

Madrasas and Recruitment of Child Soldiers: The Scenario in Afghanistan

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ABSTRACT---This study focuses on the role of religious seminaries known as *madrasas* in Afghanistan in recruitment and use of child soldiers, since there is significant amount of credible research indicating the correlation between *madrasas* and child soldiering. The study also delves into the legal position of international and national legal regimes as well as Islamic legal standards on the issue of child soldiering. The research primarily relies on doctrinal method in sections where main sources of the national and international legislations are studied, and non-doctrinal, qualitative analysis of primary and secondary sources relevant to the topic. In addition to this, textual analysis of primary sources of Islamic law and legal rulings and justification for legal rulings by the authoritative figures of armed groups involved in recruitment of underage combatants for combat in Afghanistan is utilized. The research uses comparison between the international and national legal regimes on the one side and Islamic legal standards on the other side to ascertain similarities and differences. The study has found the three legal regimes under investigation have almost identical view pertaining to the lower age limit for the conscription of soldiers. As a result, the study has also established that many more underage students were recruited and used in hostilities in the armed conflict in Afghanistan during the last twenty years of the 20th century than it has been the case in the 21st century up to the present.

Keywords: *Madrasa; Recruitment of Child Soldier; Use of Child Soldier; Taliban; Islamic State in Khorasan; Shariah Law; Jihad; International law; Afghan law*

I. INTRODUCTION

The issue of militancy, particularly of extremism among the youth, child soldiering and religious teaching has been studied and talked about in various forums worldwide. In reference to this problem within the borders of Afghanistan, one can see two tendencies among the researchers: there are those who hastily point to religion and religious institutions as the main sources of militancy, and there are those who easily dismiss any links between religious institutions and extremist tendencies. The long-lasting armed conflict in Afghanistan has been cited by both groups as a relevant example. The country undoubtedly has a large number of child soldiers, numerous *madrasas* and mosques and armed groups with extreme interpretation of Islamic teachings together with so many suicide bombings and acts of terrorism carried out by underage persons. Who recruits child soldiers and uses them in hostilities? Do these recruiters invariably appeal to religion, and whether these references to religious principles are valid vis-à-vis child soldiering? What is the relation of *madrasas* and mosques with child soldiering? How are these issues related to

international law, Islamic law and national law of Afghanistan? These are some of the issues that make the core of this study.

Child soldiers are recruited and used by almost all parties to the conflict in Afghanistan, particularly by the armed groups fighting against the government forces. Among the armed groups, the Taliban and Islamic State of Khorasan (ISK) are vocal in their attempts to justify their armed struggle by invoking Islamic sources. These two groups are also blamed for the bulk of suicide bombing and other terrorist attacks. From the outset of the appearance of Taliban, their very name and methods of mobilization of masses to support their cause is related to Islamic schools or *madrasas*. The founders and leaders of Taliban are almost invariably *madrasa* graduates and students, and they have time and again turned to *madrasas* under their control for new recruits. Similarly, the members of ISK have shown preference for individuals with some degree of religious knowledge. Since many *madrasas* were heavily radicalized from the time of armed conflict between the Soviet invaders and mujahiddin, and in the brief period of Taliban rule over Afghanistan, *madrasa* teachers and students were more easily motivated by calls to *jihad* which the ISK commanders and soldiers invariably utilize. The two armed groups have also demonstrated disregard towards international law and Afghan law, which they claim is opposed to Shariah. The reason behind their rejection of contemporary Muslim jurists' view on child soldiers and conduct of hostilities is more puzzling. The Taliban claim there is no contradiction between their methods of warfare, whereas ISK members appear to abide exclusively by their skewed interpretation of Islamic teachings.

Regarding the terms recruitment and use, there are several points that need clarification. Before children take part in actual combat, they need to be brought into the armed force or armed group in the procedure known under the generic name of recruitment. There are a number of ways by which children or young persons are allowed or made to join an armed force or armed group: compulsory conscription, forced recruitment and voluntary recruitment [1]. One of the most common methods that is in accordance with national laws is known as compulsory recruitment or conscription, whereby the recruit is under legal obligation to perform military service for a certain period [2]. Second, in situations of forced recruitment a child is forced to join a military unit by sheer force. Hence, children do not virtually have any choice to evade forcible conscription since, as it often happens in this case, they get

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kidnapped from their homes or public places and thrown into military or militia ranks at gunpoint [3]. Third, voluntary enlistment happens when underage persons choose to enlist without force or threats and in the absence of legal provisions requiring them join the armed force or militia. In other words, children decide to become soldiers of their own will [4]. Once the conscription phase is completed, child soldiers are made to carry out a range of duties, mostly as any other soldier. Therefore, the most common capacities in which child soldiers are used are scouts, spies or intelligence collectors, drummer boys, messengers, porters, servants, cooks and cook assistants. More recently, underage soldiers have started assuming similar roles to adult fighters, such as regular soldiers, guerrilla fighters, cooks and human shields [5]. Contemporary conflicts have also highlighted the roles of both young girls and boys as perpetrators of terrorist and suicide bombings [6].

A. Madrasas in Afghanistan

The term madrasa basically has twofold meaning: firstly, in its common usage it means 'school'; secondly, this school is an educational institution of knowledge that deals with Islamic subjects such as the Holy Qur'an, and hadith, Islamic jurisprudence and biography of the Prophet Mohammed (S.A.W.S.) [7]. Basically, the word madrasa originates from Arabic trilateral root and it is also used in many languages, including Pashto, Persian, and Urdu [8]. In a lot of countries for instance, Egypt and Lebanon, the madrasa have been used to define any type of school such as public or private, secular or Islamic. Nevertheless, in some other countries like Afghanistan, Bangladesh and Pakistan the word madrasa is used only for Islamic religious school [9]. Historically, madrasa kind of schools have been very old formalized seminaries for dissemination of religious knowledge and tradition in Muslim countries. Indeed, in the early centuries of formalized Islamic schooling, madrasa was the most important intricate educational facility, whereby the focus was on Islamic law learning and training, but it also incorporated subjects relevant to the other core sciences of the Islamic education. For example, sciences of the Holy Qur'an and hadith [10].

According to Makdisi [11], madrasa colleges came into existence directly from mosque studying circles and the foundation of khan, or hostel for students who had the desire to continue their education for another period of about four to eight years after four years of study at the mosque or school. In other words, madrasa appeared quickly after the masjid form of learning had been accompanied by the provision of housing for the lodging requirements of full-time students. The nature of education in mosque and the requirements of suitable lodging called for financial support, and this is done by the benevolent Muslims who apportion a significant amount of their property under the laws of required almsgiving or zakat [12]. Consequently, the learners of religious schools were supported by the means obtained through the institution of zakat and waqf. These important aspects of madrasa, its focus on religious periods with heavy special attention on Islamic law and the dependence on zakat and waqf funds, have remained mostly unaltered in many Muslim countries over the centuries until the present day [13].

Historically, madrasa education, or Islamic study at the college level has been the most important institution within Islamic schooling. Unsurprisingly, there are numerous madrasas in Muslim countries in the world. Turning to modern Afghanistan, the growth of madrasas is attributed to a number of internal and international factors. The beginning of the 20th century in Afghanistan saw the rule of Amir Habibullah Khan and the efforts to modernize the national education system. This meant that madrasas were seen as redundant or obstacles to modernization efforts [14]. The first modern institution of higher learning in Afghanistan named Habibia school was established in 1904 [15]. This college played an important role in liberalization of the Afghan youth and setting up a movement by the name of Young Afghans. The nationalistic and liberal spirit of the movement was further promoted by the successor of Amir Habibullah Khan are Ghazi Amir Amanullah Khan [16]. In reference to educational institutions, these two rulers of Afghanistan managed to temporarily reduce the influence of the religious authorities and teachers whose background was thoroughly imbued with madrasa type of education. In the first Constitution of Afghanistan of 1923, Ghazi Amir Amanullah Khan introduced freedom of religion and centralized all institutions of learning. From that time, the schools had to adopt the syllabus with mixed non-religious and religious subjects with preponderance of modern science over religion. However, [17] Ghazi Amir Amanullah Khan did not succeed in assuming complete control over the religious establishment. His liberalization drive was met with powerful resentment among the traditional Islamic populace, and it ultimately led to his loss of reign over Afghanistan and forcible exile with abrogation of his reforms in 1929 [18]. The successors on power, Nadir Shah and Zahir Shah opted for a softer approach towards madrasas and the religious establishment. These two rulers sought counsel from international Islamic scholars in their reforms [19]. A madrasa named Abu Hanifa was founded in 1936, and it served as a bridge between modernist-minded scholars and proponents religious institutions of learning. As a result of this approach, the reforms were accepted of by the Afghan religious establishment and the coexistence of religious and modern scientific syllabuses continued until the Soviet invasion of Afghanistan in late 1979 [20].

The clash between the secular-minded teachers and the Islamic-inspired ones became more palpable from the 1960s and 1970s. [21]The Soviet Union establishment identified madrasas and religious elite in Afghanistan as major obstacles for the spread of communist ideology. The Soviets started to support the proponents of communist ideology in schools and universities prior to the invasion and this, later on in 1980s, led to the establishment of pro-communist and pro-Islamic movements among university students. For instance, Kabul University saw the polarization in the establishment of religiously-oriented Organization of Muslim Youth and communist influenced People's Democratic Party of Afghanistan (PDPA) [22]. The Soviet invasion of Afghanistan gave birth to the

movement called mujahiddin which received large amount of aid from Muslim countries in the Middle East, Western European countries and the USA [23]. It was in this period that madrasas came to adopt hardline Salafist methods promoted by the Saudi Arabian religious establishment [24].

The US officials tolerated and even supported the penetration of radical Salafist and jihadi elements into Afghan madrasas since they saw it was a convenient method of mobilization of masses against their arch-enemy and invaders of Afghanistan – the Soviets [25]. Once the Soviets were defeated and forced to withdraw from Afghanistan, the mujahiddin and later on Taliban assumed power [26]. The Taliban blamed the infiltration of communist elements into Afghan society on weak Islamic credentials of schools and colleges. The Taliban even executed a number of university lecturers who they believed were the proponents of communism [27]. The persecution of teachers and lecturers deemed disloyal to the Taliban lasted from 1994 to 1996. Once the Taliban captured Kabul, they stopped the oppressive measures and kept the skilled education staff. However, the Taliban appointed their officials in each school and university within Afghanistan. To further counter this foreign influence on Afghan education system, the Taliban nationalized all schools and heavily supported madrasas as they perceived these religious seminaries as the core of the country's education. Under the Taliban rule, the school curriculum was almost completely religious. Finally, the Taliban established madrasas within universities and accorded better facilities to madrasa students compared to university students [28].

In the post 9/11 period, the internationally-recognized government of Afghanistan rapidly expanded the network of both, general schools and madrasas. Compared to 2002, when there were around one million students almost all of whom were males, in 2015 the number of school students stood at eight million out of which 39 percent were female students [29]. Likewise, the number of madrasas increased significantly in this period. At present, there are three types of madrasas in Afghanistan. First, madrasas run by the government are small in number. The operational cost and lodging expenses for students is fully supported by the government. Second, madrasas registered with and recognized by the government [30]. The curriculum in these madrasas is not planned by government officials. Yet, as a condition of approval these madrasas are required to teach mixed subjects, non-religious and religious ones. The government does not provide financial assistance to this type of madrasas. The financial means for the operation of these madrasas come from fundraising in Afghanistan and other Muslim countries in the region and from the Middle East [31]. Third, there is unspecified number of madrasas in the areas out of government control or in remote rural places. These madrasas are not in any way related to the government, their curriculum, methods of instruction and sources of funds are unknown [32]. According to the Afghan government sources, there are 6,400 madrasas and Qur'an teaching centres around the country, most of which being registered with Ministry of Hajj and Religious Affairs, and about a third of which are registered with the Ministry of Education [33].

B. Recruitment and Use of Child Soldiers by Armed Groups

Taliban's appearance in the Afghan internal struggle for power is directly related to the madrasa schools. As aforesaid, the very name Taliban in Pashto means "students" to signify the fact that Mullah Mohammad Omar and some of his close associates attended this type of school in Kandahar [34]. The newly-born organization also relied on the recruitment from a madrasa in Logar province near Kabul. The madrasa graduates, hardened veterans from the Afghan-Soviet war and some clerics pledged allegiance to Mullah Omar and his intention to combine radical interpretations of some Islamic law principles and the customary law of the Pashtuns known as Pashtunwali so as to make legal framework for the whole country [35]. From this religious educational background and also the combat experience from the time of Soviet invasion the Taliban grew to make a major force in the mid and late nineties [36].

The practice of recruitment of child soldiers by the Taliban as a clear breach of international and local law was noted by the United Nations (UN), Non-Governmental Organizations (NGOs) and the media. In its resolution of 15 May 2015, the UN report cited a madrasa in the city of Gardez, Paktya province where six boys were injured after an Improvised explosive device (IED) exploded within the premises of the school in September, 2013. Apparently, these young boys were undergoing training in making explosive devices, and the case was classified as training of children for combat [37]. From 2015 onwards, Human Rights Watch (HRW) has published several papers citing the increasing incidence of recruitment and use of children for combat from Afghan madrasas. In one such report HRW staff interviewed family members of thirteen boys who had been sent by the Taliban into the battlefield. The high incidence of child soldiers was in direct correlation with periods of heightened combat offensives. As an illustration, in 2015 when the Taliban increased their armed conflict activities against the regular forces, some districts such as Chahardara in the provinces of Kunduz, Takhar and Badakhshan saw more than a hundred child soldiers recruited by the Taliban, some younger than thirteen [38].

Recruitment of underage boys for combat was not limited to religious schools or madrasas as they are known in Afghanistan, but it also encompassed regular schools that are incorporated into the national education system. Researchers Giustozzi and Ali recorded cases of child recruitment from regular schools in the provinces of Parwan, Laghman, Balkh, Paktya, Ghazni, Nangarhar, Wardak and Zabul. As it is claimed in the research paper all of the boys enlisted voluntarily or under the influence of their classmates citing disappointment with the overall school system as the main reason for enlistment [39]. To sum up, the cases of recruitment of children from religious schools have been continuously recorded in Afghanistan ever since the uprising against the Soviet invasion to the present day. This phenomenon has apparently thrived in spite of the clear prohibitions by the international law and local law. In the

last several years, the cases of recruitment of children have spilled over to regular schools in the areas under the control of the Taliban.

As the most numerous and powerful of all armed groups in Afghanistan the Taliban are primary recruiters of underage soldiers. Recent reports confirm the earlier findings that child soldiers constitute the majority of combatants in some Taliban units. For instance, in October 2015, the Taliban recaptured the district of the Khwajaghar in Takhar Province only a few days after the armed forces of Afghanistan had assumed control over the highly contested district. According to an Afghan Army general and a government spokesman, the vast majority of killed and captured Taliban fighters were child soldiers who had been recruited from madrasas. Some of the killed and captured rebels were under 18 years of age, recruited among madrasa students. The refutation of this claim by the Taliban reveals more about who the group's commanders consider a child since they claimed no beardless children had been recruited by them [40]. Meanwhile, in the same year reports from Badakhshan Province further reinforced the findings about Taliban's recruitment of school students to fight against the armed forces of Afghanistan. Badakhshan highest ranking officials stated that up to 10,000 students were under threat to be forcefully recruited and used in armed conflict. These officials also reported that majority of Taliban casualties and POWs are underage students. Badakhshan education officials voiced their concerns that the problem of child soldier recruitment from government controlled schools was so widespread that they had to consider postponement of their school activities for an indefinite period [41]. Furthermore, some underage POWs captured in combat against Taliban units have confirmed that they had been recruited to perpetrate suicide bombings. As an illustration, four underage POWs revealed they had been instructed in a madrasa in the district of Qarabagh, Kabul Province, to carry out suicide bombing missions [42]. Recruitment of madrasa students for armed conflict in Afghanistan at times occurs without the knowledge and approval from their parents and guardians. In a BBC report from December 2014, family members recognized a boy who had previously been sent to study in a madrasa from a local TV station showing Taliban fighters in full combat gear [43].

In some provinces where Taliban have been long present, such as Nangarhar, underage soldiers are recruited from both mosques and madrasas. Hereby, religious authorities known as mullahs identify and recommend boys of suitable character to Taliban fighters for recruitment. These mullahs are either Taliban supporters or they had been forced to help the Taliban in conscription of underage soldiers by intimidation and threats levelled at themselves or their family members. The reports further claim that there are cases of mass recruitment especially after congregational prayers with many congregants such as Friday prayers, Eid prayers and funeral prayers whereby a Taliban religious official addresses the attendees [44]. One of the reasons, perhaps the most important one why Taliban turn to madrasas and mosques for recruitment of underage soldiers has to do with the characteristics and personal pedigree of the group commanders and soldiers almost all of whom have

spent certain period of study within madrasas. When these attributes are put together with the Taliban's understanding of Islamic teachings, particularly jihad and the duty to oppose what they perceive as infidels, it is only expected that Taliban commanders and supporters would direct their recruitment skills towards madrasa students [45].

The first reports of Islamic State fighters in Afghanistan, or ISK as they refer to themselves, appeared in 2014 soon after the group had made significant conquests in Iraq and Syria. The idea behind the group's name is to include the whole territory of Afghanistan together with larger part of Central Asia and Xinjiang region of western China into a state similar to the one that had earlier been proclaimed in Iraq and Syria [46]. Majority of ISK combatants have been identified as local youth with no foreign combat experience and a very few of those Afghan and Pakistani fighters who had returned from Iraqi and Syrian conflict [47]. Many of the ISK fighters were ex-Taliban combatants who had grown displeased with Taliban understanding of Islamic teachings. Since the armed group has appeared in different parts of Afghanistan, there might be some differences in the immediate reasons for its appearance. For example, in northern provinces of Afghanistan, some Taliban fighters had had the contacts with the so called Islamic Movement of Uzbekistan (IMU) whose fighters, about sixty to seventy, had previously gained experience in the Syrian conflict [48].

In a widely publicized video recorded in eastern Afghanistan, an ISK supporter teaches young children how to use some weapons in a village madrasa with both male and female students. The teacher calls on apparently very young boys and instructs them, among other things, that a Kalashnikov AK-47 gun is used in jihad against all infidels who propagate infidelity and treachery. This mixture of basic training in combat skills and forceful restricted use of the concept of jihad is reportedly a ubiquitous method of ISK commanders [49]. In the eastern Afghan province of Nangarhar, the ISK supporters managed to seize control over a number of madrasas and even established a radio station called The Voice of Khalifat [50]. According to TOLONews, a prominent local news agency, the ISK proponents use mosques and madrasas to indoctrinate children as young as three with their understanding of Islamic tenets. The same source alleges that members of the ISK systematically brainwash and recruit persons younger than eighteen for suicide bombing missions across Afghanistan [51].

Although both armed groups, the Taliban and ISK claim to derive the inspiration for their acts from the Islamic sources, there are some notable differences between them. The ISK commanders and leaders firmly reject any nationalistic tendencies and promote international jihad [52], whereas the Taliban confine their activities to Afghanistan due to perception of priority and over ethnocentric scope of action [53]. Another important difference with regard to the recruitment and use of child soldiers in hostilities is the fact that ISK commanders do not abide to any specific code of conduct that would restrict their conscription of underage

persons, while the Taliban often refer to their documents such as Layeha to justify their conscription of beardless boys. Additionally, the ISK focus on children since underage persons are more receptive of their brainwashing and indoctrinating techniques [54]. Finally, the ISK fighters are more partial to forcible recruitment of male children for combat, and compelling young women and girls to marry their soldiers [55]. In case of recruitment of very young children, the ISK members deceive the local people and combine deception with payment of sums between USD 300 and USD 500 to families willing to send their children for alleged religious learning. Naturally, the parents are never told that their children would be used for terrorist and suicide bombing attacks [56]. In conclusion, even though the ISK are not as numerous and powerful as Taliban, the fact that they have managed to establish foothold in several parts of Afghanistan and their ruthlessness in recruiting very young children from madrasas and mosques for the purpose of conducting terrorism and suicide bombings calls for detailed studies and analyses of their aspirations and methods.

C. The Legal Protection of Child Soldiers

The unfortunate fact of the presence of tens of thousands of child soldiers worldwide and certainly a disturbingly large number of them in the armed conflict in Afghanistan does not mean that the practice is in any way justified by law, whether it be international law, Islamic law or national law of Afghanistan. None of these three legal regimes permits the practice of recruitment and use of underage persons in combat. Rather, all three legal regimes contain similar if not identical prohibitive injunctions that are drafted to keep children away from the armed conflict. Despite some perceived inconsistencies, international law uniformly prohibits persons younger than fifteen to be recruited and used in combat. In some more recent treaties and documents there are significant efforts to push this age limit up to eighteen in spite of the opposition from some states. As for the Islamic law, the prohibition to recruit and use children in combat also concerns those younger than fifteen. Today's Muslim jurists are almost unanimous in this regard. The Afghan national law is closer to the recent efforts in international law. Throughout the armed conflict in Afghanistan, particularly in the recent years, the laws of Afghanistan clearly stated that no person under the age of eighteen should be recruited and used in combat.

International Legal Protections on Child Soldiering

Child soldiering is an issue that attracted a great deal of interest from the researchers and practitioners of international law. Basically, the treaties pertinent to child soldiers are primarily found in International Humanitarian Law (IHL) due to its inextricable relation with armed conflict[57]. Considering the individual treaties, the Four Geneva Conventions of 1949 [58] do not have any article relating to child soldiers owing to the fact that children have been considered just as a subgroup of civilian population. Nevertheless, following the entry into force of the Geneva Conventions, the presence of many child soldiers on the battlefields around the world, spurred the international legal community to draft a more active position of international treaties on child soldiers [59]. Thus, Additional Protocols of

1977 [60] presented a chance to refine the position of the Geneva Conventions and to include certain provisions pertaining to the child soldiering phenomenon. As a result of the pressing need to regulate conscription and use of underage soldiers, the two Additional Protocols have become the first treaties to prohibit the conscription and enlistment of children under the age of fifteen and use them in armed conflict [61]. Following this IHL prohibition, child soldiering began to be seen as a human rights problem, too.

As a consequence of the aforesaid efforts, International Human Rights Law (IHRL) saw the need to draft some provisions about the problem. The outcome was soon to come in one of the landmark treaties of IHRL, the Convention on the Rights of the Child of 1989(CRC) [62], whereby the enlistment and recruitment of children under the age of fifteen by state actors is forbidden [63]. This prohibition has been criticized by many practitioners and organizations because Article 1 of the treaty affirms that every person under the age of eighteen is a child [64]. Despite this designation of a child, the treaty only forbids recruitment and use in armed conflict of persons younger than fifteen [65]. In other words, the proscription of child soldiering has not covered all underage persons, but merely those younger than fifteen. In addition to this, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (OP-CRC) [66] attempted to accommodate the criticism by stipulating the prohibition of recruitment and use in combat of any person under the age of eighteen by state and armed groups [67]. However, a closer analysis of the OP-CRC reveals some weaknesses in the wording of the treaty. The prohibition is not spelled out in direct and sufficiently strong terms to result in complete realization of zero child soldiers in armed conflict. Rather, the OP-CRC provision recommends to the state and NSAs to take action to divert people under the age of eighteen from direct involvement in hostilities[68]. Moreover, the OP-CRC states that armed forces and armed groups need to ensure that no one under the age of eighteen is forcibly recruited or directly used in hostilities[69]. Thus, the OP-CRC stipulates that the state forbids voluntary recruitment of persons under the age of fifteen in military training[70]. Similarly, the Rome Statute of the International Criminal Court (Rome Statute of the ICC) [71] prohibits the conscription and use of children under the age of fifteen in the battlefield and criminalized the act as a war crime [72]. As a result, international treaties related to child enlistment propose to make clear prohibition of child soldiering under the age of fifteen. In spite of many attempts to restrict the prohibition of recruitment and use in armed conflict of persons younger than eighteen, these treaties have so far only taken a constructive stand on the recruitment and use of children in armed conflict under the age of fifteen.

Afghan Legal Protections on Child Soldiering

The national legal instruments in Afghanistan have always been in congruence or even stricter than the documents and provisions of international law on the problem of child soldiering. However, neither international law nor Afghan law

have been successful in the efforts to eradicate the malady of underage combatants [73]. The focus of this section is to analysis Afghan laws pertaining to the prohibitions recruitment and use of child soldiers. In 2014, the Government of Afghanistan drafted and put into force the law titled Law on Prohibition of Juveniles Recruitment in Military Units (LPJRMU) [74] that reinforces the more general prohibitions of recruitment and use in combat of persons younger than eighteen[75] . This was not the first national legal instrument to refer to conditions and prohibitions of conscription of underage persons. However, since the presence of a large number of child soldiers did not decrease by 2014, the Afghan officials felt the need to draft and implement a specific law that would directly tackle the problem. LPJRMU in its Article 2(1) defines the child as any person below the age of eighteen. In accordance with this definition, Article 3 of the law directly prohibits recruitment and use of children into national armed forces [76]. The article also states that children or persons below the age of eighteen cannot be conscripted and used on any capacity within armed forces [77]. To reinforce this prohibition, Article 4 of the law penalizes the act of child soldier recruitment with a proposed sentence of up to one year against any officer found guilty for recruiting or abetting recruitment and use of children into armed forces.

The Constitution of the Islamic Republic of Afghanistan [78] contains certain provisions referring to overarching position of Islamic Law, or Shariah law, within the legal system of the country. The Constitution in its Article 3 that no legal document or its content is permitted to contradict the teachings of Islam: “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan [79].” The drafter of the Constitution obviously wanted to indicate the supreme importance of Islamic teachings in the highest legal act of the country. It is because of this lofty position accorded to the Islamic principles that no meaningful study of Afghan legal system can be carried out without reference to the Shariah law [80]. In regards to the constitutional provisions and the issue of child soldiers, it is instructive to look into the Shariah treatment of child soldiering problem. A careful analysis of the primary sources and precedents from the Shariah law indicates its congruence with international legal provisions. In other words, the Islamic law of armed conflict in a similar vein to IHL, IHLR and ICC provisions, with an exception of the OP-CRC, prohibits recruitment and use in hostilities of persons under fifteen [81]. The age limit for recruitment and use of soldiers in combat is notably higher in Afghan national law since it provides that no person younger than eighteen can be allowed to be recruited and used in armed conflict. Thus, by adopting the age of eighteen as minimum age for recruitment, the Afghan national laws, in a manner that can be viewed as contradiction of Article 3 of the Afghan Constitution, inclines more towards international treaties to align with the prohibitions concerning underage recruits.

The armed groups operating in Afghanistan have on more than one occasion voiced their rejection of the Afghan due to its perceived incongruence with genuine Islamic teachings. According to Taliban leaders and religious authorities behind ISK, Islamic teachings and Shariah law are not properly interpreted and understood by drafter of the Afghan

Constitution and other national legal instruments. Thus, armed groups, such as Taliban and ISK have heavily emphasize the validity of their interpretation and understanding of Islamic tenets in efforts to turn citizens of Afghanistan in armed conflict against the government forces [82]. In case of Taliban, this is not the first time their leaders and religious authorities have appealed to ‘islamizing’ character of their armed insurgency. During their five-year rule over the larger part of Afghanistan, the Taliban chose the Islamic Emirate of Afghanistan as the official name of the state. Despite the fact that this group was deposed from power in the late 2001, the Taliban guerrilla fighters have continued to use the name until the present [83]. In their attempt to legally justify widespread practice of recruitment and use of child soldiers, the group issued a manifesto-like code of conduct called the Layeha. In the period between 2006, 2009 and 2010, there appeared three amendments or editions of the Layeha - the last two editions being largely identical with the first issue of 2006, especially in regards to the prohibitions [84]. Yet, the latest edition did include some noteworthy amendments that point to the desire on the part of Taliban to clarify and refine their code of conduct [85].

The latest edition of the Layeha has some provisions regarding child soldiers showing the organization’s commitment towards prohibition of recruitment and use of children for combat. To illustrate this, Article 69 of the Layeha issued in 2010 states: “Youngsters (those without beards) are prohibited from living in mujaheddin residencies or administrative centres.” This prohibition does not directly refer to use in armed conflict. Rather, it can be viewed as a step toward prevention of another problem widely reported to have occurred among the units of parties to the armed conflict in Afghanistan - the so called bacha bazi practice, or taking young boys for sexual exploitation. This practice of taking young boys to the ranks of armed forces and armed groups is deemed unacceptable by majority of Afghans. In spite of this, it has persisted and it has been confirmed by recent studies. Moreover, in the earlier editions of the Layeha, namely the 2009 edition, Article 50 provides: “Youngsters (those without beards) are not allowed to be taken for jihad [86].” The article, thus, vaguely prohibits recruitment and use of boys for armed conflict, which is in Taliban’s usage synonymous with jihad. The prohibition is unclear as it does not specify the age to which it refers. In other words, the Taliban ambiguously chose to refer to potential underage recruits’ physical features that do not appear uniformly among the young children [87]. Interestingly, several researchers have offered their explanation of this practice that appear to exonerate the act. For example, according to Nagamine, reference to facial hair is made as it is the only way to assess the age of a young person due to absence of birth certificates in some parts of Afghanistan [88]. Furthermore, commenting on the Taliban’s prohibition of recruitment of beardless boys, Niazi Shah reads into it the prohibition of conscription of persons under fifteen, and concludes that this particular prohibition is congruent with Islamic law of armed conflict [89].



The issue of whether some beliefs and practices of present day armed groups operating in a number of Muslim countries, the likes of ISK and Taliban, is rather clear to the mainstream Muslim scholars who have clearly condemned the acts perpetrated by these armed groups, particularly suicide bombing and terrorism. As counter-arguments to some beliefs and practices of Taliban and ISK, that have attempted to justify the manner of their conduct of hostilities by referring to Islamic sources, a number of scholarly works by present-day Muslim scholars point to clear prohibitions regarding child soldiering. These injunctions are conspicuously referred to by prominent Muslim jurists in their scholarly works. Their works indicate consensus by classical and contemporary Muslim legal scholars about the age of fifteen as the lower limit for recruitment into armed forces. The evidence for this prohibition is available in several hadith books and authoritative commentaries on the hadith. To elucidate this point, Al-Dawoody in his work on jihad emphasizes that: "The jurists classified anyone who had not reached puberty or was under the age of fifteen as a child and thus the beneficiary of non-combatant immunity. The same age limit is a prerequisite for Muslims to join a Muslim army [90]." Therefore, those under the age of fifteen belong to the category of civilians and persons who must not be allowed to enlist and take part in hostilities. A number of scholars, including Al-Dawoody, point to a precedence found in the early hadith literature to show that the Prophet Muhammad (S.A.W.S.) did not allow boys younger than fifteen to voluntarily enlist into the Muslim army at the Battle of Badr, granting them permission to join the army only when they turned fifteen [91].

Other scholars have corroborated this crucial finding. For example, Elahi has come to identical conclusion in her paper on the topic of prohibition of recruitment and use of child soldiers under Islamic Law [92]. The classical legal standards concerning child soldiering that set in the early stages of Muslim community have served as the main point of reference were to the following generations of Muslims in spite of the fact that the first generation of Muslims faced chronic shortage of manpower in battles and military campaigns. For this reason, among other, the argument that necessity allows for the amendment of some legal standards is untenable. These standards are so direct an unequivocal that makes it next to impossible to contemporary Muslim scholars to supplant with contravening principles or attempt their abrogation by referring to emergency or other demands of war and internal strife. Therefore, along the line of arguments presented by aforementioned scholars, Elahi reaches the identical conclusion emphasizing that both fundamental sources of Islam, the Qur'an and the Sunnah, clearly state the prohibition of recruitment and use in combat of any persons under the age of fifteen despite the general obligation that may arise from the needs of defensive jihad [93].

Other recent studies confirm the findings about the prohibition of recruitment of under-fifteens into Muslim army and their use in armed conflict. Once again, Niaz A. Shah puts forward that the minimum age for participation in qital or armed conflict is fifteen. This conclusion is easily arrived at when one takes into consideration the practice of the Prophet Muhammad (S.A.W.S.), as recorded by one of

the most prominent hadith scholars, Bukhari, on the eve of the Battle of Uhud. Hereby, when a fourteen-year-old boy named Ibn Omer expressed his desire to enlist into the Muslim in order to take part in this battle [94], the Prophet (S.A.W.S.) did not allow not only this particular boy but all the young soldiers who were willing to enlist. In case this particular boy, Ibn Omer was granted permission to enlist and take part in another battle after a year when his age was fifteen. Niaz A. Shah concludes that the following generations of Muslim commanders did not disregard this paramount ruling of the Prophet Muhammad (S.A.W.S.), closely adhering to it in subsequent eras and military campaigns [95].

Therefore, by comparing the injunctions of the Islamic Law with those of International law excluding the OP-CRC's provision, one can conclude that the two legal regimes have nearly identical views on the prohibition of recruitment and use of persons under fifteen for armed conflict even though the justification and precise categorization of such prohibition may contain some differences [96]. To recap, major international conventions, namely the Additional Protocols to the Geneva Conventions, the CRC and the Rome Statute forbid the recruitment of persons younger than fifteen into armed conflict, while the same treaties have permissive stance on the recruitment of those older than fifteen. In a similar manner, Islamic Law states the requirements for recruitment and use in combat are maturity, being older than fifteen; being of sound mind and sufficient physical ability to ensure the hardship of armed conflict can be withstood; being a male and, in some Islamic schools of jurisprudence, having obtained parental consent to take part in combat [97]. Therefore, if any Muslim organization or armed group attempts to circumvent these clearly established legal standards of Islamic humanitarian law, there is a need to reiterate and call for full implementation of the position of primary sources of the Islamic law regarding this issue. Due to the fact that all major parties to the conflict in Afghanistan have been proven to be recruiters of persons younger than fifteen and since Afghan law upholds primacy of the Islamic law, this prohibition clearly calls for immediate enforcement. Thus, no pretext by armed forces of Afghanistan nor attempt to justify the practice from the Islamic perspective by leaders and religious authorities of armed groups, such as the Taliban, ISK, and others can be deemed valid under the Islamic Law, particularly in regards to the recruitment of under-fifteens in armed conflict and their use for perpetration of suicide bombing and acts of terrorism.

II. CONCLUSION

This relatively brief paper crystalizes into several points and findings. One of the first relevant issues coalescing from the references used for this study is the issue of extremism. Up to the period of Soviet invasion of Afghanistan, the Afghan society, madrasas and schools in general were no more imbued with extreme elements than any other Muslim country. However, once the totally alien and anti-religious



ideology was forcefully pushed into a country with strong attachment to Islamic tradition, there appeared groups who resorted to all means available to them to resist the technologically superior invaders. Hence, in the early stages of the Soviet invasion of Afghanistan, the propagation of jihad was seen as an efficient rallying call to mobilize whoever could carry an AK-47 or a similar weapon to fight against the foreign enemy. Reflecting the global balance of power of the early-1980s, the USA, some other Western European countries and Saudi Arabia with United Arab Emirates unselfishly aided the Afghan Resistance movement, known as the mujahiddin or jihad fighters. Madrasas, mosques and schools in the free areas of Afghanistan were not only allowed but encouraged to preach extremism and militancy in the shroud of jihad – a mixture hitherto unknown in Afghanistan. Among those who sided with the mujahidin, including international and local leaders and intellectuals could foresee or even care enough of what consequences a large-scale propagation of militancy in the guise of jihad would have to the future of Afghanistan.

When the Taliban wrestled power from rivaling factions in 1996, they only continued to serve the mixture of militancy and jihad to the masses, not least the underage persons through the network of madrasas, mosques and schools in general. By the end of the 20th century, the extremist teaching was firmly rooted in the significant portion of the Afghan population, particularly the youth since this section of the population did not know any other interpretation of religious and social principles. When the foreign fighters on the side of Taliban or Al Qaeda, and later on, within the ISK entered the fray, the Afghan armed conflict started to see numerous incidents of suicide bombing and terrorist attacks with child soldiers as perpetrators. The increasing number of child soldiers in the ranks of virtually all parties to the armed conflict in Afghanistan gave rise to numerous reports and studies about the phenomenon of child soldiers and child suicide bombers. The fact that international and local law, including Islamic humanitarian law do not allow recruitment and use of underage persons has either been bypassed by spurious arguments of the Taliban or completely ignored by the ISK members. The reports clearly show that captured child soldiers had been groomed for suicide bombing and terrorism in madrasas and with promises related to the afterlife, with typical elements of Islamic eschatology. Although contemporary Muslim scholars comprehensively rebuffed such abuses of religious teaching, the Taliban and ISK commanders and religious authorities obviously have not heeded this response. Therefore, in spite of clear prohibitions stated in the international and national law, and cogent arguments by Muslim scholars, the practice of recruitment and use of child soldiers in armed conflict, suicide bombing and terrorist attack has continued unabated until the present.

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