IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4788

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

IREK ILGIZ HAMIDULLIN,

Defendant –Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Richmond
The Honorable Henry E. Hudson, District Judge

SUPPLEMENTAL BRIEF OF THE UNITED STATES

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STATEMENT

On September 11, 2001, the al Qaeda terrorist organization, harbored in Afghanistan by the Taliban, attacked the United States and killed nearly 3,000 people. Joint Appendix (JA) 265. In response, U.S. and coalition forces invaded Afghanistan, removed the Taliban from the parts of Afghanistan it controlled, and drove its leaders and fighters into hiding. JA 266. The only three countries that had recognized the Taliban as the government of Afghanistan – Saudi Arabia, Pakistan, and the United Arab Emirates – withdrew that recognition following the September 11 attacks. JA 276. No country has recognized the Taliban since. JA 276. In 2002, the United Nations (UN) Security Council and the UN General Assembly recognized a new government, headed by Hamid Karzai, as the sole, legitimate government of Afghanistan. JA 269-70; 314-15.

After its leaders and fighters were forced into hiding, the Taliban began a campaign of violent attacks against the internationally recognized and democratically elected Afghan government and a UN Security Council-authorized international security assistance force supporting it. JA 212, 268, 987. During that campaign, the Taliban have intentionally killed countless civilians. JA 232-49. A series of UN General Assembly resolutions have condemned the Taliban's "criminal" and "terrorist" activities against the government. JA 265, 273-75.

In 2009, the defendant Irek Hamidullin, a former Russian Army officer, led an attack on Afghan Border Police officers in Khost Province, Afghanistan, on behalf of the Taliban and its terrorist organization ally, the Haqqani Network. Hamidullin fired on coalition forces helping the Afghan police, but the coalition forces shot and captured him. JA 1186-89, 1421-24, 1479-81.

ARGUMENT

Hamidullin is not a lawful combatant entitled to immunity from criminal prosecution for attacking U.S. soldiers and Afghan police officers. Two independent reasons support that conclusion. First, prisoner-of-war (POW) protections under the Third Geneva Convention (GPW),[1] including combatant immunity, apply only in the context of an international armed conflict within the meaning of GPW Article 2. At the time of Hamidullin's attack, the armed conflict between the Taliban and Haqqani Network on one side, and the Afghan government and coalition partners (including the United States) on the other, was not an international armed conflict because it was not a conflict between two or more States. Second, even if Hamidullin had been captured in an international armed conflict, he would not qualify for combatant immunity because the Taliban

[1] *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 1956 WL 54809 (U.S. Treaty 1956) (GPW).

and Haqqani Network do not satisfy the requirements in GPW Article 4(A)(1), (2), or (3) that an armed force must meet for its members to be entitled to immunity. The Taliban and Haqqani Network do not satisfy the criteria because, among other things, they systematically and flagrantly violate the laws and customs of war.

I. By 2009, the Afghanistan Conflict Was Non-International

The POW protections under the GPW apply in armed conflicts "which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GPW art. 2, ¶ 1. Accordingly, as explained in detail in the government's response brief, POW protections and combatant immunity apply only in *international* armed conflicts, and, at the time of Hamidullin's attack, the conflict between the United States and the Taliban was *non-international*. *See* Gov't Br. 27-31; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a "conflict not of an international character"); *United States v. Shakur*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988) (holding that the GPW did not apply to defendants who asserted combatant immunity based on affiliation with a provisional government that was not a "High Contracting Party" under Article 2). Even assuming the Taliban was responsible for Afghanistan's obligations as a "High Contracting Party" when the conflict began in 2001, by 2009 the internationally recognized and legitimate

government of Afghanistan led by Hamid Karzai was responsible for Afghanistan's obligations as a "High Contracting Party," and the Taliban was a non-State insurgent group unlawfully rebelling against it. JA 314-15.

Hamidullin does not dispute that by 2009 the Taliban was not recognized as a State and did not *de facto* govern Afghanistan.[2] Instead, he contends that the Taliban *was* the *de facto* government in 2001 when hostilities with the United States began, and, as such, the Taliban must be treated as a State in an international armed conflict with the United States until hostilities cease. However, as explained below, Hamidullin's premise – that an international armed conflict cannot become a non-international armed conflict without an intervening cessation of hostilities – is incorrect.

Hamidullin cites no case and provides no convincing rationale in support of his extraordinary contention that a conflict's nature is fixed forever, such that an international conflict can never become non-international, regardless of changes in the parties' status. *See* DoD Law of War Manual § 3.1 (2016) ("[A]n international

[2] Any argument that the Taliban in 2009 was a "state" under international law would plainly fail. A sovereign state must have a defined territory, a permanent population, its own government, and engage in, or have the capacity to engage in, formal relations with other states. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.21 (D.C. Cir. 1984) (Edwards, J., concurring). The Taliban in 2009 did not satisfy any of these criteria. *See* JA 277, 314-15.

armed conflict may change into a non-international armed conflict.").[3] Hamidullin's argument is inconsistent with the views of the United States and its coalition partners, the Supreme Court of the United Kingdom, the International Committee of the Red Cross (ICRC), and many law-of-war experts. Those authorities have recognized that the conflict in Afghanistan was initially an international conflict, but, after the Karzai government was recognized, the conflict between the new government (assisted by the U.S.-led coalition) and the Taliban insurgency became a non-international armed conflict. *See*, *e.g.*, JA 314-15 (testimony of Col. Hays Parks); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 19, 32 (2016) (White House Report) (stating that the United States is currently engaged only in non-international armed conflicts);[4] *Serdar Mohammed v. Ministry of Defence*, 2017 UKSC 2, ¶ 322 (Jan. 17, 2017) (Lord Reed, dissenting) (recognizing as "common ground" that the conflict in Afghanistan in 2006 was non-international); ICRC, *International Humanitarian*

[3] *See also* Gary Solis, *Law of Armed Conflict: International Humanitarian Law in War* 154 (2010) ("Because the law of armed conflict is not static, what might commence as an international armed conflict can quickly transform into a non-international armed conflict, or vice versa.").

[4] The White House Report is filed in this case as an attachment to the government's Fed. R. App. P. 28(j) letter filed December 14, 2016.

Law and the Challenges of Contemporary Armed Conflicts 10 (2011) (explaining that the conflict in Afghanistan "must be classified as non-international . . . (*even though that armed conflict was initially international in nature*) . . . [because] all the state actors are on the same side") (emphasis added); Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 Emory Int'l L. Rev. 87, 126 (2012) (explaining that after "the establishment of the Karzai government, it was generally recognized that the conflict became a non-international armed conflict between the Karzai government and the United States on one side and insurgent Taliban forces on the other.").

Thus, contrary to Hamidullin's argument, a conflict that was initially international may become non-international when a new government is recognized and multi-national forces assist it in combating an insurgency fighting under the aegis of the former regime. That pattern represents the governing legal framework for the post-9/11 armed conflicts in both Afghanistan and Iraq, as numerous authorities have recognized. *See, e.g.*, *Serdar Mohammed*, 2017 UKSC 2, ¶ 244 ("Although the conflict in Iraq began as an international armed conflict . . . a multi-national force . . . remained there after that war had concluded and a new Iraqi Government had been established, so as to assist the Iraqi Government in

combating insurgents. . . . Similarly, when an international security assistance force . . . assisted the Government of Afghanistan in its struggle against the Taliban, that also was a non-international armed conflict."); David Wallace, Amy McCarthy, Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 Mich. St. Int'l L. Rev. 555, 584–85 (2017) (explaining that the 2003 invasion of Iraq was initially an "international armed conflict," but that when the United States passed control to an interim Iraqi government in 2004, "the ongoing hostilities became a non-international armed conflict"). None of these authorities suggest that an intervening break in hostilities is required before an international conflict can become non-international, particularly where, as in both Afghanistan and Iraq, a new government achieves international recognition, governs the country as a matter of fact, and then, with assistance of international forces, fights against insurgent members of the former regime.

Hamidullin contends (Opening Br. 24-26) that a State should not lose its immunity merely because the opposing State decides not to recognize it. But the conclusion that the conflict was non-international in 2009 does not rest only on the fact that the United States did not recognize the Taliban. Rather, in 2009, *no country* recognized the Taliban, it was not the *de facto* government, and there has

been no argument that it satisfied the international law criteria for statehood. Instead, the world had long since recognized the Karzai government as the sole, legitimate government of Afghanistan, and that government *de facto* controlled Afghanistan's major population centers, despite the Taliban's indiscriminate, brutal targeting of all persons, civilian or military, tied to the government.[5]

Hamidullin provides no convincing rationale for his purported requirement that "once an international conflict, always an international conflict." Combatant immunity is a privilege reserved for members of forces acting under the authority of States, and it makes no sense to construe the GPW to require States to afford such immunity to non-state insurgent groups like the Taliban merely because the group previously controlled parts of a State. Hamidullin's interpretation would require the United States and its coalition partners to treat lawless Taliban insurgents, many of whom are responsible to no one but themselves, JA 220, as if they were regular forces responsible to and controlled by a recognized State. *See*

[5] Hamidullin contends (Opening Br. 25) that the Taliban are analogous to the Free French, whose forces were considered lawful belligerents even though the Nazis had deposed the former French government. The analogy is inapt – the Free French forces could generally be considered co-belligerents with the Allies in a conflict with sovereign states on both sides, *i.e.*, an international armed conflict. The Taliban could more accurately be compared to members of the former Vichy government if, many years after the French republic was restored after the war, they continued waging a violent insurgency, violating the laws of war but claiming immunity based on the Vichy regime's short tenure as the *de facto* government.

Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) (reasoning that non-state actors cannot be parties to international armed conflicts because they "cannot sign an international treaty" or "secure protection by complying with the [GPW's] requirements"). And the Taliban as a group would be particularly unworthy beneficiaries of Hamidullin's proposed extension of combatant immunity to insurgent forces. As the record below establishes, the Taliban committed major atrocities while it controlled parts of Afghanistan, it lost the scant international recognition it had previously attained after the September 11 attacks, and it has continued flouting the laws of war to this day. JA 232-38, 276.

II. Hamidullin Is Not Entitled to Combatant Immunity Because the Taliban Do Not Comply with the Requirements of GPW Article 4

Even assuming that the conflict in Afghanistan was international as of 2009, the district court correctly held that Hamidullin was not entitled to immunity because the Taliban did not satisfy the criteria in GPW Article 4 that a military organization must meet for its members to qualify as lawful combatants.[6] The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps that belong to a party to the armed conflict (*i.e.*, that are acting under the

[6] This brief uses the terms "prisoner of war" (POW) and "lawful combatant" interchangeably. As relevant here, a member of an organization that satisfies the requirements in either Article 4(A)(1), (2), or (3) would be entitled to POW protections and be considered a lawful combatant.

authority of a State) are eligible for POW status only if the group in question (1) is commanded by a person responsible for his or her subordinates; (2) displays "a fixed distinctive sign;" (3) "carr[ies] arms openly;" and (4) "conduct[s] [its] operations in accordance with the laws and customs of war." GPW art. 4(A)(2).

Hamidullin does not dispute that the Taliban has consistently acted in flagrant defiance of the laws of armed conflict. Instead, Hamidullin contends (Reply Br. 22-23) that this does not matter because he did not personally violate the laws of armed conflict during the attacks for which he was convicted. As our prior filings explain (Gov't Br. 43-44; Gov't Supp. Br. 9-11), the relevant inquiry focuses on the overall characteristics of the Taliban, not the personal conduct of individual Taliban members. That conclusion is supported by the GPW's text, which refers to organizations, not individuals. *See* GPW art. 4(A)(1) (referring to "armed forces"); *id.* art. 4(A)(3) (same); *id.* art. 4(A)(2) (referring to "militias" and "other volunteer corps"). In addition, the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. *See United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002) ("[w]hat matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so");

United States v. Pineda, No. 04-232, 2006 WL 785287, at *3 (D.D.C. Mar. 28, 2006) ("[T]he Court is unpersuaded that the defendant would qualify as a prisoner of war because FARC fails to meet the Geneva Convention's definition of a lawful combatant"); *United States v. Hausa*, No. 12-cr-0134, 2017 WL 2788574, at *6 & n.6 (E.D.N.Y. Jun. 27, 2017) (holding that the lawful combatant immunity defense did not apply to defendant because al Qaeda as an organization did not satisfy Article 4's criteria); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917-18 (N.D. Ill. 2003) (same). Finally, if an individual could comply with Article 4 merely by refraining from personally violating the laws of war, the Article 4 criteria would be superfluous because the combatant immunity defense is already limited to *lawful* acts of war. *See Lindh*, 212 F. Supp. 2d at 553.

III. Extending Combatant Immunity to the Taliban Would Have Significant and Deleterious Effects on Ongoing Military Operations in Afghanistan

Hamidullin contends (Opening Br. 14) that the district court's refusal to extend combatant immunity to the Taliban amounts to a "radical conceit" because it implies that "only one side of an ongoing war is authorized to shoot." But there is nothing novel or "radical" about the principle that the combatant immunity defense does not protect members of forces that neither act under the authority of a State nor comply with the laws of war. Indeed, that principle is firmly rooted in the customary international law of war. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 30-

31 (1942); *Lindh*, 212 F. Supp. 2d at 553-54 & n.24. The Taliban has not accepted or applied the provisions of the GPW, but has instead openly flouted them by systematically defying the laws of armed conflict. As a result, the GPW's protections do not extend to them. *See Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention.").

Hamidullin's claim boils down to a demand that Taliban and Haqqani Network members be treated as if they were a legitimate State's regular armed forces that conducts operations in compliance with the laws of war. But they are not a legitimate State's regular armed force and fail to comply with the laws of war, as the district court found with overwhelming support in the record. *See, e.g.*, JA 227-49. For example, they target and kill civilians, including through suicide bombings using the mentally handicapped and children, JA 233-34, 242-43, summarily execute POWs and police officers, including through beheadings, JA 227-29, and target Afghan voters and cut off fingers when voters seek to select a legitimate government through peaceful means, JA 236, 245-46. As the U.S. State Department reported, 67% of all civilian casualties in 2009 were attributed to the Taliban, JA 242, and indeed, the Haqqani Network has been less discriminate

than the Taliban in targeting civilians and much more brutal, JA 223. Thus, the "radical conceit" in this case is Hamidullin's contention that this Court should extend combatant immunity to a fighter belonging to a brutal non-State insurgent group (the Taliban) and a terrorist organization (the Haqqani Network), overriding the express terms of the GPW and the specific, wartime determination of the Commander-in-Chief.

Extending combatant immunity to non-State groups who flout the laws of war would discourage States from joining and honoring the GPW, undermining the important humanitarian purposes it is designed to serve. Adopting Hamidullin's arguments would also usurp the exclusively Executive power to determine whether a foreign group should be recognized as a lawful belligerent. *See The Prize Cases*, 67 U.S. 635, 670 (1862) (whether to recognize enemy belligerents is "a question to be decided by [the President], and this Court must be governed by [his] decisions"); *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("recognition of belligerency abroad is an executive responsibility" that "defies judicial treatment"); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns."). Here, the Executive Branch, acting with the agreement of Congress,[7] has specifically

[7] *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No.

determined that members of the Taliban are not entitled to POW protections, including combatant immunity, and that, accordingly, they may properly face prosecution in Article III courts for attacks on U.S. forces. To be sure, the judicial branch must render its own decision on the availability of immunity to criminal charges here. But a joint judgment of the political branches in this arena is entitled to the utmost deference from this Court. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

Finally, affording combatant immunity to the Taliban would significantly undermine the consistent legal framework that the United States and its coalition partners have long relied on in conducting the ongoing armed conflict in Afghanistan. The United States and its partners currently apply the legal framework for non-international armed conflicts in Afghanistan and treat the Taliban as a non-State insurgent group whose members may lawfully be prosecuted in Afghan or U.S. criminal courts for insurgent activity. *See* White House Report at 19. The government of Afghanistan, supported by the United States, has conducted thousands of criminal prosecutions of Taliban members for

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112-81, §§ 1021, 1029, 125 Stat. 1562, 1569 (2011) (reaffirming the Executive Branch's authority to detain Taliban members engaged in hostilities against the United States and to transfer such detainees to civilian custody for trial in Article III courts).

insurgent activity, and that process is a vital part of the effort to defeat the insurgency and to bring increased stability and peace to Afghanistan. *See* David Kris, *Law Enforcement as an Effective Counterterrorism Tool—Pragmatism and Perception*, National Security Investigations and Prosecutions § 24:7 (2016) (describing the U.S. military's goal of transferring detention and prosecution responsibilities for insurgents to Afghan civilian authorities) (citing General Stanley McChrystal, then Commander, Int'l Sec. Assistance Force (ISAF), Joint News Briefing with Ambassador Mark Sedwill, NATO Representative in Afghanistan (Mar. 17, 2010); U.S. Dep't of Defense, *Report on Progress Toward Security and Stability in Afghanistan*, 74 (Oct. 2014) (explaining that the United States and Afghanistan have created "an enduring National Security Court with Afghan judges, prosecutors, defense counsel, and criminal investigators . . . to prosecute Afghans who were detained by U.S. forces under the law of war . . . The court has tried more than 7,200 cases [as of September 30, 2014] and achieved a 75 percent overall conviction rate."). The unprecedented expansion of the combatant immunity doctrine Hamidullin advocates here would call into question whether, consistent with international law, the Afghan government could continue to use its domestic criminal justice system to prosecute Taliban insurgents, thereby implicating the legitimacy of ongoing U.S. wartime operations.

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Certificate of Service and Compliance

I certify that on September 11, 2017, I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all counsel of record. I also certify that this brief complies with the formatting and length restrictions that this Court ordered.

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