

¹²³ Rule 55, ICRC CIHL Database, *supra* fn 57.

A. UNDERSTANDING OF HUMANITARIAN ACCESS, CRITERIA OR CONDITIONS FOR ALLOWING OR FACILITATING HUMANITARIAN ACCESS

The Taliban's stance on humanitarian access has significantly evolved. The 2006 Layha condoned attacks on aid workers, stating that foreign aid organisations 'that come to the country are tools of the infidels ...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'.¹²⁴ This was echoed in other Taliban public statements.¹²⁵ The Taliban also orchestrated widespread attacks on aid workers and aid projects, and accused them in specific instances of conducting intelligence gathering for the 'enemy'.¹²⁶

The 2009 Layha revised this stance, announcing the creation of a dedicated commission to deal with aid organizations and private-sector entities:

"Concerning the affairs of organisations and companies, provincial officials shall follow the guidance of the Commission for the arrangement and Control of Companies and Organisations. Of course, should there be a disagreement when provincial officials and the Commission are discussing something, the Commission will request the guidance of the leadership. The provincial, district and group officials and the representatives of the Organisations and Companies Commission in their respective province do not have the right to make their own decisions about the affairs of organisations and companies."¹²⁷

While vague, this policy shift indicated a certain level of openness toward aid agencies that widened over time. Taliban public statements in this regard progressively endorsed humanitarian access. This appears to have been motivated by the fact that their attacks on services and aid projects were alienating communities whose acquiescence they needed.¹²⁸ The Taliban did not and could not provide much aid on their own. The amir's Eid statement in 2013, for instance, stated that humanitarian organizations could implement 'selfless activities in areas under our control on the basis of our conditions and policy and in coordination with the relevant commissions'.¹²⁹ The statement did not elaborate on what these conditions and policy entailed. Also in 2013, they openly called for assistance in response to flooding:

"The Islamic Emirate calls on its Mujahideen to cooperate and help with the people of the flood-hit areas as much as they can, the Islamic Emirate also calls on the charitable and wealthy people of the country to provide emergency medical and food aid to the flood victims in this great calamity, provide shelter to them and help them rebuild their destroyed homes in accordance with Islamic and national obligations and humanitarian sympathies."¹³⁰

¹²⁴ Clark, *The Layha*, supra fn 27, p 26.

¹²⁵ See, e.g., 'Afghanistan: Taliban Blocks Polio Vaccination', *The New Humanitarian* (formerly IRIN News), 15 March 2007, <https://www.thenewhumanitarian.org/report/70721/afghanistan-taliban-blocks-polio-vaccination>.

¹²⁶ Jackson and Giustozzi, *Talking to the Other Side*, supra fn 47; AIHRC, *Insurgent Abuses Against Afghan Civilians*, supra fn 91; HRW, *The Human Cost: The Consequences of Insurgent Attacks in Afghanistan*, 2007, <https://www.hrw.org/sites/default/files/reports/afghanistan0407webwcover.pdf> (last accessed 22 May 2022).

¹²⁷ Clark, *The Layha*, supra fn 27, p 11; the 2010 edition remains fairly consistent on these issues.

¹²⁸ See Jackson and Amiri *Insurgency Bureaucracy*, supra fn 18; Jackson, *Negotiating Survival*, supra fn 15.

¹²⁹ IEA, *Eid al-Fitr statement*, 6 August 2013.

¹³⁰ 'The Taliban Have Called for Help and Cooperation With the Flood Victims' (in Pashto), Nunn Asia, 13 August 2013, <https://www.nunn.asia/7530/>.

Similarly, after a particularly harsh winter in 2016, the Taliban called on ‘the country’s businessmen, international NGOs, countries and the United Nations to deliver urgent aid to affected areas of Afghanistan on Islamic and humanitarian grounds’.¹³¹ In the intervening years, the Taliban became more open, and more sophisticated, concerning aid actors. They developed various mechanisms for registration and access negotiation on the ground, in Doha and elsewhere.¹³² At the Moscow conference in 2019, the Taliban perhaps gave its most open endorsement of humanitarian work, stating that it was ‘committed to the security of entities from humanitarian assistance providing countries, the United Nations, International Organizations, national businessmen and other humanitarian NGOs to deliver humanitarian assistance, meanwhile calls on them to provide, based on humanitarian sympathy, humanitarian assistance to those needy people living in areas under the control of the Islamic Emirate’.¹³³ Also in 2019, the Taliban reiterated that ‘public welfare institutions, their workers, medical facilities, educational facilities, and international humanitarian organizations are all not only categorized as non-targets by the Islamic Emirate but are assisted in delivering services when needed’.¹³⁴

It is, however, important to note that the line between humanitarian and other forms of aid work was deeply blurred in Afghanistan, both in the Taliban’s view and in reality. Many aid providers were multi-mandated or otherwise working across the humanitarian, development and peacebuilding spectrum. The Taliban, especially in the later years of the insurgency, drew a clearer distinction between what they saw as purely humanitarian and other forms of aid work, but this did not always match the international community’s delineations.¹³⁵

In practice, humanitarian access was typically subject to Taliban demands and negotiation. The Taliban gradually put a process of vetting in place for aid agency access,¹³⁶ meaning that many demands became more consistent over time. These demands included ‘tax’ or other payments, influence over staffing and beneficiary selection, programmatic demands and constraints on the participation of women, amongst others.¹³⁷ Particularly in the later years of the insurgency, the Taliban leadership also negotiated with humanitarians on policy and other issues in Doha and elsewhere outside of Afghanistan.

Throughout the insurgency, however, the UN and others documented targeted attacks on aid workers, NGOs and their property. After 2013, attacks on aid workers decreased but continued.¹³⁸ Attributing responsibility and motive in these attacks was not always possible. In some documented instances

131 IEA, ‘Statement of Islamic Emirate Concerning Security for Urgent Humanitarian Relief Work’, 4 March 2017.

132 See R. Amiri and A. Jackson, *Taliban Taxation in Afghanistan (2006–2021)*, Working Paper 138, International Centre for Tax and Development, 2022, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/17193/ICTD_WP138_1.0.pdf?sequence=11&isAllowed=y (last accessed 22 May 2022).

133 IEA, ‘Complete Transcript of Speech Delivered by Delegation of Islamic Emirate in Moscow Conference’, 5 February 2019.

134 IEA, ‘Hitting Civilian Targets is Not the Policy of the Islamic Emirate’, *supra* fn 66.

135 Jackson and Giustozzi, *Talking to the Other Side*, *supra* fn 47; Amiri and Jackson, *Taliban Taxation in Afghanistan (2006–2021)*, *supra* fn 133.

136 This process existed, according to Taliban sources, as early as 2011 but could not be considered systematic until many years later – roughly around 2016 by the authors’ estimate. See Jackson and Giustozzi, *Talking to the Other Side*, *supra* fn 47.

137 Jackson, *Life Under the Taliban Shadow Government*, *supra* fn 16; HRW, ‘You Have No Right to Complain’, *supra* fn 41.

138 AWSD, ‘Total Incidents by Country (1997–2020)’, <https://aidworkersecurity.org/incidents/report/country> (last accessed 22 May 2022).

where the Taliban claimed responsibility, they argued that the organizations targeted were not ‘humanitarian’ at all and political actors who were allied with their adversaries.¹³⁹ In the eyes of the Taliban, this made them legitimate targets. These actors included, at various points in time, demining agencies or others who the Taliban suspected of spying, US-funded NGOs or for-profit contractors, and a range of other organizations who otherwise presented a perceived threat to the Taliban.¹⁴⁰

5. DISPLACEMENT

IHL prohibits the forced displacement of civilians ‘unless the security of the civilians is involved or imperative military reasons so demand’.¹⁴¹ It also provides that in case of displacement, all possible measures shall be taken to ensure that the displaced persons are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.¹⁴² Displaced persons have a right to return to their homes as soon as the reason for their displacement ceases to exist and security allows.¹⁴³

There appears to be little in the Taliban policy framework that pertained to forced displacement, or which articulated the Taliban’s perceived responsibilities toward displaced populations. There is, however, a provision in the 2010 general Layha that allowed commanders to ‘expel’ a ‘suspected spy’ whose crimes cannot be proven but who they believe still presents a threat ‘to a place where he is no longer a danger’.¹⁴⁴

6. SEXUAL VIOLENCE AND GENDER-BASED VIOLENCE

Under customary IHL,¹⁴⁵ rape and other forms of sexual violence are prohibited. While Common Article 3 to the Geneva Conventions does not explicitly refer to this terminology, it prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment. Article 4, Paragraph 1(c) of AP II specifically adds ‘rape’, ‘enforced prostitution’ and ‘any form of indecent assault’ to this list.

The wider prevalence of sexual violence, domestic violence and violence specifically against women and girls in Afghanistan can make it difficult to distinguish violations specifically related to the

¹³⁹ See, e.g., R. Nordland, ‘Taliban Target Aid Groups, in an Ominous Turn in Afghanistan’, The New York Times, 13 May 2019, <https://www.nytimes.com/2019/05/13/world/asia/afghanistan-taliban-aid-workers.html>.

¹⁴⁰ See also Jackson and Giustozzi, Talking to the Other Side, *supra* fn 47.

¹⁴¹ Art 17, AP II, and customary IHL (Rule 129, ICRC CIHL Database, *supra* fn 57).

¹⁴² Rule 131, ICRC CIHL Database, *supra* fn 57.

¹⁴³ Rule 132, *ibid*.

¹⁴⁴ Art 20: ‘in accordance with shari’a principles, but the Mujahideen remain concerned about him and suspicious of him, the district governor, in consultation with experienced and expert persons, shall expel the suspected spy to a place where he is no longer a danger. Or they will get such a strong guarantee – meaning that reliable local people and his relatives provide a surety or non-transportable properties – that if the suspected person carries out espionage or other destructive actions and escapes from the region and does not present himself, his properties can be seized so that he can no longer use them.

¹⁴⁵ Rule 93, ICRC CIHL Database *supra* fn 57.

conflict.¹⁴⁶ Domestic violence and marital rape are widespread.¹⁴⁷ Between 60 and 80 percent of all marriages in Afghanistan are forced and approximately 57 percent of girls are married before the age of 16.¹⁴⁸

These are incredibly sensitive issues in Afghanistan, which a purist Islamic movement like the Taliban would be extremely reticent to explicitly address directly. The Layha and other publicly available statements do not mention rape or sexual violence. Nevertheless, the Taliban's founding myths portray them as avenging the sexual assault of women and children by Mujahideen commanders.¹⁴⁹ They have also accused the post-2001 government of violating what they see as Islamic women's rights and perpetuating what they see as 'immorality' and 'indecentry'.¹⁵⁰ UN monitoring has, however, accused the Taliban of conflict-related incidents of sexual violence.¹⁵¹

Specifically regarding forced marriage, there are reports that some Taliban courts, in line with Hanafi norms, preserved the right of consent to marriage and have overturned some marriages where the woman has not consented.¹⁵² Other reports depict courts acting with little regard for women's rights, safety or wellbeing.¹⁵³ Taliban courts have been widely documented to harshly punish moral crimes, including but not limited to women and girls running away, adultery, talking to men on the telephone and homosexuality.¹⁵⁴

146 J. Mannell, G. Grewal, L. Ahmad and A. Ahmad, 'A Qualitative Study of Women's Lived Experiences of Conflict and Domestic Violence in Afghanistan', 27 *Violence Against Women* 11 (2021).

147 R. Jewkes, J. Corboz and A. Gibbs, 'Violence Against Afghan Women by Husbands, Mothers-in-Law and Siblings-in-Law/Siblings: Risk Markers and Health Consequences in an Analysis of the Baseline of a Randomised Controlled Trial', 14 *PLOS ONE* 2 (2019); L. Ahmad and P. Anctil Avoine, 'Misogyny in "Post-War" Afghanistan: The Changing Frames of Sexual and Gender-Based Violence', 27 *Journal of Gender Studies* 1 (2018); HRW, 'I Thought Our Life Might Get Better': Implementing Afghanistan's Elimination of Violence Against Women Law, 2021, https://www.hrw.org/sites/default/files/media_2021/07/afghanistan0821_web.pdf (last accessed 22 May 2022).

148 'Forced and Early Marriages Estimates by the Afghanistan Independent Human Rights Commission', UN Women, Global Database on Violence Against Women: <https://evaw-global-database.unwomen.org/en/countries/asia/afghanistan/2007/forced-and-early-marriages-estimates-by-the-afghanistan-independent-human-rights-commission> (last accessed 22 May 2022).

149 See, e.g., Zaeef, *My Life With the Taliban*, supra fn 12.

150 'Under the name of women rights, there has been work for immorality, indecency and circulation of non-Islamic cultures. Dissemination of western and non-Afghan and non-Islamic drama serials, paving the way for immoral crimes and encouraging women to violate Afghan customs are other instances that have been imposed on Afghan society under the name of women rights', 'Complete Transcript of Speech Delivered by Delegation of the Islamic Emirate in Moscow Conference', *Al Emarah*, 5 February 2019.

151 Conflict-Related Sexual Violence: Report of the Secretary-General, UN doc S/2020/487, 3 June 2020.

152 See Jackson and Weigand, *Rebel Rule of Law: Taliban Courts in the West and North-West of Afghanistan*, supra fn 21. The Taliban government issued a decree banning forced marriage in December 2021, with the amir declaring that men and women should be equal in this regard and women should not be treated as property, see 'Taliban Bans Forced Marriage of Women in Afghanistan', *Al Jazeera*, 3 December 2021, <https://www.aljazeera.com/news/2021/12/3/taliban-bans-forced-marriage-calls-for-equal-rights-for-women>.

153 See HRW, 'You Have No Right to Complain', supra fn 41; UNAMA Human Rights, *In Search of Justice for Crimes of Violence Against Women and Girls*, 2020, https://www.ohchr.org/sites/default/files/Documents/Countries/AF/UNAMA_OHCHR_Violence_Women.pdf (last accessed 22 May 2022).

154 HRW, 'You Have No Right to Complain', supra fn 41; UNAMA Human Rights, *Afghanistan: Annual Report 2015, Protection of Civilians in Armed Conflict*, 2016,

7. THE PROHIBITION OF USING AND RECRUITING CHILDREN IN HOSTILITIES

IHL prohibits the recruitment of children into armed forces or armed groups and their participation in hostilities.¹⁵⁵ Although IHL sets the minimum age for recruitment at 15 years, as does the Convention on the Rights of the Child, Article 4(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires that ‘(a)rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’.¹⁵⁶

The 2006 Layha states that ‘mujahedin are not allowed to take underage boys with no facial hair onto the battlefield or into their military bases’.¹⁵⁷ This was revised in the 2009 and 2010 editions to stipulate that ‘youngsters (whose beards are not visible because of their age) are not allowed to be kept by mujahedin in residential or military centres’.¹⁵⁸ Echoing this, the layha for the Commission of Martyrdom Battalions and Military Camps specifies that ‘all fidaii centres [suicide squad centres] have the responsibility not to admit teenagers (those who have not yet grown beards)’.¹⁵⁹ In 2011, in response to allegations of Taliban underage recruitment, the Taliban spokesman noted:

“The Islamic Emirate, in accordance with its principles, has imposed an absolute ban

https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf (last accessed 22 May 2022); UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2016, *supra* fn 36; Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2018, *supra* fn 54; UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2020, *supra* fn 111.

¹⁵⁵ Rules 136 and 137, ICRC CIHL Database, *supra* fn 57; and Art 4, Para 3(c)(d)(e) of AP II. In the Commentary to Rule 137, the ICRC notes: In the framework of the war crime of ‘using children to participate actively in hostilities’ contained in the Statute of the International Criminal Court, the words ‘using’ and ‘participate’ have been adopted in order to: cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (Rule 137. Participation of Child Soldiers in Hostilities, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule137#Fn_71F8634_00017 (last accessed 22 May 2022)).

¹⁵⁶ There is disagreement among scholars as to whether the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict is an IHL or human rights law treaty. If it is considered to be the latter, the controversy over the applicability of human rights treaties to ANSAs would arise, and thus the issue would be whether ANSAs are bound by the 18-years standard. Article 8(b)(xxvi) of the Rome Statute lists as a war crime the ‘conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities’. Although there is a growing trend towards a prohibition on any form of military recruitment or use in hostilities of persons under the age of 18 years, for the purpose of the research, we consider that ANSAs are bound by the 15-years standard and that any commitment to the 18-years limit for recruitment of children in their armed forces goes beyond their strict obligations under international law.

¹⁵⁷ Clark, The Layha, *supra* fn 27, p 26.

¹⁵⁸ Clark, The Layha, *supra* fn 27, p 12.

¹⁵⁹ Commission of Martyrdom Battalions and Military Camps Layha, Ch 8, Regarding Suicide Attackers Mujahideen, Art 40.

on the participation of underage boys in jihadi operations. In the twelfth part of the layha prepared for the guidance of the Mujahideen, in Article 69, it states that lagharzanai (youngsters, one who has not grown a beard due to young age) are prohibited from associating with Mujahideen in residential areas and military bases. Mujahideen of the Islamic Emirate of Afghanistan, who are acting in accordance with this layha in all jihadi affairs, have so far strictly applied this principle, and have never allowed the presence of the underaged in jihadi operations or bases.”¹⁶⁰

As mentioned above, this provision could be interpreted as banning child recruitment, but also as an attempt to prevent sexual abuse or other forms of child sexual exploitation. Given the extreme sensitivity around sexual abuse in Afghanistan, it is unsurprising that the Taliban took an opaque approach to addressing the issue in its written policy.

The UN Secretary-General reported in 2019 that ‘the Taliban’s definition of a child is not in line with national or international law ... [while] efforts were reportedly taken by the Taliban Protection of Civilians Commission, data collected by the country task force indicated that child recruitment and use by the Taliban persists and that they remain the main perpetrator of that violation’.¹⁶¹ The UN and other bodies have consistently reported that the Taliban has recruited child soldiers, including suicide attackers.¹⁶² Human Rights Watch found in 2016 that the Taliban was training and deploying children for various military operations including the planting of IEDs. Their research also found that the insurgency used madrassas to provide military training to children between the ages of 13 and 17, many of whom later fulfilled combat functions. In these instances the process was preceded by religious education and ideological inculcation, beginning with children as young as six years old.¹⁶³ In 2021, the UN reported that 230 children were used by the Taliban in combat roles, including ‘to plant improvised explosive devices, to carry out suicide attacks and to participate in hostilities against government forces, as a result of which some were killed or maimed’.¹⁶⁴

The Taliban disputed these allegations.¹⁶⁵ Responding to UNAMA reporting that there was an increase in Taliban recruitment of child soldiers in 2020, they stated that, ‘based on the decree of the Supreme Leader’, they had taken serious steps through the Military Commission and the *Dawah* [Preaching] and Guidance Commission to address the issue of children and have kept its ranks clear of children. Therefore, it is not true that the Islamic Emirate is recruiting children in its ranks or has not prevented their recruitment; it has taken the issue seriously ... Islamic Emirate never allows children to conduct

¹⁶⁰ Quoted in ‘Taliban Spokesman Quoted in The Taliban Has Said It Will Not Allow Children Into Its Ranks Under Its Rule’ (in Pashto) Nunn Asia, 8 May 2011, <https://www.nunn.asia/3090/2011-05-08-10-29-43/>.

¹⁶¹ Children and Armed Conflict in Afghanistan: Report of the Secretary-General, UN doc S/2019/72, 10 September 2019, §24.

¹⁶² The Taliban has been listed as a perpetrator in the Secretary-General’s annual reports on children and armed conflict since 2007. See also UNAMA Human Rights reporting: <https://unama.unmissions.org/protection-of-civilians-reports>. See also HRW, ‘Afghanistan: Taliban Child Soldier Recruitment Surges’, 17 February 2016, <https://www.hrw.org/news/2016/02/17/afghanistan-taliban-child-soldier-recruitment-surges> (last accessed 22 May 2022); Landinfo, Afghanistan: Recruitment to Taliban, 29 June 2017, <https://landinfo.no/wp-content/uploads/2018/03/Afghanistan-Recruitment-to-Taliban-29062017.pdf> (last accessed 22 May 2022).

¹⁶³ HRW, ‘Afghanistan: Taliban Child Soldier Recruitment Surges’, *supra* fn 163.

¹⁶⁴ Children and Armed Conflict in Afghanistan, Report of the Secretary-General, UN doc S/2021/662, 16 July 2021.

¹⁶⁵ IEA, ‘Remarks of the Spokesman of the Islamic Emirate Regarding the Baseless Claim of Presence of Children in The Ranks Of Mujahideen’, 10 May 2011.

martyrdom attacks, and particularly not on weddings! This is a contradiction with wisdom and logic and therefore we categorically reject it.¹⁶⁶

8. ACCESS TO AND THE PROTECTION OF EDUCATION

Under customary IHL,¹⁶⁷ children affected by armed conflict are entitled to special respect and protection. This includes, notably, access to education, food and health care. Under Article 4 (3a) of AP II, children shall be provided with the care and aid they require, and in particular, ‘they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care’. In addition, schools are considered as civilian objects and are thus protected against attacks, unless they become military objectives. Under the principle of precautions, parties to armed conflict, including ANSAs must take constant care, in the conduct of military operations, to spare civilian objects, including schools. In addition, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to schools. In light of this principle, the use of functioning schools for military purposes must be avoided unless for imperative military reasons.¹⁶⁸

A. ATTACKS ON EDUCATION

The Taliban’s policies on education have significantly evolved. In the 2006 edition of the general Layha, attacks on teachers are encouraged, with the express purpose of forcing civilians to stop working with the government: ‘Anyone who works as a teacher or mullah under the current state – must be given a warning. If he nevertheless refuses to give up his job, he must be beaten. Of course, if a teacher or mullah continues to instruct contrary to the principles of Islam, the district commander or group leader must kill him.’¹⁶⁹

State education was seen as an extension and as a tool of the government and the international community. As one senior Taliban member explained, occupation forces ‘were building schools but

166 UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2020, *supra* fn 111.

167 Rule 135, ICRC CIHL Database, *supra* fn 57.

168 Rule 7 and Rule 15, *ibid.* See also the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict, http://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf (last accessed 22 May 2022): ‘Guideline 1: Functioning schools and universities should not be used by the fighting forces of parties to armed conflict in anyway in support of the military effort. (a) This principle extends to schools and universities that are temporarily closed outside normal class hours, during weekends and holidays, and during vacation periods. (b) Parties to armed conflict should neither use force nor offer incentives to education administrators to evacuate schools and universities in order that they can be made available for use in support of the military effort.’ The Guidelines as well as the Safe Schools Declaration are non-binding instruments through which a number of states have expressed political support and commitment to protect education in armed conflict. See Global Coalition to Protect Education from Attack, ‘Safe Schools Declaration and Guidelines on Military Use’, <https://protectingeducation.org/gcpea-publications/safe-schools-declaration-and-guidelines-on-military-use/> (last accessed 22 May 2022).

169 Clark The Layha, *supra* fn 27, p 26.

also using them to spy on us. The country did not belong to Afghans, so we were afraid of the education system.’¹⁷⁰

The 2009 general Layha, however, removed the provision authorizing attacks on schools and teachers. In 2014, the then head of the Taliban’s education commission was described as saying that he ‘pays special attention to the maintenance and upkeep of educational institutions in areas under his jurisdiction and has created a safe environment for the functioning of schools’.¹⁷¹ He also denied that they burned down schools and killed teachers, adding that the teachers and students’ institutions are all ‘our own people and the children of this nation’.¹⁷²

The Education Commission Layha reviewed by the authors in 2020 states that schools should not be attacked.¹⁷³ No one is permitted to ‘destroy or burn schools or other educational institutions’, but if ‘the enemy’ has occupied an educational facility, it loses its protected status.¹⁷⁴ The education layha also emphasizes maintaining access to education, although it permits schools to be closed under certain circumstances. These circumstances include a school not abiding by the Taliban’s restrictions or rules outlined elsewhere in the policy. These could, for example, be not following restrictions on the curriculum, not vetting staff or disobeying conditions otherwise elaborated by local commanders.

In line with these policy shifts, attacks on schools increased substantially around 2006–07 but decreased significantly by 2011.¹⁷⁵ There have nevertheless been credible reports of Taliban attacks against schools and education personnel and military use of schools.¹⁷⁶ In 2011, the Taliban seemed to acknowledge this and make a clear distinction with regard to targeting. In an interview, the Taliban spokesman said: ‘The Mujahideen are not involved in the destruction of schools. Of course, in many parts of the country, the enemy has set up military bases in schools and clinics, which are then considered military bases’.¹⁷⁷

170 Interview with former member of the Rahbari Shura, March 2018, quoted in Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18, p 15.

171 S. Sadat, ‘Chairman of the Taliban Education Commission: Teachers and Students Are Our People and the Children of the Nation’, (in Pashto), Nunn Asia, 18 December 2014, <https://www.nunn.asia/32455/>.

172 Ibid.

173 For a detailed analysis of this policy, see R. Amiri and A. Jackson, *Taliban Attitudes and Policies Towards Education*, Working Paper 601, Centre for the Study of Armed Groups, ODI, February 2021, https://cdn.odi.org/media/documents/taliban_attitudes_towards_education.pdf (last accessed 22 May 2022).

174 Education Commission Layha, Art 88, Education Policy.

175 Cited in A. Giustozzi and C. Franco, *The Battle for Schools: The Taleban and State Education*, AAN, 2012, <https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/2011TalebanEducation.pdf> (last accessed 22 May 2022). Interviews suggested that the picture was more complicated. Attacks may have decreased, but it also appears that the Taliban started to conceal their involvement in such attacks by simply not claiming responsibility. While they did not openly claim responsibility, many communities understood them to be behind the attacks. A senior Taliban official admitted in an interview that this was a common practice during this period.

176 HRW, ‘You Have No Right to Complain’, supra fn 41; HRW, *Lessons in Terror*, supra fn 101; UNAMA Human Rights, *Annual Reports on the Protection of Civilians in Armed Conflict, 2010–2020*, <https://unama.unmissions.org/protection-of-civilians-reports> (last accessed 22 May 2022); Jackson, *Negotiating Survival*, supra fn 15; Jackson, *Life Under the Taliban Shadow Government*, supra fn 16. See also UN Secretary-General annual reports on children in armed conflict: <https://childrenandarmedconflict.un.org/document-type/annual-reports/> (last accessed 22 May 2022).

177 Quoted in ‘Zabihullah Mujahid Answers Today's Asia Questions’ (in Pashto), Nunn Asia, 27 April 2011, <https://www.nunn.asia/7602/2011-04-27-19-08-25/>.

In the later years of the insurgency, there was an apparent difference in the protection (or lack thereof) for schools in areas of Taliban control and those in areas of active contestation or government areas. Typically, military imperatives took precedence over protecting educational facilities. Fighters interviewed by the authors did not feel that they were or should be expected to take precautions to protect civilians and their assets, if those precautions would inhibit their ability to achieve their military objectives.¹⁷⁸ Finally, girls' education was generally more likely to be subject to violence. Human Rights Watch documented that Taliban threats, attacks and restrictions on female education were more pronounced, even after the Taliban had articulated a vaguely more permissive stance on these issues.¹⁷⁹

B. ACCESS TO EDUCATION

Building on the 2009 general Layha's shift toward openness to education, the 2010 general Layha alludes to the existence of an education policy. It states that all educational activities shall be conducted 'according to the principles and guidance of the Education Commission' and that provincial and district education officials 'carrying out their duties shall follow the policy of the commission'.¹⁸⁰ The Taliban were in effect willing to allow schools in areas they controlled – so long as they functioned according to Taliban rules. These varied but could include vetting of teachers, changes to the curriculum (eliminating content about civic education and democracy, as well as anything that could be construed as contradicting their version of Islam), changes to the nature of gender segregation and female attendance.¹⁸¹

After 2014, the Taliban increasingly devoted resources and attention to coopting education.¹⁸² Control was typically exerted through local-level negotiations with school officials and aid workers, but in Helmand in 2018, the Taliban and the Helmand provincial Ministry of Education formalized this working relationship in a signed written agreement.¹⁸³ The 10 points of the agreement protected schools from violence and laid out provisions by which both sides would abide to enable safe access to education.¹⁸⁴ That said, independent research underscored that local Taliban had significant discretion in implementing (or ignoring) directives from above, creating a range of practices on the ground concerning education in Helmand and elsewhere.¹⁸⁵

More broadly, the Taliban's public statements increasingly sought to endorse education, particularly as they engaged in political talks with the US and sought greater international recognition. In 2017, the Taliban reiterated that it was 'committed to economic, educational and comprehensive development for our people with firm determination' and urged that 'Mujahideen should continue paving the way

¹⁷⁸ See Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18; see also Amiri and Jackson, *Taliban Attitudes and Policies Towards Education*, supra fn 175.

¹⁷⁹ HRW, 'You Have No Right to Complain', supra fn 41; HRW, 'I Won't Be a Doctor, and One Day You'll Be Sick': Girls' Access to Education in Afghanistan, 2018, https://www.hrw.org/sites/default/files/report_pdf/afghanistan1017_web.pdf (last accessed 22 May 2022); Jackson, *Negotiating Survival*, supra fn 15; Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

¹⁸⁰ Clark, *The Layha*, supra fn 27, p 21.

¹⁸¹ Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

¹⁸² Ibid; Jackson, *Negotiating Survival*, supra fn 15; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

¹⁸³ Z. Stanikzai, 'Taliban Agree to Reopening Closed Schools in Helmand', *Pajhwok*, 14 February 2018, <https://pajhwok.com/2018/02/14/taliban-agree-reopening-closed-schools-helmand/>.

¹⁸⁴ See Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

¹⁸⁵ Ibid; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18; HRW, 'You Have No Right to Complain', supra fn 41.

for religious and modern education and rehabilitation work as per the demand of the people'.¹⁸⁶ At the Moscow talks in February 2019, the Taliban stated that 'religious and modern education are necessary for the success of all Afghans and Afghan society'.¹⁸⁷ The Taliban repeatedly insisted that it provided schools 'with security to the extent possible and tries its best not to interrupt their activities'.¹⁸⁸

The education layha is even more explicit, stating:

"Every Muslim individual of the nation should help the educational head in their areas to the extent of their possibility so improvements can be brought in Islamic and Modern education. No rude behaviour should be shown towards the type of aid such as preparation of books, paying money, computers, laboratory equipment, vehicles, recruiting and motivating the nation's children to educational institutions and himself towards teaching voluntarily in madrassas and schools, constructing a building for the school or madrassa and so on."¹⁸⁹

The layha encourages education, including state-provided education – so long as it conforms to the Taliban's rules. The Taliban's education layha does not, however, guarantee access to education equally for males and females. It permits female education, particularly Islamic education, only under certain vaguely defined circumstances.¹⁹⁰ In practice, this meant that Taliban commanders had significant discretion to permit or prohibit female education. Community preferences for education also, at least in some cases, influenced local Taliban positions.¹⁹¹

Finally, in the later years of the insurgency, the Taliban appeared to recognize their obligation to provide – or at least aspire to be able to provide – access to education. They concluded an agreement with UNICEF to open 4,000 community-based schools for girls and boys in areas under their control in late 2020.¹⁹² Taliban public statements also claimed that, in 2020, 'the Commission for Education and Higher Education within the Islamic Emirate has established 300 religious schools, 91 Dar al-Hifaz, 27 orphanages and 380 regular local schools across the country'.¹⁹³

¹⁸⁶ IEA, 'Important Points of the Islamic Emirate Leader's Insightful, Rational and Resolute Eid Message', 30 June 2017.

¹⁸⁷ IEA, 'Complete Transcript of Speech Delivered by Delegation of the Islamic Emirate in Moscow Conference', supra fn 152.

¹⁸⁸ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict, Annual Report 2018, supra fn 54.

¹⁸⁹ Education Commission Layha, Ch 1, General Directives, Art 19.

¹⁹⁰ Art 15 states: 'All young girls who are not obliged to wear the hijab due to their young age should be provided with Islamic education in a mosque or madrassa or at the home of a reliable scholar, so that this class will not be deprived of Islamic studies. The Provincial Education Officer shall take serious measures in this regard.' Art 16 states: 'When the ground is prepared, the Islamic Emirate, in the light of a procedure in line with Islamic principles, Hanafi jurisprudence and the Islamic Emirate's perspectives on education, shall take action to provide women with Islamic and other required sound studies.' See Amiri and Jackson, Taliban Attitudes and Policies Towards Education, supra fn 175.

¹⁹¹ See Jackson and Amiri, Insurgency Bureaucracy, supra fn 18; Amiri and Jackson, Taliban Attitudes and Policies Towards Education, supra fn 175; Jackson, Negotiating Survival, supra fn 15.

¹⁹² See A. Gul, 'Rare UN-Taliban Agreement to Set Up 4,000 Schools in Insurgent-Held Afghan Territory', VOA, 19 December 2020, https://www.voanews.com/a/south-central-asia_rare-un-taliban-agreement-set-4000-schools-insurgent-held-afghan-territory/6199746.html.

¹⁹³ IEA, 'The Efforts of the Islamic Emirate in the Field of Education', 2 January 2021.

9. ACCESS TO AND THE PROTECTION OF HEALTH CARE

Under Common Article 3(2) of the 1949 Geneva Conventions, the ‘wounded and sick’ shall be collected and cared for. In addition, there is a series of relevant customary IHL norms that protects humanitarian relief personnel.¹⁹⁴ Medical personnel, transports and hospitals that are exclusively assigned to medical purposes must be respected and protected in all circumstances, although they lose such protection if they carry out or are used to commit acts harmful to the enemy.¹⁹⁵ Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.¹⁹⁶

A. PROVISION OF AND ACCESS TO HEALTH CARE FOR CIVILIANS

The Taliban demonstrated an openness to health access from a relatively early stage, as demonstrated by their endorsement and facilitation of access for polio campaigns (detailed above). While the Taliban's early positions toward health access were driven by the need to secure treatment for their own wounded fighters, the movement developed increasingly sophisticated policies to coopt, regulate and take credit for health work in areas under their control.¹⁹⁷ The Health Commission operated, much like the Education Commission, by largely mimicking its Republic counterpart. The documents governing its work give insight into the Taliban's position on relevant IHL norms. The Health Commission Layha endorses universal access to health care,¹⁹⁸ including special provisions for the disabled.¹⁹⁹ Additionally, in a private agreement with an international organization signed in 2016, the Taliban explicitly endorsed Article 3 of the Geneva Conventions and broader IHL norms regarding access to health care.²⁰⁰

There were nevertheless instances where military imperatives trumped these protections. Polio vaccinations are a case in point, where the Taliban occasionally suspended campaigns, because ‘the enemy was misusing vaccinators for collecting intelligence data’.²⁰¹ They also more broadly carried out abductions of and violence against health workers.²⁰² Additionally, while the Taliban did not explicitly

¹⁹⁴ Rule 31, ICRC CIHL Database, *supra* fn 57.

¹⁹⁵ Rule 28, *ibid*.

¹⁹⁶ See notably, Arts 8 and 18, API, Art 12, APII, and Art 2, APIII; see also Rule 30, ICRC CIHL Database, *supra* fn 57.

¹⁹⁷ See Jackson and Amiri, *Insurgency Bureaucracy*, *supra* fn 18.

¹⁹⁸ Health Commission Layha, Ch 2, Patient, Art 15: ‘Patients are entitled to all the medical, preventive treatment, accommodation and transportation costs until the illness is cured or the illness reaches a state of disability as confirmed by the physician, or the ill person dies. In these cases, all the affairs should be executed by the Health Commission.’

¹⁹⁹ Health Commission Layha, Ch 2, Patient, Art 12: The department should try to provide religious studies, handicrafts, easy computer programmes and other low-tech education in these centres so that the people with disabilities can use their remaining human resources to become more self-reliant in the near future.’

²⁰⁰ This agreement is not in the public domain, but a verified copy was shared with the authors.

²⁰¹ IEA Spokesman Zabiullah Mujahed quoted in J. Bjelica, ‘One Land, Two Rules (5): The Polio Vaccination Gap’, AAN, 9 May 2019, <https://www.afghanistan-analysts.org/en/reports/economy-development-environment/one-land-two-rules-5-the-polio-vaccination-gap/> (last accessed 22 May 2022).

²⁰² HRW, ‘You Have No Right to Complain’, *supra* fn 41; UNAMA, ‘Deliberate Attacks on Healthcare in Afghanistan During the COVID-19 Pandemic’, Press Release, 21 June 2020, https://unama.unmissions.org/sites/default/files/21_june_2020_-_deliberate_attacks_on_healthcare_in_afghanistan_during_covid-19_pandemic_-

restrict access to health care, their broader policies limited access. Restrictions on women's movement limited their access to care. According to Taliban de facto rules, women travelling for medical care were often required to be accompanied by a *mahram* (a male relative). In some provinces, this was more likely to be strictly enforced, but elsewhere it was not. This nevertheless presented acute problems for women who needed to travel or cross lines of control to get adequate care.²⁰³

B. CARE FOR THE WOUNDED AND SICK, EITHER ENEMY COMBATANTS, OWN FORCES OR CIVILIANS

Concerning health care, the Taliban established practices that appear to reflect some IHL norms. They defined a sick person as one who 'has been wounded in the Islamic Jihad by the enemy or by the use of jihadi tools or during imprisonment, and in this way his physical condition has deteriorated beyond normalcy'.²⁰⁴

This would seem to exclude any enemy who was sick and wounded. However, in the 2016 private agreement referenced above, the Taliban explicitly agreed (a) to allow all feasible medical care and assistance to be provided without delay, and solely based on medical need, and (b) that all sick or wounded should not be harassed, interrogated or otherwise subject to ill-treatment within health facilities or vehicles.²⁰⁵

Some provisions of the layha for the Commission for Management and Release of Prisoners focused on the well-being and rights of prisoners.²⁰⁶ According to other Taliban statements, this included taking care of prisoners 'eating, drinking, praying, ablution, illness, heat and cold' and ensuring that prisoners 'shall not be demeaned or disrespected'.²⁰⁷ The Public Relations Department of the Commission for Management and Release of Prisoners was also 'tasked with liaising and attracting support from all international organisations that provide food, clothing and medicine to prisoners in the framework of The Emirate's political policies'.²⁰⁸ A close reading of the layha for this commission suggests that this refers to Taliban prisoners in enemy custody (and not necessarily enemy prisoners in Taliban custody). Media and human rights reporting, documenting demeaning treatment and

_un_special_report_english.pdf (last accessed 22 May 2022); UNAMA, 'UN Humanitarian Agency Reports Sharp Rise in Attacks Against Aid Workers', 16 September 2013, <https://unama.unmissions.org/un-humanitarian-agency-reports-sharp-rise-attacks-against-aid-workers-afghanistan> (last accessed 22 May 2022).

²⁰³ See Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

²⁰⁴ Health Commission Layha, Ch 2, Patient, Art 14.

²⁰⁵ This agreement is not in the public domain, but a verified copy was shared with the authors.

²⁰⁶ Commission for Management and Release of Prisoners Layha, Ch 2, Introduction and General Directives, Art 7: 'If a prisoner becomes ill while imprisoned, then it is the responsibility of Commission for the Management and Release of Prisoners to treat the ill prisoner. Similarly, after the prisoner is released, if any complications of the illness caused during the imprisonment term arise then they can be treated by the health department after approval of the provincial representative of the mentioned commission and provincial authority.' Art 30: 'The Directorate's Authority has to provide assistance to the prisoner after his release; however, in time of need considering the possibilities, the mentioned authority can also help the prisoner during his term as prisoner.' Art 37: 'The Administrative Department has the responsibility to handover the aid provided to the prisoner himself, his family or to someone else with the consent of the prisoner.'

²⁰⁷ Reproduced in HRW 'You Have No Right to Complain', supra fn 41, p 79.

²⁰⁸ Commission for Management and Release of Prisoners Layha, Ch 6, Public Relations Duties and Responsibilities, Art 51.

torture, strongly suggests that these policies were not systematically adhered to by the Taliban in the treatment of prisoners in their custody.²⁰⁹

C. MILITARY OCCUPATION OF AND ATTACKS ON MEDICAL FACILITIES

The Taliban categorically denied that they attacked health workers or health facilities, instead insisting they protected them.²¹⁰ International organizations nevertheless consistently documented Taliban violence against health facilities and health workers.²¹¹ This does not appear to be part of an intentional campaign, but rather the result of specific concerns (i.e., ‘spying’) or military expediency (i.e., using abandoned clinics as firing positions).²¹² Research suggests that the Taliban would not halt military operations if a health facility was likely to be destroyed in the process.²¹³ In several instances, health facilities were typically targeted at the local level when they were seen to explicitly support the enemy or when attacking them would somehow undermine Afghan or international forces.²¹⁴

D. USE OF DISTINCTIVE EMBLEMS

The Taliban appear to have had an inconsistent position on the use of emblems. In the 2016 private agreement with an international organization, they agreed to respect health personnel, vehicles, facilities, their emblems and NGO logos.²¹⁵ In practice, the Taliban has used medical emblems to gain proximity to their targets. On 7 April 2011, Taliban suicide attackers used an ambulance to gain access

209 A. Nossiter, “‘I Wake Up and Scream’: Secret Taliban Prisons Terrorize Thousands’, *The New York Times*, 27 February 2021, <https://www.nytimes.com/2021/02/27/world/asia/afghanistan-taliban-prison.html>; S. Engel Rasmussen, ‘The Taliban Say They’ve Changed. On the Ground, They’re Just as Brutal’, *The Wall Street Journal*, 31 May 2021, <https://www.wsj.com/articles/the-taliban-say-theyve-changed-on-the-ground-theyre-just-as-brutal-afghanistan-us-troops-11622487148>; ‘UN Mission in Afghanistan Gravely Concerned About Ill-Treatment of Prisoners by Taliban, Following First-Hand Testimony’, *UN News*, 26 May 2019, <https://news.un.org/en/story/2019/05/1039191>.

210 See Taliban response reproduced in UNAMA Human Rights, *Afghanistan: Protection of Civilians in Armed Conflict 2019*, supra fn 75, p 99–102; see also ‘The Taliban Have Expressed Regret Over the Bombings in Logar and Kunduz, and Denied Any Involvement’ (in Pashto), *Nunn Asia*, 25 June 2011 <https://www.nunn.asia/3432/2011-06-25-09-13-01/>.

211 ICRC, ‘Afghanistan: Hospitals Are Under Attack, and Children Are Paying the Price’, 30 May 2017, <https://www.icrc.org/en/document/afghanistans-hospitals-are-under-attack-and-children-are-paying-price> (last accessed 22 May 2022); F. Terry, ‘Violence Against Health Care: Insights From Afghanistan, Somalia, and the Democratic Republic of the Congo’, 95 *IRRC* 885 (2013). See also UNAMA Human Rights, annual reports on the protection of civilians in armed conflict, <https://unama.unmissions.org/protection-of-civilians-reports> (last accessed 22 May 2022); UN Secretary-General annual reports on children and armed conflict, supra fn 164.

212 Jackson, *Life Under the Taliban Shadow Government*, supra fn 16; Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

213 Jackson and Amiri, *Insurgency Bureaucracy*, supra fn 18.

214 *Ibid.* That said, violence against health-care facilities fluctuated in volume and nature over time. In its 2019 reporting, UNAMA noted an increase in Taliban violence against health-care facilities including ‘targeting health facilities and protected personnel, including kidnapping of vaccinators, confiscation of ambulances, looting and forced closure of clinics’, UNAMA Human Rights, *Afghanistan: Protection of Civilians in Armed Conflict 2019*, supra fn 75, p 29.

215 This agreement is not in the public domain, but a verified copy was shared with the authors.

to a military training facility in Kandahar; the Taliban later said this ‘will not happen again’.²¹⁶ On 27 January 2018, an ambulance packed with explosives killed at least 103 people and injured over 200 in a densely populated area of Kabul in an attack on the Ministry of Interior. The Taliban claimed responsibility and reiterated that they consider the Ministry of Interior a military target (contrary to IHL).²¹⁷

10. DETENTION, FAIR TRIAL AND ADMINISTRATION OF JUSTICE

A. POLICY AND PRACTICE REGARDING CONFLICT-RELATED CRIMES

Common Article 3, Articles 4 and 5 of AP II, as well as customary IHL, provide numerous rules concerning the treatment of persons in detention, notably the prohibition of ill-treatment, the provision of food and water and safeguards with regards health and hygiene. Generally, persons deprived of their liberty are ‘entitled to respect for their person, honour and convictions and religious practice’ and ‘shall in all circumstances be treated humanely, without any adverse distinction’.²¹⁸ In addition, Common Article 3, AP II and Customary IHL provide for the requirement of judicial guarantees and prohibit arbitrary detention.²¹⁹ ICRC access to persons deprived of their liberty is mandatory only in the context of international armed conflicts and, as such, does not represent an obligation for ANSAs. In the context of a non-international armed conflict, and according to Common Article 3, the ICRC ‘may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families’.²²⁰

Taliban policies can be roughly divided into those dealing with enemy detainees and those regarding common crimes, although there is some overlap in certain policies (i.e., the appeals process looks very similar). The Taliban Intelligence Department was the primary organ responsible for the detection and/or handling of spies, political prisoners, suspected informants, civilians believed to pose a threat to the Taliban and Taliban fighters in violation of the rules. The Framework for Intelligence Officials outlines how these individuals should be dealt with, and the conditions under which they can be imprisoned. The framework also warns against making arbitrary arrests: ‘without any witnesses and evidence, it is prohibited to arrest a Muslim based on suspicion. Nobody has the right to snatch away freedom of anyone. Allah will not hold us accountable for arresting those whose crimes we are unaware of; however, we will be held accountable if we imprison and insult an innocent Muslim.’²²¹ In practice, the Taliban guidelines were so broad that it was basically up to the discretion of Taliban commanders on the ground to determine legitimate grounds for arrest, for both conflict-related and penal offences.

²¹⁶ ‘Taliban Rue Ambulance Attack’, The New Humanitarian, 12 April 2011, <https://www.thenewhumanitarian.org/news/2011/04/12/taliban-rue-ambulance-attack>.

²¹⁷ IEA, ‘Clarification of the Islamic Emirate Concerning Attack on the Ministry of Interior’, supra fn 100.

²¹⁸ Art 4, APII.

²¹⁹ See, in particular, Rules 99, 100 and 101, ICRC CIHL Database, supra fn 57.

²²⁰ Rule 124, *ibid*.

²²¹ Framework for Intelligence Officials, Reporting and References Chapter, Art 16.

Taliban policies indicate that if ‘pro-government police, army officials, spies and other similar individuals’ are arrested, the case should be referred to something called an accountability court.²²² Convictions could occur in one of four ways:

- a. The suspect confesses to spying without any use of coercion.
- b. Two witnesses testifying that can gain the satisfaction of the judge.
- c. Documents that can lead to the emergence of a dominant suspicion such as special espionage devices (equipment used exclusively for spying and used by spies for spying) and others. Of course, not everyone can determine the validity of the documents. In the case of the existence of a court, the judge and in the absence of a judge, the prudent and pious person will look at the strengths and weaknesses of the case. If the context is weak, reduce the punishment and if the context is strong, increase the punishment according to the strength of the context. If the context of the case is very strong which shows conviction, then the convict can be killed if the judge, imam and deputy imam see fit.
- d. Through Khabar Adl, Adl is said to be the one who is more just, not prejudiced, abstains from major sins and does not persist in minor sins.²²³

This last provision requires explanation. Effectively, if there are no other options, a conviction can be secured through the testimony of a completely virtuous and unbiased individual. This could be, for instance, a respected religious scholar. In practice, this was a last resort reserved for exceptional circumstances, particularly given that most crimes could likely be proven or disproven through other means.

However, if an alleged crime is not proven by the court, a person can – according to the policy – ask for compensation and his rights and, as well as sue the person, can ‘make a claim for his respect and reputation and can also bring the reporter and the captor under question’.²²⁴ This ‘right’ is somewhat ambiguous. The article goes on to state that ‘if the crime is certain but there have been problems in presenting evidence to the court, then in that case, he should be treated in accordance with article 20 of the general Jihadi [general] layha’.²²⁵ This article, discussed above in section 5E on displacement, means the individual can be forced by the Taliban to leave the area.

The Taliban articulated means by which enemy combatants could surrender in the 2006 general Layha. What it means to ‘surrender’ is not articulated in the policy but, in general, it means to switch allegiances and be allowed to lead a quiet life, in exchange for laying down arms and promising not to act against the Taliban. The 2006 general Layha states that ‘any official can invite any Afghan who is in the infidels’ ranks to accept true Islam’ and ‘Mujahedin who would like to protect people inside the opposition must get permission from and inform their commander’.²²⁶ It also ‘guarantees to any man who turns his back on the infidels, security for himself and his possessions’ but ‘whoever accepts the invitation and then breaks his promise and clearly abuses his commitments becomes a traitor and forfeits our protection. He will be given no second chance’.²²⁷

222 Ch 9, Accountability Courts Duties and Responsibilities, Art 85, Layha.

223 Ibid.

224 Framework for Intelligence Officials, Reporting and References Chapter, Art 17.

225 Ibid. Art 20 is discussed in the displacement section.

226 Clark, The Layha, supra fn 27, p 25.

227 Ibid.

Sometime around 2016, a slightly different practice became an official policy whereby the Taliban offered amnesty to anyone associated with the government or international forces.²²⁸ For example, Afghan security forces were allowed to return to civilian life, provided they surrendered their arms, apologized for the harm done and had a trusted elder vouch for them.²²⁹ In 2018, the Taliban publicly declared a ‘general amnesty to all military formations, national army, national police, Arbakis [militias] and all employees of the regime to safeguard their lives and wealth’, provided that they left the ‘enemy ranks’.²³⁰ The Preaching and Guidance Commission, responsible for defections, published routine reports about the number and nature of government employees who had ‘joined’ the Taliban on a Taliban website.

Throughout the insurgency, there were widespread credible reports and documented cases of the Taliban summarily executing, torturing or otherwise enacting violence against alleged ‘spies’, members of the security forces, civil servants and others perceived as acting against the movement.²³¹ Human Rights Watch found that, in 2020, Taliban military commanders were authorized to arrest anyone they suspect of spying or having links with the Afghan Government. Human Rights Watch also concluded that, in contested and frontline areas, they were more likely to carry out summary executions and other punishments.²³²

Finally, it is worth noting that policy documents specify that the Taliban should ‘recruit professional individuals meaning that they should be legal experts or defence attorneys, or at least hire those kind of individuals that understand the types of crimes and can differentiate political, criminal and mafia cases from one another’.²³³ While seemingly aspirational, they do not elaborate further. This does at least indicate, however, a desire to develop capacities that would result in greater adherence to the rules and stronger oversight.

B. POLICY AND PRACTICE REGARDING COMMON CRIMES (PENAL OFFENCES)

Under Common Article 3 of the 1949 Geneva Conventions and customary IHL, ‘[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’. Article 6 of APII as well as customary IHL provides further details on fair trial guarantees and the administration of justice.

It is important to stress that the Taliban did not make the same distinctions in their justice system as those that exist in IHL, as their policies and practices reflect that their normative framework is based on Sharia. But it is also critical to emphasize that, in practice, what might be considered ‘common crimes’ (i.e., penal offences) were often bound up in – and the adjudication influenced by – the broader

²²⁸ Jackson, *Negotiating Survival*, supra fn 15.

²²⁹ Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

²³⁰ IEA, ‘Statement of the Islamic Emirate Regarding Amnesty for Kabul Administration Employees Seeking Surrender’, 18 May 2018.

²³¹ AIHRC, *Insurgent Abuses Against Afghan Civilians*, supra fn 91; UNAMA Human Rights, *Annual Reports on the Protection of Civilians in Armed Conflict, 2007–2020*, <https://unama.unmissions.org/human-rights> (last accessed 22 May 2022).

²³² HRW, ‘You Have No Right to Complain’, supra fn 41; HRW, *The Human Cost*, supra fn 127; UNAMA Human Rights, *Reports on the Protections of Civilians in Armed Conflict*, <https://unama.unmissions.org/protection-of-civilians-reports> (last accessed 22 May 2022).

²³³ Commission for Management and Release of Prisoners Layha, Ch 5, *Investigation and Research Department Duties and Responsibilities*, Art 46.

conflict. What follows is a general overview of their justice system, and an analysis of its reflection of IHL and IHRL norms.

The Taliban began to re-establish their Sharia courts very early in the insurgency, probably around 2006. By 2011, a clear Sharia court system had emerged.²³⁴ From at least 2017 onwards, the Taliban claimed that a three-tiered court system was operational and accessible to Afghans in areas under their control.²³⁵ The tiers consisted of the district-level court, the first court of appeal (usually at the provincial level) and a final or supreme court. This tiered court structure was gradually introduced in province after province, in full or partial form, with mobile or roving courts operational in contested and remote areas. These courts handled both civil and criminal cases, but research indicates the majority of cases were civil.²³⁶ Interviews with Taliban judges and analysis of case records conducted in Faryab and Herat in 2019 indicated that they roughly followed the Ottoman codification of Hanafi jurisprudence (*Majallat al-Ahkam al-Adliyya*, commonly referred to as the Majalla) for civil offences.²³⁷

Local Taliban commanders carried out arrests and detentions, usually on the orders of the Taliban district or provincial military or governance officials.²³⁸ There are clear provisions in some *layha* governing how these arrests and trials are to be carried out, indicating a degree of oversight and caution. For example:

- The Alif [intelligence] administrative department is obliged to investigate any case related to the administration by itself or through its trustee. They should not act on everyone's words and rumours, because in the case of a criminal, there may be personal animosity between the two.²³⁹
- If the governor's office orders the Alif administration Mujahideen to arrest someone, the Alif administration Mujahideen must demand an explanation for the reason of the arrest and crime, and then share the matter with the central administration. No action is allowed without the permission of the center.²⁴⁰
- Mujahideen should not search people's homes and if there is a need for searching, then permission is required from the district governor, and the village mosque imam and two elders should accompany them in searching.²⁴¹

Public Taliban statements noted a right of appeal, and that all capital punishments required a mandatory review before sentences are carried out. The Taliban claimed the execution of individuals convicted of crimes, in accordance with their principles and interpretation of Sharia.²⁴² They also claimed to have disciplined those who carry out punishments that contravene their principles and

234 Jackson, *Life Under the Taliban Shadow Government*, supra fn 16.

235 IEA, 'Courts of the Islamic Emirate, Key Factor for Peace and Solace Among the People', 8 January 2017.

236 Jackson and Weigand, *Rebel Rule of Law: Taliban Courts in the West and North-West of Afghanistan*, supra fn 21.

237 Ibid.

238 HRW, 'You Have No Right to Complain', supra fn 41.

239 General Directives, First Chapter, Provincial Representatives, p 23, Art 3, Lahya.

240 Ibid, p 24, Art 11, Lahya.

241 Lahya for Mujahideen, Part 12, Regarding Prohibitions, p 66, Art 72.

242 See, e.g., 'Ghazni: Taliban Kill Three Killers' (in Pashto), Nunn Asia, 18 April 2015, <https://www.nunn.asia/42472/>; A. Jaras, 'Taliban Hang Two Kidnappers in Helmand' (in Pashto), Nunn Asia, 21 September 2014, <https://www.nunn.asia/23789/>.

interpretation of Sharia.²⁴³ In response to questions posed by Human Rights Watch, however, the Taliban provided a much lengthier explanation of how individuals accused of collaborating with the government were tried and convicted, including an overview of the appeals process:

- After the judgement, if the offender is not content with the lower court's decision, he will be given the right to: defend himself, appeal, and object to the lower court's decision. The case will [then] go to the appeal court. Appeal court will look at the entire case, and the lower court decision and his objections to the decision [judgement]. After that if the lower court decision was in accordance with Sharia, the appeal court will approve it. The approval will be announced to the offender. After [the decision is announced] if the offender is not content with the appeal court's decision, he will be given the right to: defend himself, ask higher court [Discernment Court] to take the case, and object on appeal court's decision. The case will go to the higher court.
- If the lower court decision is not in accordance with the Sharia, the appeal court will reject it. In such a case if the appeal court rejects the lower court's decision, appeal court will send the case back to the same lower court which has made the initial decision on the case and will point out flaws in the decision and will make recommendations in accordance with Sharia on correcting the flaws.
- When the lower court makes the second decision [judgement], it will send it back to the appeal's court. Appeal court will again look at the lower court's decision; if the lower court's second decision is in accordance with Sharia, appeal's court will approve the decision. After the decision is approved, it [decision] will be announced to the guilty person.²⁴⁴

If the accused still objects to the decision and appeals, it will be sent to the higher court and follow a similar process. If the higher court does not approve the secondary court's decision, it will send it to another province's appeal court (what they refer to as an identical court) and will instruct it to make a decision. If the accused does not accept this 'identical appeal', they can appeal once again and the higher court will review the whole case, now including the identical court's decision. If the higher court does not approve the identical court's decision, it will investigate and make its own decision and announce that to the accused. After this, '[t]he high court will send its decision to the High Office of the Courts. The High Office of the Courts can reduce or increase this offender's punishment in accordance with its authority.'²⁴⁵

The letter also stipulates that, in the event of a lower court deciding a death sentence, the case will automatically go to appeal regardless of whether the 'individual accepts or rejects the decision'.²⁴⁶ The appeals court reviews it, and if it approves the lower court's decision, it sends the case for review to the higher court. If the higher court approves the decision, the entire case goes to the 'Emirate's leadership'. Only then, if the leadership approves, would the death sentence be carried out.

Practice appears to have been variable. Some of this variation appears to be down to the fact that commanders were typically given more latitude in contested areas or where governance structures

243 See, e.g., 'The Taliban Have Condemned the Beheading of Four Labourers', Nunn Asia, 12 March 2011, <https://www.nunn.asia/2783/2011-03-12-14-14-22/>.

244 Reproduced in HRW, 'You Have No Right to Complain', supra fn 41, pp 76–77.

245 Ibid, p 78.

246 Ibid, p 79.

were less well established.²⁴⁷ UNAMA Human Rights, which documented extensive violations arising from the Taliban insurgency's justice structures, found that the Taliban's courts were responsible for 'cruel, inhuman or degrading punishment under the guise of enforcing decisions of their parallel justice structures'.²⁴⁸ Human Rights Watch notes:

“The Taliban justice system is focused on punishment and largely relies on confessions, often obtained by beatings and other forms of torture. The swift administration of punishment for major crimes is a way for the Taliban to demonstrate their control and instill fear. Authorities sometimes execute those found guilty of murder within days. Corporal punishment for hudud crimes, serious offences under Sharia, appears to be less frequent.”²⁴⁹

The Taliban ran prisons in many areas, about which the UN expressed 'grave concerns'.²⁵⁰ They found credible allegations of ill-treatment, murder and torture, and concluded that the Taliban's treatment of detainees 'contravenes minimum standards applicable to a party to a non-international conflict'.²⁵¹

C. POLICY AND PRACTICE REGARDING DETENTION

Regarding torture, Taliban policies contain provisions limiting its use. The Framework for Intelligence Officials strictly prohibits 'beating prisoners, torture, insults, humiliation and other type of offences'.²⁵² The Taliban's correspondence with Human Rights Watch also alludes to an order issued by the 'Emirate leadership ... not to torture prisoners'.²⁵³ However, the Framework for Intelligence Officials notes that 'if torture is required for interrogation of a detainee', then its approval must be sought from court officials.²⁵⁴ Confessions extracted through the use of torture are only valid under certain circumstances: 'forced confession by beating has no validity either in one's own right or others; however, with the permission of the judge if the accused confesses through beating, and if the crime is confirmed outside, then it is valid'.²⁵⁵

Some policies of the Commission for Management and Release of Prisoners focus on the well-being and rights of the prisoners.²⁵⁶ The High Office of the Courts' letter to Human Rights Watch indicates

²⁴⁷ HRW, 'You Have No Right to Complain', supra fn 41.

²⁴⁸ UNAMA Human Rights, Afghanistan: Protection of Civilians in Armed Conflict 2019, supra fn 75.

²⁴⁹ HRW, 'You Have No Right to Complain', supra fn 41.

²⁵⁰ UNAMA, 'UN: Grave Concern About Accounts of Taliban Ill-Treatment of Detainees', 26 May 2019, <https://unama.unmissions.org/un-grave-concern-about-accounts-taliban-ill-treatment-detainees> (last accessed 22 May 2022); Nossiter, "I Wake Up and Scream", supra fn 211; see also Rasmussen, 'The Taliban Say They've Changed', supra fn 211.

²⁵¹ UNAMA, 'UN: Grave Concern About Accounts of Taliban Ill-Treatment of Detainees', supra fn 252; Nossiter, "I Wake Up and Scream", supra fn 211; see also Rasmussen, 'The Taliban Say They've Changed', supra fn 211.

²⁵² Framework for Intelligence Officials, Investigation and Research Chapter, Art 33.

²⁵³ Reproduced in HRW, 'You Have No Right to Complain', supra fn 41, p 79.

²⁵⁴ Framework for Intelligence Officials, Investigation and Research Chapter, Art 34.

²⁵⁵ Ibid.

²⁵⁶ Commission for Management and Release of Prisoners Layha, Ch 2, Introduction and General Directives, Art 7: 'If a prisoner becomes ill while imprisoned, then it is the responsibility of Commission for the Management and Release of Prisoners to treat the ill prisoner. Similarly, after the prisoner is released, if any complications of the

that the Taliban is obliged to take care of prisoners' 'eating, drinking, praying, ablution, illness, heat and cold'. It also indicates that prisoners 'shall not be demeaned or disrespected' or 'kept in prison after [their] sentence time is completed'.²⁵⁷ These provisions appear to also apply more widely to detention practices (i.e., not just for conflict-related crimes but for any offence).

It is important to note that the Taliban prioritized the release of its own prisoners from enemy custody, and devoted significant attention to developing specific structures and processes around this. The Commission for Management and Release of Prisoners is authorized to 'exchange national and international prisoners with the enemy under the guidance of the leadership for the Islamic Emirate'.²⁵⁸ The Framework for Intelligence Officials also emphasizes the need to separate more valuable political prisoners, who could then be used as leverage for exchange.

Throughout the conflict, the release of prisoners has been a consistent Taliban demand in political talks. In 2014, the US exchanged five high-level Taliban held in the prison at Guantanamo Bay, Cuba, for an American soldier being held by the Taliban since 2009. As part of the US-Taliban agreement signed in 2020, the US and the Taliban agreed to the release of up to 5,000 Taliban prisoners in exchange for up to 1,000 Afghan security forces. The Afghan Government, however, said it had not committed to such a swap. In the end, the Republic agreed to release the 5,000 Taliban prisoners in exchange for up to 1,000 Afghan security forces.

illness caused during the imprisonment term arise then they can be treated by the health department after approval of the provincial representative of the mentioned commission and provincial authority'. Art 30: 'The Directorate's Authority has to provide assistance to the prisoner after his release, however, in time of need considering the possibilities, the mentioned authority can also help the prisoner during his term as prisoner.' Art 37: 'The Administrative Department has the responsibility to handover the aid provided to the prisoner himself, his family or to someone else with the consent of the prisoner.'

²⁵⁷ Reproduced in HRW, 'You Have No Right to Complain', *supra* fn 41, p 79.

²⁵⁸ Commission for Management and Release of Prisoners Layha, Ch 3, Directorate's Authority Duties and Responsibilities, Art 25. Art 50 also states: 'The Mentioned authority is obliged to have comprehensive information about those enemy captives that are introduced for exchange, meaning their personal details, occupation, field, rank and educational level.'

CONCLUSIONS

The following conclusions can be extracted from this case study:

- It is clear from internal documents and Taliban public statements that the movement was familiar with both IHL and human rights norms. Several key norms were echoed in Taliban policy and statements. Some, such as prohibitions on attacks on schools or clinics, were mostly followed, particularly in the later years of the insurgency. However, there was a significant gap between Taliban rules and rhetoric around IHL-relevant issues on the one hand, and independent monitoring and investigations on the other. The Taliban routinely violated many IHL norms, even where they were embodied in written Taliban policies and echoed in Taliban public statements.
- Part of the reason appears to be that the Taliban leadership saw these rules as broad guidance, not as specific operational protocols. As such, many rules were treated by commanders as subordinate to their military preferences. While the general Layha, sectoral layha and other forms of top-down policy guidance provided general parameters for action, much was historically left up to the discretion of military commanders on the ground and determined by local military imperatives. Local discretion has tended to be particularly pronounced where the official rules might obstruct the attainment of military objectives. In contested areas, the rules – particularly around targeting and the use of certain tactics (IEDs, summary executions, suicide attacks) – were almost always subordinate to military objectives.
- It is important to note that their policies evolved significantly. They reversed certain policy positions, such as on health care and education, and their definition of ‘civilian’ widened towards the end of the insurgency. Their command and control tightened, and their ability to disseminate and enforce decisions grew. Where there were differences of opinion and potential controversies, they tended to articulate only vague guidelines. These were practically unenforceable due to their lack of specificity, but allowed different practices to co-exist. This was the case with female access to education, among other issues.
- The analysis of different rules shows that the Taliban tried to regulate and enforce certain behaviours more than others. It was difficult to find any policies or statements, for example, around forced displacement or sexual violence. Regarding sexual violence, taboos around talking directly about these issues mean that they were likely dealt with through informal means, on a case by case basis. In the instance of displacement, by contrast, this may simply not have been seen as a concern. Regarding cultural preservation, the Taliban made relatively more statements in the later years of the conflict but still did not articulate a comprehensive policy in this regard. These statements can be read as part of their broader appeal for legitimacy, assuring the international community and Afghan people that they would act differently with respect to cultural preservation than they had in the 1990s.
- It is difficult to discern how much of the Taliban’s guidance and statements were operational, aspirational or, alternately, driven by perception concerns (i.e., the desire to appear compliant with widely accepted norms or as otherwise behaving honorably). There was a public relations aspect to Taliban statements and some of the Taliban’s policies. Particularly, as the movement aspired to international legitimacy, they more frequently referred to international norms and concerns. There was also a self-image aspect. To both external audiences and their own fighters, they presented an idealized version of the Taliban’s aspirations as accountable, disciplined and religiously pure. In this research, it was at times difficult to parse what was genuine policy, and what was more a performance for internal or external audiences.
- As the Taliban is now the de facto government of Afghanistan, it is important to understand what rules and norms they endorsed and adhered to as an ANSA. It is particularly important to engage them on how their obligations have changed now that they are a de facto ruling authority. This analysis

provides a useful baseline with which to begin that conversation. Rules governing the treatment of prisoners and the general conduct of hostilities, for example, remain relevant as the Taliban remains a party to the conflict with Islamic State Khorasan Province. As the Taliban seeks to professionalize its security and defence forces, it will be all the more important to sustain dialogue with them on IHL and related issues.

SELECTED REFERENCES

Afghanistan Independent Human Rights Commission, *Insurgent Abuses Against Afghan Civilians*, December 2008, <https://www.refworld.org/docid/4a03f7a82.html> (last accessed 22 May 2022).

Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978–2001*, 2005, <https://reliefweb.int/attachments/cdbe08d5-7d6b-3fef-aebb-0d05ec317b18/B7C09154CD3E144EC12570430049F76A-ajp-afg-18jul.pdf> (last accessed 22 May 2022).

Ahmad, L. and P. Anctil Avoine, ‘Misogyny in “Post-War” Afghanistan: The Changing Frames of Sexual and Gender-Based Violence’, 27 *Journal of Gender Studies* 1 (2016) 86–101.

Amiri, R. and A. Jackson, *Taliban Taxation in Afghanistan (2006–2021)*, Working Paper 138, International Centre for Tax and Development, 2022, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/17193/ICTD_WP138_1.0.pdf?sequence=11&isAllowed=y (last accessed 22 May 2022).

Amiri, R. and A. Jackson, *Taliban Attitudes and Policies Towards Education*, Working Paper 601, Centre for the Study of Armed Groups, Overseas Development Institute, February 2021, https://cdn.odi.org/media/documents/taliban_attitudes_towards_education.pdf (last accessed 22 May 2022).

Bellal, A., G. Giacca and S. Casey-Maslen, ‘International Law and Armed Non-State Actors in Afghanistan’, 93 *International Review of the Red Cross* 881 (2011) 47–79.

Bellal, A., *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights, 2019, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf> (last accessed 22 May 2022).

Bellal, A., P. Bongard and E. Heffes, *From Words to Deeds: A Research of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norm*, Research Brief, Geneva Academy of International humanitarian Law and Human Rights, <https://www.geneva-academy.ch/joomlatools-files/docman-files/From%20Words%20to%20Deeds%20A%20Research%20of%20Armed%20Non-State%20Actors%E2%80%99Practice%20and%20Inter.pdf> (last accessed 22 May 2022).

Bjelica, J., 'One Land, Two Rules (5): The Polio Vaccination Gap', Afghanistan Analysts Network, 9 May 2019, <https://www.afghanistan-analysts.org/en/reports/economy-development-environment/one-land-two-rules-5-the-polio-vaccination-gap/> (last accessed 22 May 2022).

Clark, K., The Layha: Calling the Taleban to Account, Appendix 1. The Taleban Codes of Conduct in English, Afghanistan Analysts Network, 2011, https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf (last accessed 22 May 2022).

DW, 'Taliban Lift Ban on Red Cross in Afghanistan', 15 September 2019, <https://www.dw.com/en/taliban-lift-ban-on-red-cross-in-afghanistan/a-50437550>.

Engel Rasmussen, S., 'The Taliban Say They've Changed. On the Ground, They're Just as Brutal', The Wall Street Journal 31 May 2021, <https://www.wsj.com/articles/the-taliban-say-theyve-changed-on-the-ground-theyre-just-as-brutal-afghanistan-us-troops-11622487148>.

Gopal, A. and A. Strick Van Linschoten, Ideology in the Afghan Taliban, Afghanistan Analysts Network, 2017, <https://www.afghanistan-analysts.org/wp-content/uploads/2017/06/201705-AGopal-ASvLinschoten-TB-Ideology.pdf> (last accessed 22 May 2022).

Giustozzi, A. and C. Franco, The Battle for Schools: The Taleban and State Education, Afghanistan Analysts Network, 2012, <https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/2011TalebanEducation.pdf> (last accessed 22 May 2022).

Gul, A., 'Rare UN-Taliban Agreement to Set Up 4,000 Schools in Insurgent-Held Afghan Territory', VOA, 19 December 2020, https://www.voanews.com/a/south-central-asia_rare-un-taliban-agreement-set-4000-schools-insurgent-held-afghan-territory/6199746.html.

Haver, K., and W. Carter, What It Takes: Principled Pragmatism to Enable Access and Quality Humanitarian Aid in Insecure Environments, report of the Secure Access in Volatile Environments research programme, November 2016, <https://www.humanitarianoutcomes.org/file/112/download?token=qQbVKV35> (last accessed 23 May 2022).

Hirose, K., K. Imai and J. Lyall, 'Can Civilian Attitudes Predict Insurgent Violence? Ideology and Insurgent Tactical Choice in Civil War', 51 Journal of Peace Research 1 (2017) 47–63.

Human Rights Watch, Afghanistan: Massacre in Mazar-i-Sharif, 1998. <https://www.hrw.org/legacy/reports98/afghan/Afreporo.htm> (last accessed 22 May 2022).

— — —, Lessons in Terror: Attacks on Education in Afghanistan. New York: Human Rights Watch, 2006, <https://www.hrw.org/reports/2006/afghanistan0706/afghanistan0706brochure.pdf> (last accessed 22 May 2022).

---, The Human Cost: The Consequences of Insurgent Attacks in Afghanistan, 2007, <https://www.hrw.org/sites/default/files/reports/afghanistan0407webwcover.pdf> (last accessed 22 May 2022).

---, 'Afghanistan: Taliban Child Soldier Recruitment Surges', 17 February 2016, <https://www.hrw.org/news/2016/02/17/afghanistan-taliban-child-soldier-recruitment-surges> (last accessed 22 May 2022).

---, 'I Won't Be a Doctor, and One Day You'll Be Sick': Girls' Access to Education in Afghanistan, 2018, https://www.hrw.org/sites/default/files/report_pdf/afghanistan1017_web.pdf (last accessed 22 May 2022).

---, 'You Have No Right to Complain': Education, Social Restrictions, and Justice in Taliban-Held Afghanistan, 2020, https://www.hrw.org/sites/default/files/media_2020/06/afghanistan0620_web_o.pdf (last accessed 22 May 2022).

---, 'I Thought Our Life Might Get Better': Implementing Afghanistan's Elimination of Violence against Women Law, 2021, https://www.hrw.org/sites/default/files/media_2021/07/afghanistan0821_web.pdf (last accessed 22 May 2022).

International Committee of the Red Cross, The Roots of Restraint in War, 2018.

Jackson, A., Life Under the Taliban Shadow Government, Overseas Development Institute, 2018, <https://cdn.odi.org/media/documents/12269.pdf> (last accessed 22 May 2022).

---, Negotiating Survival: Civilian-Insurgent Relations in Afghanistan, Hurst, 2021.

Jackson, A. and R. Amiri, Insurgency Bureaucracy: How the Taliban Makes Policy, Peaceworks no 153, US Institute of Peace, 2019, https://www.usip.org/sites/default/files/2021-08/pw_153-insurgent_bureaucracy_how_the_taliban_makes_policy.pdf (last accessed 22 May 2022).

Jackson, A. and A. Giustozzi, Talking to the Other Side: Humanitarian Negotiations With the Taliban in Afghanistan, HPG Working Paper, Overseas Development Institute, 2012, <https://cdn.odi.org/media/documents/7968.pdf> (last accessed 22 May 2022).

Jackson, A. and F. Weigand, Rebel Rule of Law: Taliban Courts in the West and North-West of Afghanistan, Overseas Development Agency, 2020, https://cdn.odi.org/media/documents/Rebel_rule_of_law_Taliban_courts_in_the_west_and_north-west_of_Afghanistan.pdf (last accessed 22 May 2022).

Jewkes R., J. Corboz and A. Gibbs, 'Violence Against Afghan Women by Husbands, Mothers-in-Law and Siblings-in-Law/Siblings: Risk Markers and Health Consequences in an Analysis of the Baseline of a Randomised Controlled Trial', 14 PLOS ONE 2 (2019).

Jo, H., *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015.

Johnson, T. H., *Taliban Narratives: The Use and Power of Stories in the Afghanistan Conflict* (Kindle Edition), Oxford University Press, 2018.

Johnson, T. and M. C. DuPee, 'Analysing the New Taliban Code of Conduct (Layeha): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban', 31 *Central Asian Survey* 1 (2012) 77–91.

Mannell, J., G. Grewal, L. Ahmad and A. Ahmad, 'A Qualitative Study of Women's Lived Experiences of Conflict and Domestic Violence in Afghanistan', 27 *Violence Against Women* 11 (2021) 1862–1878.

Nagamine, Y., *The Legitimization Strategy of the Taliban's Code of Conduct*, Palgrave Macmillan, 2015.

Nordland, R., 'Taliban Target Aid Groups, in an Ominous Turn in Afghanistan', *The New York Times*, 13 May 2019, <https://www.nytimes.com/2019/05/13/world/asia/afghanistan-taliban-aid-workers.html>.

Nossiter, A., "'I Wake Up and Scream': Secret Taliban Prisons Terrorize Thousands', *The New York Times*, 27 February 2021, <https://www.nytimes.com/2021/02/27/world/asia/afghanistan-taliban-prison.html>.

Paybarah, A., 'Taliban Allow Polio Vaccine Program to Restart in Afghanistan', *The New York Times*, 20 October 2021, <https://www.nytimes.com/2021/10/19/world/asia/taliban-polio-vaccines-afghanistan.html>.

Petrasek, D., *Ends & Means: Human Rights Approaches to Armed Groups*. International Council on Human Rights Policy, 2000, <https://reliefweb.int/attachments/2d260b8d-64fa-32ce-97ad-3d639c95f777/3DCC2D9C95FC0BCFC1256C14004E55A1-EndsandMeans.pdf> (last accessed 22 May 2022).

Ruttig, T., *How Tribal Are the Taleban? Afghanistan's Largest Insurgent Movement Between Its Tribal Roots and Islamist Ideology*, Afghanistan Analysts Network, 2010, <https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20100624TR-HowTribalAretheTaleban-FINAL.pdf> (last accessed 22 May 2022).

---, 'More Violent, More Widespread: Trends in Afghan Security in 2017', Afghanistan Analysts Network, 2018, <https://www.afghanistan-analysts.org/en/reports/war-and-peace/more-violent-more-widespread-trends-in-afghan-security-in-2017/> (last accessed 22 May 2022).

Schneckener, U., 'Armed Non-State Actors and the Monopoly of Force', in A. Bailes, U. Schneckener and H. Wulf (eds), *Revisiting the State Monopoly on the Legitimate Use of Force*, Policy Paper no 24, Geneva Centre for the Democratic Control of Armed Forces, 2006, <http://www.wulf-herbert.de/DCAFPP24Wulf.pdf> (last accessed 22 May 2022).

Sivakumaran, S., *The Law of Non-International Armed Conflict*, Oxford University Press, 2012.

---, 'Implementing Humanitarian Norms Through Non-State Armed Groups', in H. Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, 2015.

Sassòli, M., 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* 1 (2010) 5–51.

---, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing 2019.

Terry, F., 'The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action', 93 *International Review of the Red Cross* 881 (2011) 173–188.

---, 'Violence Against Health Care: Insights from Afghanistan, Somalia, and the Democratic Republic of the Congo', 95 *International Review of the Red Cross* 885 (2013) 23–39.

The New Humanitarian (formerly IRIN News), 'Taliban Rue Ambulance Attack', 12 April 2011, <https://www.thenewhumanitarian.org/news/2011/04/12/taliban-rue-ambulance-attack>.

Voudouri, I., 'Who is a Civilian in Afghanistan?', 102 *International Review of the Red Cross* 914 (2020) 893–922.

Zaeef, A. S., *My Life With the Taliban*, Hurst & Company, 2010.