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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

14 Cr. 401 (KPF)

5 HAJI NAJIBULLAH,

6 Defendant.

7 -----x

Hearing

8 New York, N.Y.
9 August 8, 2024
10:10 a.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS
16 United States Attorney for the
17 Southern District of New York
18 DAVID ROBLES
19 SAMUEL ADELSBERG
20 JACOB GUTWILLIG
21 Assistant United States Attorneys

22 FEDERAL DEFENDERS OF NEW YORK INC.
23 Attorneys for Defendant

24 ANDREW DALACK
25 ARIEL WERNER
MARK GOMBINER
SAMUEL JACOBSON

ALSO PRESENT:
Tofan Dawarzai, Interpreter (Pashto)
Naim Saidi, Interpreter (Pashto)
Malcolm Hanchet, Paralegal (USAO)
Rebecca Reid, Paralegal (Defense)

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1 (In open court; case called)

2 THE DEPUTY CLERK: Please state your name for the
3 record, starting with the government.

4 MR. GUTWILLIG: Jacob Gutwillig for the government.
5 And I am joined by my colleagues, David Robles, Sam Adelsberg,
6 and Malcolm Hanchet.

7 THE COURT: Good morning.

8 Mr. Dalack.

9 MR. DALACK: Andrew Dalack, from the Federal
10 Defenders, alongside Ariel Werner and Samuel Jacobson, on
11 behalf of Mr. Najibullah.

12 Mr. Gombiner may arrive, but if he does, we are not
13 going to wait.

14 THE COURT: I look forward to his possible arrival.
15 Thank you.

16 Just while I have everyone together, let me ask a
17 couple of questions.

18 I don't expect, but I don't know, that classified
19 information might make its way somehow into here. I don't
20 think it will. But I have spoken to our CISO, Dan Hartenstine.
21 He is in town to meet with another judge on another matter. He
22 is available by phone if for some reason we need him. So I am
23 just keeping that in everyone's minds. He, like Mr. Gombiner,
24 may pop in for all of this.

25 All right. Mr. Dalack, I think I understood from the

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1 government that the defense was acceptable with the government
2 proceeding first; is that correct?

3 MR. DALACK: Yes, Judge. To clarify, the parties do
4 not agree as to whose burden it is.

5 THE COURT: Of course. That I did know, yes.

6 MR. DALACK: And so we appreciate the government's
7 willingness to go first, notwithstanding their position that
8 it's our burden, and we are happy to sort of address the burden
9 issue briefly if your Honor would like.

10 THE COURT: I think I know what it is. We can talk
11 about it later. I don't think it impacts the order here. But
12 perhaps there is something else you would like me to know.

13 MR. DALACK: We do have our testifying expert,
14 Professor Rachel VanLandingham, in the courtroom. We think
15 it's appropriate to have her present for the government's
16 expert testimony, and we just wanted to flag that for the
17 Court.

18 THE COURT: I was under the impression that all of the
19 experts could remain in the courtroom, insofar as they may be
20 asked questions about a prior expert's testimony or something
21 else. So unless anyone had an objection to that, my thought
22 was to let them all remain in the courtroom this morning.

23 Is there an objection from the government?

24 MR. GUTWILLIG: We have no objection.

25 Also, our second expert, Barclay Adams, may also join

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1 and sit in the courtroom during the testimony as well.

2 THE COURT: Thank you.

3 Mr. Dalack, you have no objection?

4 MR. DALACK: Of course.

5 THE COURT: Before we started with these housekeeping
6 matters, I should have confirmed with your client that he could
7 hear and understand what is going on.

8 So, Mr. Dalack, with your permission, I will ask him
9 directly.

10 MR. DALACK: Yes, your Honor.

11 THE COURT: Good morning, sir.

12 THE DEFENDANT: Good morning to you.

13 THE COURT: Sir, you are receiving assistance at this
14 time from a Pashto-language interpreter. If at any time you
15 cannot hear or cannot understand what is being said, please let
16 me know, or let your attorneys know, so that we can stop the
17 proceedings and ensure that you're able to hear what is going
18 on.

19 Have you been able to hear and understand what I have
20 said so far, sir?

21 THE DEFENDANT: I understand, your Honor.

22 THE COURT: All right. Thank you very much.

23 Let's do this. Let the government please call its
24 first witness.

25 MR. GUTWILLIG: The government calls Christopher

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1 Jenks.

2 THE COURT: Mr. Jenks, please come forward.

3 Counsel, I was just using the honorifics Mr. and
4 Ms. and not professor. But if you want me to be formal, I can
5 refer to him as professor.

6 MR. GUTWILLIG: I am going to refer to Mr. Jenks as
7 Professor Jenks during his testimony.

8 THE COURT: Professor Jenks, please come forward.

9 MELVIN CHRISTOPHER JENKS,
10 called as a witness by the government,
11 having been duly sworn, testified as follows:

12 THE DEPUTY CLERK: Please state your full name for the
13 record and spell it.

14 THE WITNESS: Melvin Christopher Jenks, M-e-l-v-i-n,
15 C-h-r-i-s-t-o-p-h-e-r, J-e-n-k-s.

16 THE COURT: Sir, thank you and welcome.

17 Let me ask counsel a question. In this hearing, does
18 each side contemplate having some discussion with their
19 respective witnesses about their qualifications in the service
20 of seeking to qualify them as experts? And if so, does either
21 side actually object to qualifying the other side's witnesses
22 as experts? I hate to have you skip over something that was so
23 carefully prepared, but I just don't know that we need it.

24 May I have your view?

25 MR. GUTWILLIG: We were going to go through it, and we

1 don't object to the qualification of the defense's expert.

2 MR. DALACK: Likewise, your Honor. We have no
3 objections to the qualifications of the government's experts.

4 THE COURT: Then I deem all of them to be qualified
5 based on the representations that have been made to me and
6 based on the CVs that I have received in advance.

7 You may proceed. If you have some background
8 questions you need to ask, please do, but then let's go into
9 the meat of this. Thank you so much.

10 MR. GUTWILLIG: Perhaps just a couple of questions to
11 orient everyone, and we will skip over the rest of it.

12 THE WITNESS: Your Honor, apologies to the Court and
13 to the audience. I have a lingering cough. I am just
14 apologizing in advance for what I expect will be some
15 intermittent annoying coughs.

16 THE COURT: We are sorry to hear that you're not
17 feeling a hundred percent, and we will all understand that.
18 Thank you.

19 DIRECT EXAMINATION

20 BY MR. GUTWILLIG:

21 Q. Good morning, Professor Jenks.

22 A. Good morning.

23 Q. As you heard, the Court has already qualified you as an
24 expert on the law of armed conflict. I will just ask a couple
25 of orienting questions before we get into the substance.

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1 Where do you currently work?

2 A. I work in the Pentagon, in Washington, D.C.

3 Q. What is your role there?

4 A. I serve as the Army Judge Advocate General Corps Senior Law
5 Advisor.

6 Q. At a high level, what is it that you do in that role?

7 A. I am the principal advisor to the Army Lawyer Generals who
8 run the Army JAG Corps.

9 Q. Do you hold any other positions right now?

10 A. I do. I hold both an academic position at SMU Dedman
11 School of Law and a series of fellowship or executive board
12 positions at law of war entities both in the United States and
13 in Europe.

14 Q. So if it's okay with you, sir, I will call you Professor
15 Jenks today?

16 A. Okay.

17 Q. Approximately how long have you been a professor where you
18 have been a professor?

19 A. Since 2012.

20 Q. Prior to that, were you in military service?

21 A. Yes, for 20 years. So 1992 to 2012.

22 Q. What were your roles in the military?

23 A. Essentially, that 20 years was almost equally divided
24 between ten years as a combat arms officer, as an infantry
25 officer, and ten years as an Army lawyer.

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Jenks - Direct

1 Q. My last question here is, in your present role, is that a
2 civilian role?

3 A. It is.

4 Q. You retired in the military in approximately what year?

5 A. 2012.

6 Q. So I would like to get into the substance now.

7 I would like to talk briefly about the background to
8 the 1949 Geneva Conventions.

9 So, in general, Professor Jenks, what is the genesis
10 of what is now I will call the 1949 Conventions?

11 A. The 1949 Conventions are the capstone, if you will, of a
12 series of Geneva Conventions that began in 1864.

13 Q. What happened in 1864?

14 A. 1864 was the first Geneva Convention, where a group of 12
15 states met in Geneva and agreed to international law, to a
16 treaty, to ameliorate the conditions for wounded and sick on
17 the battlefield.

18 Q. Were there any particular organizations involved in that
19 discussion in 1864?

20 A. Yes. The 1864 Convention was the result of -- well,
21 negotiations that were called for by an organization, by the
22 International Committee of the Red Cross, which had only been
23 formed the year prior.

24 Q. And historically, what role, if any, has the International
25 Committee of the Red Cross, which I will just call the ICRC for

1 shorthand, had in drafting and interpreting various Geneva
2 Conventions over the years?

3 A. Well, as I indicated, the International Committee of the
4 Red Cross is the origins of the Geneva, is the Geneva
5 Conventions. They led to the states coming together to develop
6 the first Geneva Convention, and at various times since 1864,
7 have assisted and prompted the expansion and refinement of the
8 conventions.

9 Q. So, fair to say, then, that the ICRC is, at a minimum, a
10 persuasive source in interpreting the conventions?

11 A. Yes.

12 Q. Following 1864, did there come a time that another
13 iteration of the Geneva Conventions was passed?

14 A. Yes.

15 Q. When was that?

16 A. 1906.

17 Q. What happened in 1906?

18 A. 1906, following a series of armed conflicts between 1864
19 and the turn of the century, it was thought by the ICRC and
20 states that it was time to revisit, review, and revise the 1864
21 Convention.

22 Q. And then moving ahead again, after 1906, did there come a
23 time where a new version of the conventions was passed?

24 A. Yes.

25 Q. When was that?

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Jenks - Direct

1 A. 1929.

2 Q. What was the context, generally, in which the 1929 Geneva
3 Conventions were passed?

4 A. Well, in between 1906 and 1929 was, of course, the First
5 World War.

6 Q. Perhaps passed isn't the correct term, but approximately
7 how many countries ratified the 1929 Geneva Conventions?

8 A. Roughly, 52.

9 Q. Did that reflect a majority of the nations in the world?

10 A. Not even.

11 Q. So, approximately?

12 A. Less than half the countries in the world ratified the 1929
13 Conventions.

14 Q. And did any non-states ratify the 1929 Geneva Conventions?

15 A. No.

16 Q. So, moving ahead, when was the 1949 Geneva Convention
17 ratified, passed, however you'd like to call it?

18 A. In terms of ratified, at various points by different
19 states, but it was open for signature beginning in 1949.

20 Q. And is that the presently operative version of the Geneva
21 Conventions?

22 A. Yes.

23 Q. What was the context in which the 1949 Geneva Conventions
24 were passed?

25 A. The aftermath of the Second World War, and maybe to a

1 lesser extent, the Spanish Civil War.

2 Q. And approximately how many countries have ratified the 1949
3 Geneva Conventions?

4 A. 196.

5 Q. Are there any countries that have not ratified the present
6 Geneva Conventions?

7 A. No.

8 Q. Have any non-states ratified the present Geneva
9 Conventions?

10 A. No.

11 Q. So, briefly, at a high level, what constitutes what I am
12 calling for shorthand as the 1949 Geneva Conventions?

13 A. The 1949 Geneva Conventions are four stand-alone, separate,
14 technically, treaties. The first convention deals with the
15 wounded and sick; the second convention is wounded and sick at
16 sea; the third convention on prisoners of war; and the fourth
17 convention civilians.

18 Q. So, today I would like to focus on the prisoner of war
19 convention, so the Third Geneva Convention of 1949.

20 So, I would like to pause here. At a high level, in
21 what circumstance do the Geneva Conventions apply?

22 A. So, the trigger for the application of the Geneva
23 Convention is the existence of an armed conflict.

24 Q. And do the entirety of all four of the 1949 Geneva
25 Conventions apply to every armed conflict?

1 A. No.

2 Q. Do different portions of the convention, and now I am just
3 using shorthand, 1949 Convention, apply based on the type of
4 conflict?

5 A. Yes.

6 Q. What are the types of conflicts?

7 A. International and non-international.

8 Q. I will refer to those as shorthand as IAC for international
9 armed conflict and NIAC for non-international armed conflict.

10 I would like to talk now about some specific articles
11 of the Third Geneva Convention, so the prisoner of war
12 convention.

13 Beginning with Article 3, in general, what is Article
14 3?

15 A. Article 3 is an article dedicated to a non-international
16 armed conflict.

17 Q. But, in general, what is the function of Article 3 in kind
18 of plain spoken terms?

19 A. Article 3 is referred to as really a mini-convention, in
20 and of itself, in terms of providing a host of protections to
21 persons no longer participating in hostilities, or who have
22 been detained.

23 Q. So, fair to say that Article 3 is kind of the minimum bar
24 of protections operative in any conflict?

25 A. Yes.

1 Q. Okay. And the Article 3 protections, just at a high level,
2 what are the Article 3 protections?

3 A. So, the Article 3 protections are intentionally more
4 general than the somewhat explicit protections throughout the
5 rest of the convention. But they are the core fundamental
6 protections still down, protections against deprivations of
7 life, protections against cruel, inhumane, depraved treatment,
8 and torture, among several others.

9 Q. Are Article 3 protections satisfied by process in a federal
10 court?

11 A. Yes.

12 Q. Does Article 3 contain any provisions for prisoners of war?

13 A. No.

14 Q. So, now let's take a step back to Article 2 of the 1949
15 Convention, the Third Geneva Convention.

16 In general, what is the purpose of Article 2?

17 A. The purpose of Article 2 is to dictate whether or not the
18 entirety of the convention applies, the scope of application.

19 Q. What is the way that the scope of application is
20 determined?

21 A. By whether or not there is an international armed conflict.

22 Q. So, Article 2, then, is the way by which one determines
23 whether there is an international armed conflict or a
24 non-international armed conflict, right?

25 A. Yes.

1 Q. So, now moving to Article 4. In general, what is the
2 purpose of Article 4 of the 1949 Third Geneva Convention?

3 A. Article 4 is a categorical list of potentially qualifying
4 for prisoner of war status.

5 Q. Can you explain just a little bit by what you mean by a
6 categorical list?

7 A. Sure.

8 So, Article 4 details six categories or classes of
9 groups for which, if you qualify, if the group qualifies, would
10 be entitled to prisoner of war status.

11 Q. So, in general, six pathways, one could potentially qualify
12 for prisoner of war protections?

13 A. Yes.

14 Q. If an armed conflict is not an international armed conflict
15 under Article 2, can Article 4 even apply?

16 A. No.

17 Q. So, now to Article 5. In general, what is the purpose of
18 Article 5?

19 A. The purpose of Article 5 is to resolve cases of doubt for
20 when -- the purpose of Article 5 is to resolve cases of doubt
21 involving whether or not an individual falls into an applicable
22 category or classification from Article 4.

23 Q. When you say falls into a particular category, what do you
24 mean by that?

25 A. So, we were just discussing again the classifications or

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1 categories from Article 4. So Article 5 is for instances where
2 you have an individual and you are unsure whether or not they
3 fit into one of the categories or classifications from 4.

4 Q. So, the inquiry of Article 5 is whether an individual is a
5 member of a particular group?

6 A. Correct.

7 Q. And, in practice, how does Article 5 work mechanically?

8 A. Within at least the Department of Defense or the Army, a
9 three-member panel or tribunal.

10 Q. And a three-member panel or tribunal composed of whom?

11 A. Service members.

12 Q. What does that panel determine?

13 A. Determine whether or not the individual fell into a
14 category eligible for prisoner of war status under Article 4.

15 Q. So, is it fair to say then that the Article 5 function is a
16 bucketing one for purposes of categorizing people?

17 A. Yes.

18 Q. And, in your expert opinion, is it uncertainty as to
19 whether a particular person gets prisoner of war protections?

20 A. No.

21 Q. In practice, based on your experience with this, would
22 there be issues if a three-person panel composed of service
23 members were making such a determination?

24 A. Absolutely.

25 Q. Why would that be a problem?

1 A. At least it would potentially be a problem because you
2 would run the risk of different tribunals coming to different
3 results of members of the same organization, and that shouldn't
4 happen. Members of a certain group should either -- a certain
5 group is either eligible for prisoner of war status or they are
6 not.

7 Q. Just generally here, during the conflict in Afghanistan,
8 did the U.S. military detain members of the Taliban?

9 A. Yes.

10 Q. To your knowledge, by either a military or civilian court,
11 has the Taliban ever been deemed a group that is eligible for
12 prisoner of war status under the Geneva Conventions?

13 A. It is not.

14 Q. Now I would like to look at the text of the conventions.

15 MR. GUTWILLIG: Mr. Hanchet, if you could pull up
16 Government Exhibit 119.

17 Q. Professor Jenks, is your screen working?

18 A. Yes.

19 Q. If you need a paper copy of anything, just let me know.

20 THE COURT: I also have the set here as well.

21 Q. So I would like to go through the text of some of these
22 articles here. So I am showing you what is marked as --

23 THE COURT: One moment, please.

24 Mr. Dalack, does the defense object to any of the
25 proposed government exhibits?

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1 MR. DALACK: No, your Honor.

2 THE COURT: May I admit them as a group at this time?

3 MR. DALACK: Yes, Judge.

4 THE COURT: Similarly, does the government object to
5 any of the defense's proposed exhibits?

6 MR. GUTWILLIG: No, your Honor.

7 THE COURT: All of the exhibits are therefore admitted
8 without objection from other side. And you don't have to do
9 the foundational questions, you can get to the questions of
10 substance.

11 MR. GUTWILLIG: Thank you, your Honor.

12 BY MR. GUTWILLIG:

13 Q. So, Professor Jenks, I am showing you here a copy of the
14 1949 Third Geneva Convention. Do you recognize that?

15 A. Yes.

16 Q. So, you testified earlier that the purpose of Article 2 of
17 this convention is to determine whether something is an
18 international or a non-international armed conflict.

19 Let's look at the text of Article 2.

20 Can you let me know when you see that on your screen,
21 please.

22 A. Okay.

23 Q. So, just looking now at Article 2, how many paragraphs are
24 there in Article 2?

25 A. Three.

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1 Q. In general, what does each paragraph represent?

2 A. Each paragraph represents three possible doors or triggers
3 for an international armed conflict.

4 Q. And we will go through this in more detail, but at a high
5 level, did the conflict in Afghanistan in approximately 2008
6 meet any of the three criteria here for establishing an
7 international armed conflict?

8 A. It did not.

9 Q. So, let's start with the first paragraph. I am looking
10 here at the paragraph that begins, "In addition to the
11 provisions which shall be implemented in peacetime, the present
12 convention shall apply to all cases of declared war," and ends
13 with "not recognized by one of them." Do you see that?

14 A. Yes.

15 Q. This paragraph references a term "high contracting
16 parties." Under the Geneva Conventions, what is a high
17 contracting party?

18 A. A high contracting party is a state that has agreed, has
19 ratified the Geneva Conventions, agreed to be bound, and for
20 which the Geneva Conventions is operative.

21 Q. In general -- or not in general, I guess. How many
22 countries are high contracting parties to the Geneva
23 Conventions?

24 A. 196.

25 Q. The same number that have ratified the convention?

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1 A. Yes.

2 Q. Does a country, once it becomes a high contracting party,
3 does that status ever go away for the country?

4 A. No.

5 Q. Meaning, for example, in the United States, regardless of
6 whether democrats or republicans are in elected office, the
7 United States remains a high contracting party to the Geneva
8 Conventions?

9 A. Correct.

10 Q. Let's talk about this in the context of Afghanistan and the
11 Taliban.

12 In 2001, was the country of Afghanistan a high
13 contracting country?

14 A. Yes.

15 Q. Has Afghanistan, the country, remained a high contracting
16 party to the present day?

17 A. Yes.

18 Q. In 2001, was the Taliban the government of Afghanistan?

19 A. Yes.

20 Q. And did there come a time where that changed?

21 A. Yes.

22 Q. Approximately when and how did that change?

23 A. There are different estimates ranging from as early as late
24 2001 to as late as fall of 2004. I would say the majority view
25 is summer of 2002 with the loya jirga recognition of the Karzai

1 government.

2 Q. Can you explain a little bit more why that point of time is
3 the majority view?

4 THE COURT: Sir, there is a term that you used that is
5 not common. Can you spell that term?

6 THE WITNESS: Loya jirga, L-O-Y-A, J-I-R-G-A.

7 A. The significance of the summer of 2002 I think is
8 multifold. One, you have the International Committee of the
9 Red Cross recognizing a transition in armed conflict from
10 international to non-international. You also have actions by
11 the United Nations Security Council. So there is a series of
12 different actions by international organizations that focus on
13 summer of 2002.

14 Q. So the majority view is that by the summer of 2002, the
15 Taliban was no longer the government of Afghanistan; is that
16 correct?

17 A. Correct.

18 Q. In all events, was the Taliban the government of
19 Afghanistan in approximately 2008?

20 A. No.

21 Q. I would like to show you what is marked as Government
22 Exhibit 115.

23 Please let me know when that's up on your screen.

24 A. Yes.

25 Q. What is this document here?

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1 A. This is a Report of the United Nation Special Rapporteur on
2 Extrajudicial Summary or Arbitrary Executions. So a report to
3 the Human Rights Council.

4 Q. In general, what is the significance of a pronouncement by
5 the United Nations on a topic like this?

6 A. The United Nations reflects the international community,
7 reflects the international community.

8 Q. Okay. I would like to direct your attention to page 5 and
9 note 1.

10 Do you see the paragraph that says "the international
11 armed conflict in Afghanistan began," that paragraph there?

12 A. Yes.

13 Q. I won't read it into the record. What is your
14 interpretation of that paragraph?

15 A. The special rapporteur is indicating the point by which the
16 armed conflict in Afghanistan transitioned from international
17 to non-international.

18 Q. And that date is June 2002, correct?

19 A. Yes.

20 Q. And the last sentence of that paragraph, "From that date,
21 the armed conflict became of a non-international character
22 inasmuch as the international forces were fighting on behalf of
23 the government."

24 So, there, who is the government?

25 A. At this point, the government is the Karzai government.

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1 Q. Who are the international forces there?

2 A. That would be the United States and the ISAF, International
3 Security Assistance Force.

4 Q. You have done this a little bit, but just in your own
5 words, how did the conflict transition from 2001, as an
6 international armed conflict, to in 2002, a non-international
7 conflict?

8 A. As indicated in the footnote, the international armed
9 conflict began 7 October 2001, when the U.S. invaded
10 Afghanistan. So at that point we unequivocally have the start
11 of an international armed conflict.

12 So, from 7 October 2001 until June, broadly speaking,
13 of 2002, there was an international armed conflict. But at the
14 point where the Taliban was no longer the government of
15 Afghanistan, the conflict transitioned from international to
16 non-international.

17 Q. So, focusing on that brief period where it was an
18 international armed conflict, was that because the first
19 paragraph of Article 2 was triggered?

20 A. Correct.

21 Q. Why is that?

22 A. That's because there were essentially high contracting
23 parties on both sides of the verses.

24 Q. After the summer of 2002, even though Afghanistan was a
25 high contracting party, the Taliban does not benefit from that

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1 because they are not the government of Afghanistan, correct?

2 A. Correct.

3 Q. So, in 2008, now flashing forward, was the Taliban the
4 government of Afghanistan then?

5 A. It was not.

6 Q. I would like to show you what is marked as Government
7 Exhibit 123.

8 Just let me know when you see that on your screen,
9 please.

10 A. Okay.

11 Q. What is that document?

12 A. That is a White House report, dated December 2016, on the
13 legal and policy frameworks guiding the United States' use of
14 military force and related national security operations.

15 Q. In general, what is the significance of a document like
16 this?

17 A. This was the Obama administration laying out,
18 articulating -- well, as the title indicates, the legal and
19 policy frameworks that were influencing how and why the U.S.
20 was using force.

21 Q. I would like to direct your attention to page 19, which is
22 the paragraph beginning, the second paragraph, "because the
23 United States is currently engaged in hostilities."

24 A. Okay.

25 Q. What does this paragraph say, generally?

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1 A. That in terms of the hostilities, that the U.S. is -- there
2 was no state or country that the U.S. was fighting.

3 Q. So, here it says, "The applicable international legal
4 regime governing these U.S. military operations is the law of
5 armed conflict covering non-international armed conflicts."

6 Do these military operations involve or refer to the
7 conflict in Afghanistan?

8 A. Yes.

9 Q. So, in 2016, what is the statement from the executive here?

10 A. The statement is, in essence, that the conflict in
11 Afghanistan is non-international, it's a non-international
12 armed conflict.

13 Q. And in this space, what kind of weight is a pronouncement
14 from the executive given?

15 A. Considerable.

16 Q. Why is that?

17 A. Because the executive branch, the executive has primacy
18 over national security and the armed forces and foreign policy.

19 Q. And here the statement is that Article 3 applies, correct?

20 A. Yes.

21 Q. And Article 3 applies when there is not international armed
22 conflict; is that right?

23 A. Yes.

24 Q. Okay. So now that's 2016. Did the Taliban later again
25 become the government of Afghanistan?

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Jenks - Direct

1 A. Yes.

2 Q. Approximately when did that happen?

3 A. 2020, 2021, depending on the metric or measure used.

4 Q. What are some of the metrics used?

5 A. The Doha accord by physically regaining control of the
6 country, the U.S. withdraw, some combination of those.

7 Q. So, in general, sometime in 2020, 2021?

8 A. Yes.

9 Q. Is the Taliban presently the government of Afghanistan?

10 A. Yes.

11 Q. What does the Taliban call the country?

12 A. The Emirate.

13 Q. So, if hypothetically today the United States had a
14 conflict with the Emirate of Afghanistan, how would that
15 conflict be classified?

16 A. As an international armed conflict.

17 Q. Why is that?

18 A. Because you would have high contracting parties on both
19 sides of the verses.

20 Q. And those two high contracting parties would be the United
21 States on the one side and Afghanistan on the other side,
22 correct?

23 A. Correct.

24 Q. But between 2002 and at least 2020, was it an international
25 armed conflict?

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Jenks - Direct

1 A. No.

2 Q. Was Taliban the government of Afghanistan during that
3 period?

4 A. No.

5 Q. So does Taliban become a high contracting party during that
6 period?

7 A. No.

8 Q. Are any non-states high contracting parties?

9 A. No.

10 Q. We will come to this with Article 4, but -- well, we will
11 skip that.

12 So, before we move off Article 2, paragraph 1 --

13 MR. GUTWILLIG: Mr. Hanchet, if you could please bring
14 that back up, Government Exhibit 119.

15 Q. Okay. So a few questions, Professor Jenks, on the topic of
16 Pakistan.

17 After the Taliban was displaced as the government of
18 Afghanistan, did some members of the Taliban go to or relocate
19 to Pakistan?

20 A. Yes.

21 Q. During that period, did the U.S. conduct certain military
22 operations targeting Taliban members in Pakistan?

23 A. Yes.

24 Q. In general, what types of military operations?

25 A. Largely drone strikes in and around the border region

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Jenks - Direct

1 between Afghanistan and Pakistan.

2 Q. Based on your review of public statements and public
3 reporting, did Pakistan approve of at least some of those
4 United States military actions?

5 A. Yes.

6 Q. And does the United States or any coalition partner taking
7 military action against the Taliban in Pakistan trigger an
8 international armed conflict?

9 A. No.

10 Q. I would like to pull up Government Exhibit 121.

11 Is that up on your screen, Professor?

12 A. Yes.

13 Q. What are we looking at here?

14 A. We are looking at the ICRC commentary of 2020 to Article 3
15 of the third convention, the prisoner of war convention.

16 Q. Let's do a couple of things to place this in context.

17 Are there different sources that interpret the Geneva
18 Conventions?

19 A. Yes.

20 Q. Are you familiar with Jean Pictet?

21 A. Yes.

22 Q. Who is that?

23 A. Jean Pictet is the now deceased but the former vice
24 president of the International Committee of the Red Cross and
25 the lead author of the official commentaries of the 1949

1 Conventions.

2 Q. And were Pictet's commentaries to the 1949 Conventions
3 contemporaneous in some respects?

4 A. Well, much closer, certainly.

5 Q. What we are looking at here, what does this reflect?

6 A. This reflects a more modern, a more modern perspective led
7 by the International Committee of the Red Cross but undertaken
8 by academics from around the world, about how the law perhaps
9 should be interpreted or applied in a more modern environment.

10 Q. This here is just commentary to Article 3 of the 1949 Third
11 Geneva Convention, correct?

12 A. Yes.

13 Q. In what type of conflict does Article 3 apply?

14 A. Non-international armed conflict.

15 Q. So, I would like to direct your attention to pages, it's
16 between page 38 and 39 here. It's a paragraph beginning
17 "second," and it goes over from 38 to 39.

18 If you could please let me know when you see it.

19 A. Okay.

20 Q. So, the paragraph beginning "second." And this references
21 what is called here as a spill-over non-international armed
22 conflict. What is that?

23 A. A spill-over is certainly a nonlegal term, but is a
24 helpful, maybe descriptive term for when a non-international
25 armed conflict in one state spills over into the territory of a

1 neighboring state that is not a party to that conflict.

2 Q. And what is the conclusion about that type of circumstance
3 in the commentary here?

4 A. The conclusion of the commentary is that, where force is
5 directed against a non-state actor in that neighboring state,
6 that the majority view is that that use of force in the
7 territory of that neighboring state does not transform the
8 non-international armed conflict into an international armed
9 conflict, it remains non-international.

10 Q. And did this commentary have any particular conflict in
11 mind?

12 A. If you look at the footnotes to this section, the footnotes
13 are to reflect Afghanistan and Pakistan.

14 Q. And mapping this language on to that, who would be the
15 actors in such a conflict?

16 A. The actors would be some combination of the United States,
17 members of the International Security Assistance Force, the
18 government of Afghanistan, the Taliban, and the territory
19 and/or government of Pakistan.

20 Q. And directing your attention to the sentence that begins
21 "assuming." It says, "Assuming for the purpose of this
22 analysis, that the second state consents to the use of its
23 territory by the state party to the conflict, thereby
24 precluding the existence of an IAC between the two states."

25 So, in this sentence, who would be the second state?

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1 A. So the second state in this context would be Pakistan.

2 Q. And who is, later in that sentence, the state party to the
3 conflict?

4 A. Well, there would be, frankly, a number of them. It would
5 be potentially the United States, Afghanistan, and we are
6 talking about 2008, I would say 41 to 42 other countries that
7 comprise the International Security Assistance Force.

8 (Continued on next page)

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Jenks - Direct

1 BY MR. GUTWILLIG: (continuing)

2 Q. And that circumstance, would that circumstance, just to
3 conclude here, of the United States and ISAF and Afghanistan
4 conducting military action on Taliban targets in Pakistan cause
5 an international armed conflict?

6 A. No.

7 Q. OK.

8 MR. GUTWILLIG: Mr. Hanchet, can we go back to
9 Government Exhibit 119?

10 Q. And now, Professor Jenks, focusing your attention on the
11 second paragraph of Article 2, so to orient ourselves we have
12 now talked about the first paragraph or the first door to
13 creating international armed conflict so let's move to the
14 second, and looking at the second paragraph beginning: The
15 Convention shall also apply, shall also apply to all cases of
16 partial or total occupation of the territory of a High
17 Contracting Party, even if said occupation meets with no armed
18 resistance.

19 In general, what does this paragraph mean?

20 A. So this paragraph is referring to occupation.

21 Q. And how is occupation defined, for purposes of Geneva
22 Conventions?

23 A. It is not defined through the Geneva Conventions but
24 through the 1907 Hague Regulations.

25 Q. And how does the 1907 Hague Regulations define occupation?

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Jenks - Direct

1 A. So, Article 42 of the 1907 Hague Regulations explains that
2 occupation involves the exercise of authority by a foreign or
3 hostile army.

4 Q. Was the United States recognized as an occupier in
5 Afghanistan?

6 A. No.

7 Q. Arguably, could there have been a period where that would
8 have been the case?

9 A. Not in my opinion.

10 Q. And why not?

11 A. Occupation is not just boots on the ground. So, there was
12 obviously a period of time post-October 2001 where there were
13 any number of U.S. service members physically in the territory
14 of Afghanistan, but occupation requires more than just physical
15 presence of a hostile or foreign power. It requires the
16 exercise of authority. And what authority refers to is
17 literally the government functions and at no time between
18 October 2001 and summer of 2002, did the U.S. military have the
19 ability to exercise authority in government functions in
20 Afghanistan.

21 Q. After that period, did the United States ever become an
22 occupier of Afghanistan?

23 A. No.

24 Q. Because here, who would the High Contracting Party in that
25 circumstance be?

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Jenks - Direct

1 A. The High Contracting Party would be Afghanistan.

2 Q. And by 2002 and after, was there a government of
3 Afghanistan?

4 A. Yes.

5 Q. Was the United States there at the invitation of that
6 government?

7 A. Yes.

8 Q. Was that government the Taliban?

9 A. No.

10 Q. So, in 2008, was the United States occupying Afghanistan?

11 A. By definition, no.

12 Q. Now let's move to the third paragraph. The third paragraph
13 is the one that begins: Although one of the powers in conflict
14 may not be a party to the present convention, the powers who
15 are parties thereto shall remain bound by its mutual relations.

16 I would like to unpack this a little bit. Could you
17 please just explain kind of the history and background of
18 paragraph 3 of Article 2?

19 A. Sure.

20 As we were discussing with the successive or the
21 iterative nature of the Geneva Conventions, essentially each
22 iteration of the Geneva Conventions tries to improve upon or
23 recognize the shortfalls or gaps from armed conflicts that
24 occurred in the interim. So, if you go back, we go back to the
25 first Geneva Convention in 1864, there were only 12 parties,

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1 only 12 states signed up to that first convention. If we move
2 forward to the 1929 Convention, and the significance of the
3 1929 convention is that is the convention that was operative
4 during World War II and, as we discussed, only about 52
5 countries had ratified the 1929 Convention going into World
6 War II and, quite significantly, the Soviet Union had not
7 ratified and Japan had signed but not ratified.

8 So, now let's flash forward to the aftermath, the
9 aftermath of World War II. We are going through this exercise
10 again, Well, we have had another war. Let's revisit how well
11 our previous convention did and didn't do. So, the thought
12 process was we are probably not going to have everyone sign up
13 for this new 1949 convention. We have never had everyone sign
14 up. That was not envisioned. And we might even have
15 situations like, frankly, Japan, where people sign up but then
16 don't ratify. So paragraph 3 of Article 2 envisions a couple
17 things. It envisions, frankly, a future conflict where there
18 were parties to the conflict that had ratified the Geneva
19 Conventions and parties that had not, and potentially
20 situations like Japan where people had started the process
21 signing but not ratifying. And kind of the further
22 significance of this is the way that the 1929 conventions were
23 structured, you only had reciprocal -- you only had
24 obligations -- you only had obligations to other ratifying
25 countries. So, for example, Germany, Nazi Germany had ratified

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1 the 1929 conventions, as had France, the United Kingdom and the
2 U.S., so there was reciprocal obligations, Soviet Union had not
3 signed, did not ratify the 1929 conventions. So, the Germans
4 were unfortunately quite clear that they did not owe Geneva
5 Conventions protections and obligations, which was technically
6 literally correct, to the Soviets, to Soviet prisoners. So
7 they made a point of treating Soviet prisoners markedly
8 different, markedly differently and worse than American,
9 British, or French prisoners.

10 So, to kind of conclude, there is an awful lot that is
11 in paragraph 3 of Article 2 that we are quite fortunate to say
12 is not even really relevant to the situation that we find
13 ourselves in today which is every country, every state -- there
14 are no non-state -- there are no countries in the world that
15 are not High Contracting Parties. So, there is not a
16 universe -- there is not a universe in which -- there is not a
17 universe in which paragraph 3 of Article 2 would be operative
18 today.

19 Q. Because paragraph 3 of Article 2 contemplated a world where
20 there were some countries that had ratified and some that had
21 not?

22 A. Correct.

23 Q. And now we are in a world where almost every country or
24 every country has ratified?

25 A. Not almost.

1 Q. Every country has ratified. OK.

2 Here, so I am looking at the word "powers", although
3 one of the powers. What does "powers" mean here?

4 A. So this is Japan. This is the term that they used to
5 reflect a country that is not a party to the convention.

6 Q. Does powers refer to non-countries?

7 A. No, it refers to a state. It refers to a state, it is just
8 the problem is we are kind of running out of terms here. We
9 can't use "parties" because we are into High Contracting
10 Parties in these previous paragraphs. So although one of the
11 powers in conflict -- and if you read the commentary it is
12 clear, we are talking about Article 2, international armed
13 conflict involving states so this is essentially -- this is for
14 the countries that have not signed up.

15 Q. So I would like to pause here for a second on the idea of
16 states. OK? And you have been clear that this applies to
17 states, not non-states. Is there ever a circumstance where a
18 non-state, not a formal state, can be recognized as a state?

19 A. Yes.

20 Q. How is that determined, generally?

21 A. The consensus is through the Montevideo Convention or the
22 Montevideo criteria.

23 Q. And is Montevideo part of the Geneva Conventions?

24 A. No. It is separate and apart.

25 Q. And what is Montevideo?

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1 A. Montevideo is a 1930s convention from the western
2 hemisphere that has been close to, if not universally, adopted
3 and recognized around the world as forming the criteria by
4 which states are formed and recognized as such.

5 Q. What are those criteria?

6 A. Controlled territory, exercising -- you have defined
7 orders, population, and also that you have recognition, that
8 you have the ability to -- you are engaging in relations,
9 outside external foreign relations and recognition and some
10 form and level of external recognition.

11 Q. And, in your opinion, in 2008 or any time during the
12 non-international armed conflict in Afghanistan, did the
13 Taliban meet those factors?

14 A. No.

15 Q. And has any authority recognized the Taliban as a state?

16 A. Not to my knowledge.

17 Q. I'm sorry. Between approximately 2002 and approximately
18 2020 did any authority recognize the Taliban as a state?

19 A. Not to my knowledge.

20 Q. And as a non-state could the Taliban even at qualify for
21 the category set forth in Article 2, paragraph 3?

22 A. No.

23 Q. Now I would like to turn back to the text here. After the
24 Karzai regime came to power in summer of 2002, was Afghanistan
25 bound by the Geneva Conventions?

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Jenks - Direct

1 A. Yes.

2 Q. And was the United States bound by the Geneva Conventions?

3 A. Yes.

4 Q. Did the Taliban ever indicate -- and again, I am talking
5 about this period from approximately 2002 to approximately
6 2020, did the Taliban ever indicate that it accepted or applied
7 the Geneva Conventions?

8 A. No.

9 Q. How do you know that?

10 A. If you look at the end of each of the Geneva Conventions,
11 the Swiss Foreign Ministry is designated as the repository for
12 notifications regarding the Geneva Conventions. Historically
13 that was by mail but it has now been digitized and is now an
14 online platform. And in reviewing the Swiss foreign ministry
15 Geneva Conventions notification website there has not been any
16 notification by the Taliban regarding the Geneva Conventions.

17 Q. And, historically, had any other groups that are not
18 officially recognized as states indicated that they would, in
19 fact, apply and adopt the Geneva Conventions?

20 A. Yes.

21 Q. Are you familiar with the term Free French?

22 A. Yes.

23 Q. At a high level, what does Free French refer to?

24 A. Free French refers to a resistance movement from World
25 War II.

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1 Q. And just a little bit more on the context of the Free
2 French?

3 A. Sure.

4 Following Germany's rapidly conquering France in the
5 early portions of World War II, a large number of both British
6 and French soldiers were evacuated from France to England. And
7 while France surrendered to Germany, a large portion of French
8 soldiers decided to continue, continued to fight and held
9 themselves out as representing the French government-in-exile
10 and a French military force outside of France.

11 Q. And you just answered this but were they in control of the
12 territorial region of what is recognized as France?

13 A. They were not.

14 Q. So we will come back to the Free French in a few minutes,
15 but during this period did the Free French indicate publicly
16 that they would follow the Geneva Conventions?

17 A. They did.

18 Q. And how did they do that?

19 A. They submitted -- and again we are referring to the 1929
20 conventions but they submitted notice to the International
21 Committee of the Red Cross.

22 Q. And publicly? Or how do you know that, I guess.

23 A. Through the International Committee of the Red Cross.

24 Q. So we will come back to the Free French but I would like to
25 talk for a moment about international armed conflict and

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Jenks - Direct

1 non-international armed conflict. Have you reviewed external
2 sources that would support your position that between
3 approximately 2002 and 2020, the conflict in Afghanistan was a
4 non-international armed conflict?

5 A. Yes.

6 Q. And let's look at some of those.

7 MR. GUTWILLIG: Mr. Hanchet, could you please pull up
8 what is marked as Government Exhibit 111?

9 Q. Is that on your screen?

10 A. Yes.

11 Q. What is that?

12 A. This is a letter from the legal advisor, the ICRC legal
13 advisor to the United Kingdom Parliament.

14 Q. Why is this letter significant?

15 A. It is significant because this is the head lawyer for the
16 ICRC detailing and explaining the ICRC's legal position
17 regarding the characterization or classification of the armed
18 conflict in Afghanistan and how it changed and when it changed.

19 Q. And directing your attention to the second page, there is a
20 paragraph about three quarters of the way down that begins
21 with: Following. What was that conclusion?

22 A. The conclusion was that following the Loya Jirga in June of
23 2002 and the establishment of a transitional government, as
24 well as the unanimous recognition by the community of states
25 that the ICRC characterized or classified the armed conflict in

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1 Afghanistan as non-international, that it was in longer
2 international and it was now, beginning June 2002 forward,
3 non-international.

4 Q. Let's skip ahead to 2007 and Government Exhibit 113. What
5 is Government Exhibit 113?

6 A. Government Exhibit 113 is the International Committee of
7 the Red Cross, an institutional statement, it is them codifying
8 their position or attitudes regarding international
9 humanitarian law and challenges of contemporary armed
10 conflicts.

11 Q. Just as a source, in general, what is the significance of a
12 document like this?

13 A. I think the significance is this is not an academic
14 writing, say, a law review article. This is the International
15 Committee of the Red Cross' institutional position so this is
16 the collective position of the organization.

17 Q. Is this a statement by the United States government?

18 A. I'm sorry?

19 Q. Is this a statement by the United States government?

20 A. This is not a statement by the United States government
21 but -- no.

22 Q. I would like to direct your attention to page 6 which is
23 the sixth page which is page 725. There is a paragraph in the
24 middle beginning: The so-called war on terror. It says: The
25 so-called war on terror can also take the form of a

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1 non-international armed conflict, such as the one currently
2 being waged in Afghanistan between the Afghan government
3 supported by a coalition of states and different armed groups,
4 namely, remnants of the Taliban and Al Qaeda.

5 What is the conclusion or significance of this
6 paragraph here?

7 A. The significance is that the armed conflict is
8 non-international -- is a non-international armed conflict,
9 that it is not an international armed conflict.

10 THE COURT: Well, so says the ICRC as of this date;
11 correct?

12 THE WITNESS: Yes, your Honor.

13 THE COURT: OK.

14 BY MR. GUTWILLIG:

15 Q. I would like to ask a question about, the second sentence
16 here that says: This conflict is non-international, albeit
17 with an international component in the form of a foreign
18 military presence on one of the sides, because it is being
19 waged with the consent and support of the respective domestic
20 authorities and does not involve two opposed states.

21 So here who is the domestic authority?

22 A. The domestic authority is the government of Afghanistan.

23 Q. And what does "the military presence on one of the sides"
24 mean?

25 A. That is in reference to the United States and approximately

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Jenks - Direct

1 40-plus other countries, militaries present in Afghanistan and
2 participating in the armed conflict.

3 Q. Let's skip ahead now to Government Exhibit 114. What is
4 Government Exhibit 114?

5 A. Similar to the previous exhibit, it is the ICRC
6 institutional position reflecting in their international
7 humanitarian law and challenges of contemporary armed conflict
8 report.

9 Q. I would like to direct your attention to page 10, the
10 paragraph at the top beginning: Fourth. The penultimate
11 sentence of the paragraph there says: A current example is the
12 situation in Afghanistan (even though that armed conflict was
13 initially international in nature).

14 How do you interpret this?

15 A. As reflecting that the start of the conflict was an IAC,
16 international armed conflict.

17 Q. Can an armed conflict change in nature from an
18 international armed conflict to a non-international armed
19 conflict over time?

20 A. Yes.

21 Q. And that is the conclusion here in 2011; correct?

22 A. Correct.

23 Q. I would like to pause for a second. Are you familiar with
24 the *Tadic* case?

25 A. Yes.

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Jenks - Direct

1 Q. And in general, what is the *Tadic* case or cases?

2 THE COURT: For the court reporter, T-A-D-I-C.

3 MR. ROBLES: Yes, your Honor.

4 THE COURT: Thank you.

5 THE WITNESS: The *Tadic* case was the first case to go
6 to trial at the international criminal tribunal for the former
7 Yugoslavia in 1997.

8 Q. And you just said this but beyond Yugoslavia, did this case
9 involve a particular region?

10 A. Broadly speaking I would say the Balkans.

11 Q. And was there a conflict, an armed conflict in the Balkans
12 in the '90s?

13 A. A series of interrelated interconnected conflicts -- armed
14 conflicts, yes.

15 Q. And were you deployed to that region at that time?

16 A. I was. I was part of the initial NATO peace-keeping force
17 that deployed to Bosnia in January of 1996.

18 Q. Have you reviewed certain court filings from the *Tadic*
19 case? I know there were multiple cases but I will call it the
20 *Tadic* case?

21 A. Yes.

22 Q. I would like to direct your attention to Government Exhibit
23 120. Do you recognize this?

24 A. I do.

25 Q. And what is this?

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Jenks - Direct

1 A. This is a submission -- this is a submission by the United
2 States to the tribunal regarding some motions -- regarding some
3 positions that the defendant *Tadic* had made before the
4 tribunal.

5 Q. This is a brief from the United States, effectively?

6 A. Yes.

7 Q. So, let's look at footnote 43, which is on page 29, or
8 perhaps it is on page 27 but it is footnote 43 and I will read
9 it while it is coming up. But, footnote 43 says: The
10 commentary to the Geneva Conventions makes clear that once the
11 provisions of the Geneva Convention relating to international
12 armed conflicts are triggered, the conventions apply in their
13 entirety. And it cites to Jean Pictet. What does this
14 footnote mean?

15 A. This footnote simply means -- not to be, obviously not
16 trying to be flippant, what it says is that when an armed
17 conflict -- when an international armed conflict starts, that
18 the conventions apply while that international armed conflict
19 remains ongoing.

20 Q. Does that mean that the conventions always apply for the
21 entirety of hostilities?

22 A. No. I mean, that's not what it says or what the
23 conventions or the commentary say.

24 Q. It says here that once deemed an international armed
25 conflict, the entire Conventions are triggered; correct?

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Jenks - Direct

1 A. Correct.

2 Q. But at some point it could be deemed a non-international
3 armed conflict; correct?

4 A. Correct.

5 Q. And what was the context in which at least some subset of
6 the United States took this position in this single brief here?

7 A. Sure. If you read the page, that footnote it is to and
8 maybe the page following, I think it provides useful and
9 appropriate context also for footnote 43.

10 In essence, you had two different new countries, you
11 had the former Yugoslavia, you had multiple different armed
12 groups. At times, different states were fighting each other.
13 Different states were fighting the armed groups. And, the
14 armed groups were also fighting amongst themselves. So, one of
15 the things that *Tadic* stands for, amongst others, is conflict
16 classification and trying to sort through when various
17 conflicts were triggered. *Tadic*, having been charged with a
18 grave breach which is an international armed conflict concept.
19 So, what *Tadic* was frankly disingenuously trying to argue is,
20 in essence, well, on Monday, between 9:00 and 11:00 that armed
21 conflict was only involving two non-state actors, and since we
22 didn't have state on both sides of the versus, that's a
23 non-international armed conflict. So, the U.S. was simply --
24 the U.S. was pointing out the impracticality, the
25 inappropriateness, and how unrealistic it is to apply that

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1 approach, that there were international armed conflicts,
2 frankly more than one that were ongoing, and that while they
3 were ongoing, the laws of armed conflict, including grave
4 breach provisions, were applicable.

5 Q. So once it is NIAC the entire Conventions are triggered;
6 correct?

7 A. Yes.

8 Q. But that doesn't necessarily last forever?

9 A. No.

10 Q. Was the situation in *Tadic* in the Balkans at all analogous
11 to the circumstances in Afghanistan in 2008?

12 A. No.

13 Q. Why not?

14 A. I mean we have the -- again, I alluded to the fractious
15 nature of the former Yugoslavia splitting into six pieces
16 parts, but we have a single international armed conflict in
17 Afghanistan and the transition to a new government in
18 Afghanistan. There is nothing akin to that in the former
19 Yugoslavia.

20 Q. So in your view would this position, this footnote in *Tadic*
21 apply to Afghanistan in 2008?

22 A. I see minimal to no applicability or relevance.

23 Q. Let's move on to Article 4 and, Mr. Hanchet, if you could
24 please bring back up Government Exhibit 119?

25 So, Professor Jenks you testified earlier, just to

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Jenks - Direct

1 place this in context here, Article 4 refers to six possible
2 categories of groups or persons that could receive POW or
3 prisoner of war protections; correct?

4 A. Yes.

5 Q. So I would like to direct your attention to the
6 introductory language here of Article 4 and it says: Prisoners
7 of war, in the sense of the present convention, are persons
8 belonging to one of the following categories who have fallen
9 into the power of the enemy.

10 What is the significance of the word "categories"
11 here?

12 A. The significance is that we are not talking about
13 individual assessments but broader categorical determinations.

14 Q. Why do you think that?

15 A. Well, quite literally from the word "categories" and then
16 in reading Article 4 you see we are talking about groups and
17 the use of plurals.

18 Q. So let's focus here on 4(A)(1), which is members of the
19 armed forces of the party to the conflict as well as members of
20 militias or volunteer corps forming part of such armed forces.

21 In plain spoken terms, what does this mean?

22 A. This is referring to a country's armed forces and that
23 country is fighting in the war.

24 Q. And you have answered this earlier, but in this context
25 here, what does "party" mean?

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Jenks - Direct

- 1 A. Party refers to High Contracting Party.
- 2 Q. And were the Taliban the armed forces -- well, was
3 Afghanistan a High Contracting Party in 2008?
- 4 A. Yes.
- 5 Q. And were the Taliban the armed forces of Afghanistan?
- 6 A. Purportedly.
- 7 Q. Of the country of Afghanistan?
- 8 A. Yes.
- 9 Q. The Karzai regime?
- 10 A. Oh. The Karzai regime, no.
- 11 Q. To be clear, were the Taliban the armed forces of
12 Afghanistan?
- 13 A. What time period?
- 14 Q. In 2008. I'm sorry?
- 15 A. No.
- 16 Q. Did the Karzai government, the Afghanistan government have
17 its own armed forces?
- 18 A. Yes; the Afghanistan National Army.
- 19 Q. So, in your view, would any member of the Taliban be
20 eligible, even if we were in an international armed conflict,
21 for the protections of 4(A)(1)?
- 22 A. No.
- 23 Q. Let's move to 4(A)(2). We will come back to 4(A)(2) but
24 just a couple initial questions. What types of groups, in
25 general, does 4(A)(2) refer to?

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Jenks - Direct

1 A. So this is other militias, volunteer corps, and resistance
2 movements belonging to a party of the conflict.

3 Q. Are you aware of any court, civilian or military, that has
4 determined that any member of Taliban could meet the criteria
5 of 4(A)(2)?

6 A. I am not.

7 Q. Let's move now to 4(A)(3). 4(A)(3), what is the
8 circumstance that 4(A)(3) refers to?

9 A. 4(A)(3) is essentially 4(A)(1) where your country is no
10 longer recognized.

11 Q. So let's unpack that a little bit. It says: Members of
12 regular armed forces who profess allegiance to a government or
13 an authority not recognized by the detaining power.

14 So in this context, what does "detaining power" mean?

15 A. This is the state, this is the country that has captured
16 you.

17 Q. That has captured your state; correct?

18 A. Captured members of this group.

19 Q. And are there metrics by which one can determine whether
20 4(A)(3) is applicable?

21 A. Yes.

22 Q. And when I say applicable, I mean to members of the regular
23 army of the displaced power.

24 A. Yes, sir.

25 Q. So what are those criteria?

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Jenks - Direct

1 A. So, the first, kind of tying into the title from 4(A)(3),
2 first you need to be claiming or linking yourself to a
3 government or authority that is no longer recognized.

4 Q. OK. And what else?

5 A. Second, you need to meet the four criteria just discussed
6 from 4(A)(2).

7 Q. OK. And anything else?

8 THE COURT: Where does it say that? Is that just
9 understood that the criteria in 4(A)(2) is somehow implicitly
10 subsumed or brought into 4(A)(3)?

11 THE WITNESS: So that comes from -- we know that, your
12 Honor, from Pictet and the commentary and from the Free French.

13 THE COURT: OK.

14 BY MR. GUTWILLIG:

15 Q. We will go into that in more depth, Professor Jenks. You
16 were saying that under 4(A)(3) to qualify there are a few
17 criteria. One is to hold oneself out as the government of the
18 country, another is to meet the four criteria in 4(A)(2) which
19 we will come back to. Are there any other criteria?

20 A. There is one more necessary and then one more, I would say,
21 desirable I believe is how Pictet it is referred to.

22 So the third necessary criteria is that either you are
23 representing that, hey, we are a High Contracting Party or we
24 are not High Contracting Party but we want to and we want to be
25 bound, we will be bound and abide by the Geneva Convention. So

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Jenks - Direct

1 that's the third of the necessary criteria to claim 4(A)(3).

2 And there is also a desirable or even highly desirable

3 additional factor.

4 Q. Which is what?

5 A. So, Pictet talks about external recognition of your entity
6 and he reminds that 4(A)(3) is based on and draws from the Free
7 French, which was one but not the only, frankly,
8 government-in-exile and military force. So we talk a lot about
9 the Free French, but.

10 Q. Running through those at a high level quickly, the first
11 criteria would be holding oneself out as the government of the
12 country. Did the Taliban do that during the period from 2002
13 to approximately 2020?

14 A. Yes.

15 Q. The second criteria would be indicating that one would
16 follow or adopt the Geneva Conventions. Did the Taliban ever
17 do that?

18 A. No.

19 Q. The third mandatory one which we will come back to, as you
20 said, that the group must meet the four criteria set forth in
21 4(A)(2). Did the Taliban do that?

22 A. No.

23 Q. Ever?

24 A. No.

25 Q. And the last, the optional one is international

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Jenks - Direct

1 recognition. During the period from 2002 through 2020, was the
2 Taliban ever internationally recognized?

3 A. To my knowledge, not by a single country.

4 Q. And prior to 2001 had they been recognized?

5 A. By, I believe, three.

6 Q. And did those countries withdraw their recognition?

7 A. They did.

8 Q. So, earlier you testified about the Free French. Do you
9 remember that?

10 A. I do.

11 Q. What was the background and history of 4(A)(3) and why it
12 was part of the 1949 Conventions?

13 A. So, as I alluded to, after Germany successfully invaded
14 France, France signed a surrender instrument to Germany that
15 indicated that any subsequent purported French soldiers would
16 not be treated as prisoners of war. But at the same time,
17 hundreds of thousands of French soldiers had evacuated France
18 for England. French General Charles de Gaulle started going on
19 British radio and making calls for French soldiers to join his
20 call, join his effort, and General de Gaulle formed a French
21 government-in-exile and a French army-in-exile, if you will.
22 And when they achieved a certain amount of numbers, they
23 deployed and began operating and fighting in north Africa.

24 Q. And did the Free French hold themselves out as the
25 government of France?

O885naj2

Jenks - Direct

1 A. They did.

2 Q. Were they internationally recognized?

3 A. They were.

4 Q. And did they explicitly make it known, the Free French,
5 that they would follow the currently applicable version of the
6 Geneva Conventions, which I guess was the 1929 conventions?

7 A. Yes.

8 Q. And how did they do that?

9 A. They communicated that to the International Committee of
10 the Red Cross.

11 Q. How did they communicate that?

12 A. Through correspondence.

13 Q. Can you just explain just briefly the background of the
14 fighting in north Africa?

15 A. Sure. So, this is Rommel and El-Alamein and the British
16 Army, as well as the French. It became highly problematic.
17 Whenever you have armies fighting you are going to have
18 prisoners that are taken and so the issue came up. When
19 Germany began taking French soldiers prisoner, having already
20 had France sign a surrender instrument where technically they
21 said we agree that there will be no French prisoners of war
22 after this point, so the issue became what are these French
23 prisoners in north Africa, what are they entitled to in the
24 form of treatment? And the German perspective was nothing.
25 Zero. We have already had this discussion, see the surrender

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Jenks - Direct

1 instrument.

2 So, the International Committee of the Red Cross spent
3 considerable time and effort meditating between
4 General de Gaulle and the Free French, the British, and the
5 Germans, trying to come to some resolution about the status and
6 treatment of these Free French forces that were primarily in
7 north Africa.

8 Q. Were the Free French and other groups like them the impetus
9 for what became 4(A)(3) of the 1949 Conventions?

10 A. Unquestionably. It is explicitly stated in the commentary.

11 Q. Were there also other groups like the Free French that held
12 themselves out as the government and indicated their desire to
13 follow the Geneva Conventions?

14 A. There were upwards of 15 or so, upwards of 15 countries
15 during World War II that established governments-in-exile which
16 were externally recognized and had some form of a military
17 force that continued to fight.

18 Q. What were some of the examples?

19 A. In the Pacific theater had you had both the Philippines and
20 Thailand which set up governments-in-exile actually in
21 Washington, D.C. In Europe you had ten or more countries that
22 set up their governments-in-exile in London and fought.
23 Poland, what was then Czechoslovakia, Denmark, Belgium, just to
24 name a handful. I think we focus primarily on the Free French
25 because the numbers were so much greater. The Free French, by

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Jenks - Direct

1 war's end, totaled approximately 750,000 so they dwarf the
2 numbers involved with the other countries but there were other
3 governments-in-exile that held themselves out and had
4 militaries that also fought.

5 So, it was a problem or an issue greater or broader
6 than just the Free French but it manifested itself primarily
7 and most significantly with the Free French.

8 Q. And to get prisoner of war protections, these countries
9 would need to hold themselves out and indicate a desire to
10 adopt the currently operative version of the Convention;
11 correct?

12 A. Yes.

13 Q. So, you mentioned commentary a moment ago. I would like to
14 direct your attention to Government Exhibit 116. What is that
15 document?

16 A. So this is a report from the ICRC on its work during World
17 War II between September 1, 1939 and June 30 of 1947.

18 Q. Was this the period under which this topic we have been
19 talking about would have been discussed by the ICRC?

20 A. Yes.

21 Q. Let's go to page 519 and the paragraph beginning: It may
22 be added. Perhaps it is not?

23 THE COURT: It is the second sentence.

24 Q. The second sentence of the first paragraph: It may be
25 added that the committee had already undertaken a similar

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Jenks - Direct

1 office --

2 Let me have one moment, please, your Honor?

3 THE COURT: Of course.

4 Q. Professor Jenks, is there somewhere in the commentary that
5 indicates -- I'm sorry -- page 520, and I am looking here at
6 the third full paragraph on page 520 and it says: It may be
7 added that with effect from August 1, 1941, the committee had
8 entered into direct relations with General de Gaulle and had
9 requested him, on a condition of reciprocity, to apply the
10 Geneva Conventions to prisoners of war and civilian internees
11 in the hands of the French forces.

12 And then it goes on to say that General de Gaulle did
13 in fact, by letter in 1941, indicate that the Free French would
14 that. So, what is the import of this here?

15 A. Well, this is, again from the 1929 Conventions, this is the
16 Free French affirmatively indicating or expressing their intent
17 to be bound by the Geneva Conventions.

18 Q. Did the Taliban ever do anything like this?

19 A. No.

20 Q. So now directing your attention, and now I am on page 521
21 which is the paragraph, the third full paragraph or second full
22 paragraph beginning: The provisional government further made
23 it known that the French forces of the interior...

24 Do you see that there?

25 A. Yes.

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Jenks - Direct

1 Q. What is that paragraph saying?

2 A. This is referring to the fact that the Free French complied
3 with the four criteria that we see from, in Article 4(A)(2) but
4 which originated in the Hague Conventions of 1899 and then
5 1907.

6 Q. So we are going to talk about that in a moment. I just ask
7 you whether the Taliban had ever indicated a desire, that you
8 are aware of, to follow or apply the Geneva Conventions. On
9 the flipside, in your expert opinion, did the Taliban follow
10 the rules of war from the period of 2002 to 2020?

11 A. On a systematic or pervasive level? No.

12 Q. So now let's talk about the 4(A)(2) criteria and how they
13 apply to 4(A)(3), and I would like to pull up Government
14 Exhibit 118. What is Government Exhibit 118?

15 A. 118 is the official commentary from the ICRC to the third
16 Geneva Convention relative to the treatment of prisoners of
17 war.

18 Q. Is this Pictet's commentary to the third Geneva Convention?

19 A. He was the general editor, yes.

20 Q. So a few minutes ago you testified about the term regular
21 armed forces. Do you recall that?

22 A. Yes.

23 Q. And regular armed forces appears in Article 4(A)(1),
24 correct?

25 A. Yes.

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Jenks - Direct

1 Q. So, I would like to direct your attention to the paragraph
2 that goes from the bottom of page 62 to the top of page 63. I
3 won't read the whole thing but it begins: The expression
4 "members of regular armed forces" denotes armed forces which
5 differ from those referred to in subparagraph 1 in one respect
6 only. The authority to which they profess allegiance is not
7 recognized by the adversary as party to the conflict.

8 Then it goes on to state: These regular armed forces
9 have all the material characteristics and attributes of armed
10 forces.

11 So, what does this mean?

12 A. What Pictet is describing is that both 4(A)(3) and 4(A)(1),
13 the armed forces, that, by definition, implicit in being an
14 armed forces, you would meet the criteria that are articulated
15 in 4(A)(2).

16 Q. What types of forces does 4(A)(2) apply to?

17 A. Well, 4(A)(2) applies to essentially -- not to be
18 disrespectful -- non-professional, non-permanent armed forces.
19 So this is again militias, volunteer corps, so non-professional
20 militaries, nonstandard or non-professional militaries.

21 Q. So, put differently, 4(A)(1) and 4(A)(3) assume that a
22 regular army would do the things in 4(A)(2); correct?

23 A. Yes.

24 Q. Why is that?

25 A. Because it is just implicit or inherent in being an armed

O885naj2

Jenks - Direct

1 force. I mean, stated another way, it's either a non-sequitur
2 or nonsensical to think of an armed force that does not have a
3 hierarchical structure that does not carry its arms openly,
4 that does not follow the laws of armed conflict, and that does
5 not wear uniforms. I can't tell you what that organization is
6 but I can tell you what it is not. It is not an armed force.

7 Q. Thank you, Professor Jenks.

8 Switching gears a little bit, you testified earlier
9 about the weight that an executive pronouncement might have to
10 whether certain individuals or members of groups would receive
11 Article 4 prisoner of war protections. Are you familiar with
12 any pronouncements by the executive on the topic of whether the
13 Taliban should receive Article 4 prisoner of war protections
14 during the conflict in Afghanistan?

15 A. Yes.

16 Q. Let's look at a couple of those. And I would like to pull
17 up Government's Exhibits 109 and 110 and we will start with
18 Government Exhibit 110.

19 A. OK.

20 Q. What is Government Exhibit 110, Professor Jenks?

21 A. 110 is a memorandum opinion for the counsel of the
22 president dated February 7, 2002, titled: Status of Taliban
23 Forces Under Article 4 of the Third Geneva Convention of 1949.

24 Q. Is this, in effect, legal advice to the president?

25 A. Yes.

O885naj2

Jenks - Direct

1 Q. Have you reviewed this?

2 A. Yes.

3 Q. Looking at the first paragraph here, what are the main
4 conclusions of this memorandum to the president?

5 A. Sure. The introductory or first paragraph indicates, the
6 main points were that the Taliban, as a militia, did not meet
7 or couldn't meet the requirements, the four criteria of
8 Article 4(A)(2), or at least because they failed to satisfy at
9 least three of the four, that neither 4(A)(1) nor
10 Article 4(A)(3) applied to militia but that the criteria from
11 4(A)(2) applies but that they do -- I'm sorry -- but that the
12 criteria do apply to -- the four criteria do apply to (A)(1)
13 and (A)(3).

14 I apologize for the disjointed presentation there.

15 Q. Sir, just to summarize there the conclusion, am I correct,
16 that it says no member of the Taliban could satisfy any
17 category of Article 4?

18 A. So no member of the Taliban can satisfy (A)(1), (A)(2), or
19 (A)(3), and that as a result there is no need to conduct an
20 Article 5 tribunal because the only reason you would need to
21 conduct an Article 5 tribunal is in cases of doubt about
22 whether or not someone falls into a qualifying category in
23 Article 4. But, having concluded that there are no qualifying
24 categories in Article 4, there is no need to conduct Article 5
25 tribunals.

O885naj2

Jenks - Direct

1 Q. Just to pause on this, it is about midway through but it
2 says because it fails to satisfy at least three of the four
3 conditions of lawful combat..., which are expressly
4 incorporated into 4(A)(2). And the next sentence says:
5 Second, we note that neither Article 4(A)(1) nor
6 Article 4(A)(3) apply to militia and that the four conditions
7 of lawful combatant contained in the convention also govern
8 4(A)(1) and 4(A)(3).

9 Just as a punch line, what does that mean?

10 A. That the four criteria that we have been discussing also
11 apply to -- from (A)(2) apply to (A)(1).

12 Q. Can you just restate that, please?

13 A. Yes. That the four criteria listed in 4(A)(2) apply to
14 4(A)(1), even though they're not expressly referenced.

15 Q. OK. so now let's look at Government Exhibit 109. Professor
16 Jenks, you just testified that the four criteria in 4(A)(2)
17 apply to 4(A)(1). Do they also apply to 4(A)(3)?

18 A. Yes.

19 Q. So now let's look at Government Exhibit 109. What is
20 Government Exhibit 109?

21 A. Government Exhibit 109 is a White House memorandum dated
22 February 7, 2002, the subject line: Humane treatment of
23 Taliban and Al Qaeda detainees.

24 Q. What is the conclusion here? And I am directing your
25 attention to paragraph 2(c).

O885naj2

Jenks - Direct

1 A. Essentially, that the president accepted the legal
2 conclusion from the Department of Justice that the conflict in
3 Afghanistan was an international armed conflict.

4 Q. So, as of February 2002 there is a pronouncement from the
5 executive that the conflict in Afghanistan satisfies Article 2;
6 correct?

7 A. Correct.

8 Q. And that was prior to the summer of 2002 and the Karzai
9 government; correct?

10 A. Correct.

11 Q. Now let's look at the next paragraph which is 2(d). It
12 says: Based on the facts supplied by the Department of Defense
13 and the recommendation of the Department of Justice, I
14 determine that the Taliban detainees are unlawful combatants
15 and therefore do not qualify as prisoners of war under
16 Article 4 of Geneva.

17 What does that mean?

18 A. Essentially it is incorporating the language that we were
19 just referencing that the Taliban don't meet any of, don't fall
20 under 4(A)(1), 4(A)(2) or 4(A)(3).

21 Q. That the Taliban as a group or any member of the Taliban;
22 correct?

23 A. Correct.

24 Q. So even at this point, while there is international armed
25 conflict, members of the Taliban cannot receive Article 4

O885naj2

Jenks - Direct

1 prisoner of war protections; correct?

2 A. Correct.

3 Q. So now let's flash forward to 2007 and look at Government
4 Exhibit 112. What is this?

5 A. This is an executive order interpreting Geneva Conventions
6 common Article 3.

7 Q. And just walking through this here, the date is 2007;
8 correct?

9 A. Correct.

10 Q. And it says that the United States is engaged in armed
11 conflict with Al Qaeda, the Taliban, and others. Does this
12 executive order make any pronouncements about whether members
13 of the Taliban can receive Article 4 protections?

14 A. If you can slow it up or --

15 Q. Yes. Sorry.

16 So I am looking here at the second full paragraph and
17 the sentence that begins: On February 7, 2002, I determined
18 for the United States that members of Al Qaeda, the Taliban,
19 and associated forces, are unlawful enemy combatants who are
20 not entitled to the protections that the Third Geneva
21 Convention provides to prisoners of war.

22 What is the import of this?

23 A. So, that's a reference to the memorandum we were just
24 discussing that there was an international armed conflict that
25 created at least the potential for the application of Article 4

O885naj2

Jenks - Direct

1 and prisoner of war status but that the Taliban didn't qualify
2 as group under either 4(A) (1), (2), or (3), and that now --
3 now, in 2007, the president, through this executive order, is
4 reaffirming that determination.

5 Q. So, although this document is silent as to whether the
6 international armed conflict has transitioned to a
7 non-international armed conflict in any event, the president
8 reaffirms the prior position that if it were, the Taliban could
9 not receive Article 4 protections; correct?

10 A. Correct.

11 Q. And by this point, was it generally accepted in the
12 international community and otherwise that it was a
13 non-international armed conflict?

14 A. I would say it was much more than generally accepted.

15 Q. What would you say?

16 A. Overwhelmingly, if I were to quantify 99 percent of what I
17 would consider, international law scholars or noted
18 commentators considered the status of the armed conflict in
19 Afghanistan in 2008 to be non-international in nature. So,
20 overwhelmingly.

21 Q. By the same token, based on your experience as an expert,
22 what is the consensus view of whether, during that period,
23 including 2008, the Taliban could qualify -- any member of the
24 Taliban could qualify for protections under Article 4?

25 A. I am not aware of a commentator or a Court that has

1 determined that they would qualify.

2 (Continued on next page)

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1 Q. And in all events, that determination would not be made
2 unless previously it had been determined that there was an
3 international armed conflict, correct?

4 A. Most don't get there because they determine that there is
5 not an international armed conflict, so we are not having a
6 prisoner of war discussion. The few that even reach it for
7 academic or intellectual purposes, and try to fit the Taliban
8 under one of the criteria, conclude that they don't fit.

9 MR. GUTWILLIG: May I have a moment, please, your
10 Honor.

11 THE COURT: You may.

12 MR. GUTWILLIG: Thank you, Professor Jenks.

13 No further questions, your Honor.

14 THE COURT: Mr. Dalack, I am ready to go forward with
15 cross, but there are a number of people in the courtroom. If
16 you want to take a break beforehand, we can do that.

17 MR. DALACK: We will be grateful for a five-minute
18 break, your Honor.

19 THE COURT: I will see everyone in five minutes.
20 Thank you.

21 (Recess)

22 (Continued on next page)

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25

1 THE COURT: Let's begin with the cross.

2 MR. JACOBSON: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. JACOBSON:

5 Q. Good afternoon, Mr. Jenks. It's nice to meet you.

6 I wanted to briefly go over some of your background.

7 You have had a long career in the U.S. Army; is that right?

8 A. Yes.

9 Q. You attended the U.S. Military Academy at West Point?

10 A. Yes.

11 Q. And I think you said you were an infantry officer from 1992
12 to approximately 2001?

13 A. Yes.

14 Q. And you deployed to Kuwait and Bosnia; is that right?

15 A. Yes.

16 Q. In 2001, the Army sent you to law school and you switched
17 your occupational specialty to judge advocate; is that right?

18 A. The timing is a little -- 2001 is when I graduated from law
19 school and transitioned to the JAG Corps.

20 Q. And you served as a JAG from 2001 to 2012, right?

21 A. Yes.

22 Q. Did you deploy to Afghanistan at any time in your service
23 in the Army?

24 A. No.

25 Q. You obviously had friends and fellow soldiers who have?

O888NAJ3

Jenks - Cross

1 A. Yes.

2 Q. You currently work for the Department of Defense?

3 A. Yes.

4 Q. And in preparing for today's testimony, you had
5 conversations with government counsel; is that right?

6 A. Yes.

7 Q. And other DOD employees were on those calls with you?

8 A. Yes.

9 Q. You couldn't take a position here today that was contrary
10 to Department of Defense policy or positions?

11 A. I suppose not.

12 Q. I want to start with Article 5, which governs tribunal
13 determinations of status; is that right?

14 THE COURT: Counsel, I just need to step back.

15 Why couldn't you take a position contrary to the
16 Department of Defense? Does your job foreclose it? Do you
17 think you would lose standing with your colleagues? Do you
18 just feel innately you gravitate toward -- I am just trying to
19 figure out. I thought you are here testifying in your own
20 capacity, not as a representative of DOD. So that's what I am
21 trying to figure out.

22 THE WITNESS: I hadn't thought of it, your Honor.

23 Part of it is my position -- I am not here articulating DOD or
24 United States government policy, which would require a whole
25 clearance process. My views are consistent with, aligned with,

1 both Army and Department of Defense policies. So I don't think
2 there is an issue. I think it's more of a theoretical question
3 or issue.

4 THE COURT: All right.

5 Counsel, you may continue.

6 BY MR. JACOBSON:

7 Q. Who were the other DOD employees who were on some of these
8 calls with government counsel?

9 A. Representatives from the Army litigation division and the
10 Department of Defense general counsel's office.

11 Q. And they listened to the conclusions that you would reach
12 in today's testimony?

13 A. Yes.

14 Q. They never expressed any concerns with any of your
15 testimony today?

16 A. No.

17 Q. Back to Article 5, again, which governs tribunal
18 determinations of status; is that right?

19 I just want to confirm that the ICRC takes the
20 position that the burden of proof is on the detaining power to
21 prove that the detainee is not entitled to PoW protections; is
22 that right?

23 A. I'm not sure where that -- can you provide that source or
24 authority? I'm sorry.

25 Q. Do you understand the question?

O888NAJ3

Jenks - Cross

1 A. If you could restate it.

2 Q. The ICRC's position is that it's not up to the detainee to
3 prove that he is protected, it's up to the detaining power to
4 prove that he is not. Do you agree with that?

5 A. As a general proposition, yes.

6 Q. I want to briefly back up to the legal landscape of
7 combatant protections before the Geneva Conventions, in
8 particular, in the United States.

9 You're familiar with John Fabian Witt?

10 A. Yes.

11 Q. He is an historian at Yale Law School?

12 A. Yes.

13 Q. You know his scholarship on the Civil War, in particular,
14 his book Lincoln's Code?

15 A. Yes.

16 Q. And his research, and I think this is commonly understood,
17 shows that no rank-and-file Confederate soldiers were
18 prosecuted for mere participation in the war; is that right?

19 A. Yes.

20 Q. There was a broad grant of immunity by the president?

21 A. Yes.

22 Q. There were a few prosecutions against Confederate leaders,
23 those were later abandoned; is that right?

24 A. Yes.

25 Q. And those prosecutions were for treason arising out of a

O888NAJ3

Jenks - Cross

1 duty of loyalty to the union, correct?

2 A. Yes.

3 Q. None of those prosecutions were for common crimes like
4 murder?

5 A. Correct.

6 Q. Let's turn to Common Article 2.

7 You talked on direct about the sort of binary paradigm
8 between Article 2 and 3; is that right?

9 A. Yes.

10 Q. An international armed conflict versus a non-international
11 one?

12 A. Yes.

13 Q. And an international armed conflict triggers the full scope
14 of the GPW, but a non-international one does not; is that
15 right?

16 A. Correct.

17 Q. And the reason the drafters came to this language is that
18 nations were concerned that foreign governments would meddle in
19 their domestic affairs and domestic conflicts, right?

20 A. Yes.

21 Q. So, it was about governing internal conflicts? Common
22 Article 3, sorry, was focused on internal conflicts?

23 A. Yes.

24 Q. You talked a bit on direct about spill-officer conflicts, I
25 think is the term from the commentary.

O888NAJ3

Jenks - Cross

1 A. Yes.

2 Q. And, of course, as you stated, it is possible that a
3 cross-border conflict could be a sort of passive spill-over of
4 the NIAC, right?

5 A. Yes.

6 Q. But it could be equally true that a conflict in an adjacent
7 country could be a sign that it's an international armed
8 conflict?

9 A. I would agree.

10 Q. You're, of course, familiar with the general history of the
11 Taliban and the fact that they took control of Kabul in 1992,
12 correct?

13 A. Generally familiar, yes.

14 Q. And beginning in around 1992, the Taliban had regularly
15 constituted military units?

16 A. I wouldn't -- I am not in a position to -- I am not in a
17 position to assess the Taliban's military structure in 1992.

18 Q. At some point between 1992 and 2001, they had artillery
19 units, right?

20 A. That is my understanding.

21 Q. They had a small air force?

22 A. Yes.

23 Q. They had a standing army?

24 A. They had a standing military. I would agree they had a
25 standing military force, however you want to characterize or

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Jenks - Cross

1 label that.

2 Q. And they even recruited former officers from the pro-Soviet
3 Afghan government?

4 A. Yes.

5 Q. I think we agree that the conflict in Afghanistan began as
6 an international one within the meaning of Common Article 2; is
7 that right?

8 A. In the fall of 2001, yes.

9 Q. And you agree that the Taliban maintained some degree of
10 control over provinces in Afghanistan through 2022, some degree
11 of control?

12 A. Yes.

13 Q. We can quibble about the degree of control.

14 Now, your position today is that the conflict became a
15 non-international one after the convening of the loya jirga in
16 2002?

17 A. Amongst other factors, yes.

18 Q. I think you also testified on direct that the Taliban never
19 relinquished its claim to state authority?

20 A. Yes.

21 Q. Throughout the entire period of the conflict, the Taliban
22 purported to be the true government of Afghanistan?

23 A. That is my understanding.

24 Q. And you agree that the Taliban continued to have military
25 capabilities throughout the pendency of the conflict?

O888NAJ3

Jenks - Cross

1 A. Yes.

2 Q. And they also, again, we can disagree on the degree, but
3 the Taliban maintained a civil governance apparatus in many, if
4 not most, of the provinces?

5 A. That's outside the scope of my knowledge.

6 Q. You're familiar with the term "shadow government," as some
7 people refer to it?

8 A. I am familiar with the term. As applied to the Taliban and
9 any given province in any given time, I wouldn't be comfortable
10 speaking to that one way or the other.

11 Q. You talked a little bit about the Doha agreement on direct.
12 The United States negotiated that agreement directly with the
13 Taliban, right?

14 A. Yes.

15 Q. The government of Ashraf Ghani was not a party to those
16 negotiations in Doha?

17 A. Correct.

18 Q. Separately, there were other countries that were
19 negotiating agreements with the Taliban, right?

20 A. Yes.

21 Q. Iran, for instance, as far back as 2005; is that right?

22 A. I'm not familiar with that.

23 Q. And prior to Doha, the United States had some negotiations
24 with the Taliban at various periods during the conflict?

25 A. Yes.

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Jenks - Cross

1 Q. I believe you said on direct that there were 42 countries
2 that were a part of the NATO-ISAF mission?

3 A. Approximately.

4 Q. And ISAF is the International Security Assistance Force,
5 right?

6 A. Yes.

7 Q. Those countries were in Afghanistan to train the Afghan
8 national security forces, that was the mission, right?

9 A. Amongst other activities, yes.

10 Q. To generally assist the Karzai government with maintaining
11 control over Afghanistan?

12 A. Yes.

13 Q. And to later assist Ashraf Ghani's government, right?

14 A. Yes.

15 Q. And those 42 countries did not recognize the Taliban as the
16 government of Afghanistan?

17 A. No.

18 Q. Many of those 42 countries suffered casualties in the
19 conflict?

20 A. Yes.

21 Q. The UK suffered hundreds, right?

22 A. Yes.

23 Q. Similar for Germany, Canada, other countries?

24 MR. GUTWILLIG: Objection to this line of questioning.

25 This expert is qualified on the law of armed conflict, not the

1 specific acts of casualties during the conflict.

2 THE COURT: I am sure this line of questioning is
3 coming to an end.

4 MR. JACOBSON: It's two more questions, Judge.

5 THE COURT: I am not sure I will let him answer, but
6 go ahead.

7 BY MR. JACOBSON:

8 Q. Tying this back to the law of armed conflict, to your
9 knowledge, have any of those other countries prosecuted members
10 of the Taliban for those attacks that led to casualties?

11 A. Yes.

12 Q. Which countries?

13 A. United Kingdom, I believe Germany, and maybe one other
14 European country.

15 Q. For murder?

16 A. I'm sorry?

17 Q. For murder?

18 A. In the case of United Kingdom, it was for murder. I would
19 have to go back and double-check, but I believe there were two,
20 if not three European countries that have prosecuted former
21 members of the Taliban for battlefield actions up to and
22 including in the case of the United Kingdom murder.

23 Q. For war crimes?

24 A. Yes.

25 Q. You said on direct -- we looked at the categories of

1 international armed conflicts during your testimony on direct,
2 right? And that includes all cases of armed conflict which may
3 arise between high contracting parties, correct? It also
4 applies to cases of partial or total occupation of the
5 territory of a high contracting party?

6 A. Yes.

7 Q. And that's true even if the occupation meets with no armed
8 resistance?

9 A. Yes.

10 Q. You agree, broadly speaking, that there was no cessation of
11 the hostilities in Afghanistan between 2001 and 2022?

12 A. I do.

13 Q. You looked at footnote 43 in the *Tadic* case. That footnote
14 was in a brief filed by the U.S. government, correct?

15 A. Yes.

16 Q. That's not from the court's opinion in the case?

17 A. Correct.

18 Q. And your criticism of Mr. Tadic's argument is that he is
19 playing games toggling the switch on and off of when the
20 conflict became non-international versus international, right?

21 A. Yes.

22 Q. You testified a bit on direct about Pakistan's involvement
23 in the context of a spill-officer conflict, right?

24 A. A little, yes.

25 Q. You agree, and on an unclassified level, you have read

1 reporting of Pakistan providing funding to the Taliban?

2 A. Yes.

3 Q. And weaponry?

4 A. Yes.

5 Q. Safe harbor?

6 A. Yes.

7 Q. Training and tactical support?

8 A. I'm not as familiar on that last point.

9 Q. I want to be clear here, without mentioning anything you
10 may know to be classified, you would expect, given your
11 experience in the Army, that there might be additional
12 classified reporting about the extent of foreign involvement in
13 the conflict?

14 MR. GUTWILLIG: Objection.

15 THE COURT: Sustained.

16 Q. I want to ask you a few questions about the principle of
17 reciprocity that you were testifying about.

18 If this conflict were a NIAC, the current government
19 of Afghanistan could prosecute former Afghan soldiers for
20 murder; is that right?

21 MR. GUTWILLIG: Objection. Form.

22 THE COURT: I want to hear the question again, please.
23 Thank you.

24 Q. If this conflict were a NIAC, the current government of
25 Afghanistan could prosecute people for crimes committed against

1 Taliban soldiers?

2 MR. GUTWILLIG: Objection. Which conflict is the
3 NIAC?

4 Q. The conflict in Afghanistan.

5 THE COURT: Let's try that again.

6 I believe what Mr. Gutwillig is saying is that, if we
7 are talking about the period from some point in late 2002
8 through 2021, or at least through the period, perhaps the
9 period covered by the indictment, can we agree on that?

10 MR. JACOBSON: Yes. I can try to be more clear with
11 the question.

12 THE COURT: Let's do that.

13 BY MR. JACOBSON:

14 Q. In a non-international armed conflict, any party to the
15 conflict can initiate prosecutions under their domestic law; is
16 that right?

17 A. A state, yes.

18 Q. The Taliban currently is the state of Afghanistan?

19 A. Yes.

20 Q. You agree that soldiers under the army of President Karzai
21 and President Ghani did attack Taliban fighters in 2008?

22 A. Yes.

23 Q. And you agree that U.S. soldiers attacked Taliban fighters
24 in 2008?

25 A. Yes.

1 Q. Assuming that the conflict in 2008 was a NIAC, the Taliban
2 government could prosecute U.S. soldiers or Afghan soldiers for
3 those attacks?

4 A. I'm sorry. Just so I am clear, the NIAC involves which
5 parties?

6 Q. Well, your position is the NIAC was between the Taliban on
7 one side and the government of Afghanistan and coalition forces
8 on the other side.

9 A. Right. But you have made the Taliban a state.

10 Q. They are now the state, correct?

11 THE COURT: What he is suggesting, sir, is this. If I
12 find that this is a non-international armed conflict, then --

13 THE WITNESS: In 2008.

14 THE COURT: In 2008, correct.

15 -- then there may be certain protections that Mr.
16 Najibullah would not be entitled to.

17 His point is, in sort of a sauce for the goose is
18 sauce for the gander, what's to stop the folks who are
19 currently in power in Afghanistan from prosecuting the former
20 soldiers under the Karzai regime for engaging in what some
21 might say would be battlefield crimes, what some might say
22 would be murder, against folks who are now part of the Taliban
23 in charge? That's what he is saying.

24 THE WITNESS: Thank you.

25 THE COURT: Have I misstated it, sir?

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Jenks - Cross

1 MR. JACOBSON: No, your Honor.

2 A. So there could be a prosecution in, essentially, 2024 for
3 actions in 2008?

4 Q. Nothing would bar that, correct?

5 A. Well, the assessment would be in 2008 terms, not 2024
6 terms.

7 Q. Right.

8 A. Okay.

9 Q. I will move on. Let's talk a little bit about Article 4.

10 Let's start with the subconditions of 4(A)(2).

11 You agree that those subconditions don't appear in the
12 text of 4(A)(1) and 4(A)(3), right?

13 A. I do.

14 Q. You also agree that the Geneva Conventions of 1949
15 supplement but don't supersede the Hague Conventions?

16 A. Yes.

17 Q. And you did testify earlier that the subconditions of
18 4(A)(2) to the GPW appear in the text of the Hague Conventions
19 as well?

20 A. Yes.

21 Q. In other words, responsible command, fixed insignia, carry
22 arms openly, and conduct operations in accordance with the law
23 4(A)?

24 A. Yes.

25 Q. Article 1 to the Hague Convention says that -- the first

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Jenks - Cross

1 line is that the laws, rights, and duties of war apply to
2 armies, right?

3 And then it goes on to say that as to militias and
4 Volunteer Corps, they have to fulfill the following conditions,
5 and it lists those four subconditions, right?

6 A. Yes.

7 Q. So, as with the GPW, those four conditions are not at least
8 explicitly applied to standing armies?

9 A. They are not expressly listed.

10 Q. Expressly listed. Thank you.

11 You are aware of scholars of international
12 humanitarian law who conclude that the 4(A)(2) subsections do
13 not apply to (A)(1) and (A)(3), right?

14 A. I am.

15 Q. As an example, you know Sean Watts, right?

16 A. I do.

17 Q. You have studied under him in Army law of war programs?

18 A. Yes.

19 Q. And in his commentaries on combatant protections, he takes
20 the decisive position that 4(A)(1) and 4(A)(3) do not need to
21 comply with the 4(A)(2) subsections, right?

22 A. Yes.

23 Q. He says that mere membership is sufficient?

24 A. Yes.

25 Q. You testified on direct that the Taliban -- during the

1 conflict between 2001 and 2022, the Taliban never agreed to be
2 bound by the conventions, right? Or put another way, I think
3 what you said is, they never stated that they would be bound by
4 the conventions and would comply with the conventions, right?

5 A. Yes.

6 Q. I am sorry for the long-winded question there.

7 And in your view, the requirement that they state that
8 they will comply, I think you said it comes from the Free
9 French, that principle?

10 A. It comes from the official commentary, ICRC's commentary to
11 Article 4(A) (3).

12 Q. For the record, the Pictet commentary is the 1960
13 commentary to the Geneva Conventions?

14 A. Yes.

15 Q. So, I don't know that we looked at the language, but the
16 Pictet commentary to 4(A) (3) says that, to qualify for
17 protections under 4(A) (3), it's necessary that the authority
18 either consider itself to be the high contracting party, right,
19 or declare that it accepts the obligations of the conventions
20 and wishes to apply them?

21 A. Yes.

22 Q. Pictet doesn't say you have to do both?

23 A. Right. It's or.

24 Q. And you're familiar with the 2020 commentary to the GPW,
25 right?

1 A. Yes.

2 Q. Even that sort of dual requirement in Pictet drops out in
3 the 2020 commentary?

4 A. It does.

5 Q. There is no mention of stating that you will be obligated
6 to comply or wish to comply, right?

7 A. There is neither mention nor explanation.

8 Q. And there is also no mention in the 2020 commentary of
9 international recognition as a requirement?

10 A. No, there's not.

11 Q. In fact, the 2020 commentary to 4(A)(3) says that
12 recognition is not required?

13 A. Correct.

14 Q. The 2020 commentary also takes the position that those
15 (a)(2) subconditions don't apply to (a)(1) and (a)(3), right?

16 A. It does.

17 Q. The 2020 commentary also says that -- the 2020 commentary
18 not only interprets the conventions, but also looks to state
19 practice, right?

20 A. Yes.

21 Q. And state practice is important because, if it's the
22 prevailing view, it can become customary international law,
23 right?

24 A. Yes.

25 Q. *Opinio juris*, correct?

1 A. Yes.

2 Q. And the 2020 commentary to Article 4 says that, as a matter
3 of practice, virtually no state has denied PoW status to
4 members of a force under (A) (1) or (A) (3) on grounds that those
5 forces had not fulfilled the (A) (2) conditions?

6 A. Yes.

7 Q. And then it gives one exception?

8 A. Yes.

9 Q. And that one exception is the United States government's
10 position with respect to the Taliban?

11 A. Yes.

12 Q. As the only deviation from the state practice?

13 A. Yes.

14 Q. You talked on direct about an OLC memo to the president on
15 the status of the Taliban under Article 4?

16 A. Yes.

17 Q. That was authored by Jay Bybee?

18 A. Yes.

19 Now, Judge Bybee is also the author of what is known
20 as the Torture Memo, right?

21 THE COURT: And this has what relevance, sir? Don't
22 sully yourself by going down that road.

23 Q. The Bybee memo that you referred to does take the position
24 that the 4(A) (2) conditions apply to (A) (1) and (A) (3), right?

25 A. Yes.

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Jenks - Cross

1 Q. There is no citation in that section of the memo?

2 A. I don't recall. I will take your representations, but I
3 don't recall.

4 Q. No footnotes either to any law or case?

5 A. Similarly, I don't recall. But I am certainly happy to
6 take your representation on that.

7 Q. Turning to the 2007 executive order, 2007, the order, I
8 think you testified is silent as to whether the war had
9 transformed into a NIAC?

10 A. Correct.

11 Q. Do you, Mr. Jenks, locate the Taliban within 4(A)(2)?

12 I think you referred to them as a militia, but I don't
13 know if we quite got to the question of which category you
14 think is the closest fit. Where should we be analyzing the
15 Taliban in 2008?

16 A. I never get there. From my perspective, it's a three-step
17 process that begins with conflict classification. I would
18 analyze the conflict in 2008 under Common Article 2, determine
19 that there is not an international armed conflict. That would
20 end the analysis. There are no prisoners of war, so I wouldn't
21 reach Article 4. So what subcategory of Article 4 wouldn't be
22 applicable or relevant.

23 Q. Understood.

24 I want to ask you a few questions about 4(A)(2)
25 itself.

1 We have talked a lot about whether the 4(A)(2)
2 conditions apply to (1) and (3), right?

3 A. Yes.

4 Q. In Article 4(A)(2), you agree that at least some of those
5 subconditions are collective requirements rather than
6 individual ones?

7 A. I do. If you don't mind, I just have a copy of a couple of
8 the articles. I am just going to look at them.

9 Q. You have Article 4 in front of you?

10 A. I have a couple of the articles, including Article 4.

11 I would agree that some of them are collective versus
12 individual.

13 Q. At least responsible command and complying with the laws of
14 war?

15 A. Yes.

16 Q. So, if an individual commits a war crime, that individual
17 can still qualify for PoW status? They can be prosecuted for
18 the war crime and still be a PoW?

19 A. Yes.

20 Q. And could not be prosecuted for a common crime like murder?

21 A. I'm sorry. You lost me on that last part.

22 Q. So, at the individual level, if a soldier or a militiaman
23 does not comply with the laws of war, that militiaman is still
24 entitled to PoW protections so long as collectively the militia
25 complies with the law of war?

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Jenks - Cross

1 A. Yes.

2 Q. And there is no substantial noncompliance, right?

3 A. I agree.

4 Q. And if that's the case, that militiaman, despite having
5 committed war crimes, is entitled to PoW protections?

6 A. Yes.

7 Q. And that militiaman can be prosecuted for the war crimes,
8 right, but not for common crimes like murder, under the
9 detaining nation's domestic law?

10 A. Or not for otherwise permissible lawful acts under the law
11 of conflict.

12 Q. You discussed a little bit on direct the additional
13 protocols to the GPW or to the Geneva Conventions, or did it
14 not come up?

15 A. I am not feeling super well. I don't believe it came up.

16 Q. You're aware of the additional protocols to the
17 conventions?

18 A. Yes.

19 Q. The Additional Protocol 1 at least was ratified by 174
20 nations?

21 A. Yes.

22 Q. It was not ratified by the U.S., Iran and Pakistan?

23 A. Correct.

24 Q. Are you generally familiar with the additional protocol
25 articles governing the 82 subconditions, or the modifications

1 to those subconditions?

2 A. Are you referring to Article 43 and how we are going to
3 define armed forces?

4 Q. Article 44 I think specifically addresses the requirements
5 of carrying arms openly and wearing a fixed insignia, right?

6 A. Yes.

7 Q. And says that if the nature of the conflict prevents a
8 militia from wearing a fixed insignia, they are still protected
9 so long as they carry arms openly, right?

10 A. Yes.

11 Q. And they are only required to carry arms openly during the
12 attack and the immediate preparations before the attack?

13 A. Under AP1, yes.

14 Q. They can go back to their village at night and put their
15 rifle off to the side?

16 A. Yes.

17 MR. JACOBSON: If I could just have one moment to
18 confer. Thank you, Judge.

19 We don't have any further questions. Thank you,
20 Mr. Jenks.

21 THE COURT: Thank you, sir.
22 Redirect?

23 MR. GUTWILLIG: Briefly, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. GUTWILLIG:

1 Q. Just a few questions, Professor Jenks.

2 So you were asked a couple of questions on
3 cross-examination about Pakistan. Do you remember that?

4 A. Yes.

5 Q. Are you aware of any legislation in approximately 2008,
6 2009, 2010 in the United States relating to Pakistan?

7 A. Generally, yes.

8 Q. Anything in particular?

9 A. I am going to do an atrocious job of not remembering the
10 title of the legislation, but Congress enacted and was signed
11 into law at least one bill articulating the critical alliance
12 between the United States and Pakistan.

13 MR. GUTWILLIG: May I have one moment, please, your
14 Honor.

15 Can we put up what is marked as Government Exhibit
16 212, please.

17 THE COURT: All right.

18 Q. What is that, Professor Jenks?

19 A. It's actually not that complicated a title. The Enhanced
20 Partnership with Pakistan Act of 2009.

21 Q. So, in approximately 2009, there was public cooperation
22 adopted by Congress between the United States and Pakistan,
23 correct?

24 A. Yes.

25 Q. Shifting gears a little bit, you were asked some questions

1 about whether the determination as to whether someone fits into
2 a group as opposed to an individual qualifies that person for
3 prisoner of war protections under Article 4. Do you recall
4 that?

5 A. Yes.

6 Q. And you testified on cross-examination that if an
7 individual who himself or herself did not follow the laws of
8 war was a member of a group that by and large did, that person
9 could get protections under Article 4, correct?

10 A. Yes.

11 Q. On the flip side of that, if there is an individual,
12 regardless of whether that individual did or did not follow the
13 laws of war, who was a member of a group that systematically
14 does not follow the laws of war, could that person get
15 protection under Article 4 of GPW?

16 A. No.

17 Q. It's a collective determination as to a category or group,
18 correct?

19 A. Correct.

20 Q. With respect to the reading in of the four criteria in
21 4(A)(2) to 4(A)(3), are you aware of any court decisions in the
22 United States that have found that?

23 A. That have read the --

24 Q. The four requirements in 4(A)(2) into 4(A)(3).

25 A. The Southern District of New York did so in the late 80s in

1 a rather quirky case, but did read the 4(A) (2) factors into
2 4(A) (3).

3 Q. With respect to the different commentaries, you testified
4 on direct that the 1960 commentary was the official commentary,
5 correct?

6 A. That's not my label, that's the label.

7 Q. That's the label.

8 And the 2020 commentary, what does that reflect in
9 relation to the official commentary?

10 A. So that's referred to as the updated commentary, and they
11 are -- they are very different.

12 Q. How so?

13 A. So let's start with the official commentary by John Pictet.

14 So, John Pictet is vice president of the International
15 Committee of the Red Cross. John Pictet played a leading
16 role -- ICRC started drafting proposed revisions to the 1929
17 Geneva Conventions. They started that drafting process led by
18 John Pictet. They started that during World War II. That was
19 led by John Pictet. So when the countries get together,
20 starting in 1947, to kind of hash out what becomes the 1949
21 Geneva Convention, John Pictet is in the room. He is in the
22 room for the two years of negotiations.

23 So, flash forward between 1952 and 1960s when the
24 commentaries are assembled under Pictet's direction. So when
25 you read the commentaries, you have Pictet saying things like,

1 Well, you know, Russia said, let's not use "or," let's use
2 "and," he is providing a first-person perspective from having
3 been in the room, and why states chose or were concerned about
4 certain language over other language. I think that has
5 tremendous significance and should be afforded considerable
6 persuasive weight and authority.

7 So now let's flash forward to the updated
8 commentaries, which are useful to a point. The updated
9 commentaries are a collective project, led by the International
10 Committee of the Red Cross and Jean-Marie Henckaerts, by
11 academics that provide perspectives on areas of the law as it
12 has developed according to the ICRC. But the key to
13 international law is, international law is made by states.
14 It's not made by the International Committee of the Red Cross,
15 it's not made by academics, it's made by states.

16 So we can talk about the law that we might want to
17 have, but we need to focus on the law that exists, and the law
18 that exists is the 1949 Geneva Conventions, and the most
19 persuasive commentary about what that law is, what it means and
20 how to interpret it, is the official commentary by a person in
21 the room at the time, that is John Pictet.

22 Q. Thank you, Professor Jenks.

23 Is everything you testified about today from your own
24 expertise and experience as a scholar on the law of armed
25 conflicts?

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1 A. Yes.

2 Q. And approximately when did you leave the military?

3 A. Fall of 2012.

4 Q. How long have you been a professor?

5 A. Since that time period, so 12 years.

6 Q. And is your current role as the law of war advisor a
7 civilian role?

8 A. Yes.

9 Q. So does that current position, or any other position,
10 impact the substance of your testimony today?

11 A. No.

12 Q. And is what you testified to today in its entirety your
13 expert opinion?

14 A. Yes.

15 MR. GUTWILLIG: No further questions, your Honor.

16 THE COURT: All right. Sir, thank you very much. You
17 may step down. We all hope you feel better.

18 (Witness excused)

19 THE COURT: Let me hear from the parties. This is the
20 break you wanted to have, correct?

21 MR. DALACK: Correct, your Honor.

22 THE COURT: I want to be sure your client is able to
23 eat.

24 MR. DALACK: If I could have a moment to speak to Mr.
25 Najibullah about that very issue.

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1 THE COURT: My expectation is we are starting again at
2 the crack of 2, yes?

3 MR. DALACK: At the crack of 2, yes, Judge.

4 MR. GUTWILLIG: Your Honor, just to briefly raise a
5 scheduling issue. We expect our next witness will take about
6 an hour on direct, and that witness needs to leave here by 4
7 p.m. So if we can, depending on the length of cross, perhaps
8 take a shorter break for lunch, that might make sense.

9 THE COURT: If we start at 2 and you have an hour of
10 direct, do you think there is an hour of cross on the second
11 witness?

12 MR. GUTWILLIG: I don't expect so. I don't know.

13 THE COURT: I understand.

14 MR. DALACK: An hour or less, maximum an hour. So
15 4:00 should be a fine cutoff point.

16 THE COURT: Mr. Dalack, are you willing to bet that,
17 in the sense that, are you willing to start at 2 and the
18 government finishes their direct by 3, and at 4:00, even if
19 there is a question left, the witness goes?

20 MR. DALACK: Just to be on the safe side, maybe we
21 should start at 1:45.

22 THE COURT: We will start at 1:45. I appreciate your
23 risk aversion.

24 We are finishing today, yes?

25 MR. DALACK: We are finishing today. I need to speak

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1 to Mr. Najibullah before we break.

2 (Counsel confers with defendant)

3 MR. DALACK: Thank you very much, your Honor.

4 THE COURT: I will see everyone back here at 1:45.

5 Thank you very much. Enjoy your lunch.

6 (Luncheon recess)

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O885naj4

Adams - Direct

1 A F T E R N O O N S E S S I O N

2 1:50 p.m.

3 THE COURT: Is the government ready with the next
4 witness?

5 MR. ROBLES: Yes, your Honor. The government calls
6 Barclay Adams.

7 THE COURT: How does he prefer to be addressed. Is
8 Professor Adams, Mr. Adams?

9 MR. ROBLES: Mr. Adams.

10 THE COURT: Mr. Adams, come forward, please.

11 Sir, stand right there in the well and raise your
12 right hand.

13 BARCLAY ADAMS,

14 called as a witness by the Government,

15 having been duly sworn, testified as follows:

16 THE COURT: Sit down and get close to the microphone,
17 and when you have done that if you can state and spell your
18 full name?

19 THE WITNESS: My name is Barclay Adams.

20 THE COURT: Counsel, you may inquire.

21 MR. ROBLES: Thank you, your Honor.

22 DIRECT EXAMINATION

23 BY MR. ROBLES:

24 Q. Good afternoon, Mr. Adams.

25 A. Good afternoon.

O885naj4

Adams - Direct

1 Q. I am not going to go through all of your background but I
2 did want to ask you a few questions about your experience.

3 Have you ever worked at the U.S. Central Command?

4 A. I did.

5 Q. What is the U.S. Central Command?

6 A. The U.S. Central Command is the military headquarters
7 responsible for military operations in the Middle East, Central
8 Asia and South Asia.

9 Q. Approximately how long did you work at the U.S. Central
10 Command?

11 A. For approximately 13 years.

12 Q. What position did you hold there?

13 A. I was a senior intelligence officer over Afghanistan,
14 Pakistan and the Central Asian states.

15 Q. And, generally speaking, what does a senior intelligence
16 officer do for the U.S. Central Command?

17 A. I oversaw the group of analysts who were providing
18 intelligence support to the commander of U.S. Central Command,
19 also to other customers including the commanders in
20 Afghanistan, as well as military leaders and political
21 officials in the Washington, D.C. area.

22 Q. And did that include gathering intelligence and information
23 on the activities of the Taliban in Afghanistan?

24 A. Yes, it did.

25 Q. Have you ever worked at the Defense Intelligence Agency?

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Adams - Direct

1 A. I did.

2 Q. What is that?

3 A. The Defense Intelligence Agency is the Department of
4 Defense's core strategic intelligence element.

5 Q. And what role did you serve in the Defense Intelligence
6 Agency?

7 A. I worked as a senior analyst and then as a senior
8 intelligence officer also looking at Afghanistan initially, and
9 then later also Afghanistan/Pakistan region looking
10 specifically at the militant groups and the Afghan insurgent
11 elements that were operating there.

12 Q. When you say Afghan insurgent elements, what do you mean by
13 that?

14 A. We would define insurgency as an organized group that is
15 seeking to overthrow and supplant an official government.

16 Q. During your time at the U.S. Central Command and the
17 Defense Intelligence Agency, were you ever deployed to
18 Afghanistan?

19 A. I was.

20 Q. Approximately how many times in your career have you been
21 deployed to Afghanistan?

22 A. Eight times total. When I was with the Defense
23 Intelligence Agency, specifically I deployed in 2009 and again
24 in 2010 and 2011. And then, when I was with U.S. Central
25 Command, I deployed in 2012, 2013, '16, and '18.

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1 Q. And approximately how much time did you say you spent, in
2 total in Afghanistan, during those deployments?

3 A. In total I spent about five years in Afghanistan.

4 Q. Have you ever testified before in federal court?

5 A. I have.

6 Q. When was that?

7 A. In 2015.

8 Q. And in what case did you testify in?

9 A. In the case of the *U.S. v. Hamidullin*.

10 Q. In that case, were you qualified as an expert?

11 A. I was.

12 Q. And generally, what were the topics about which you
13 testified in the *Hamidullin* case?

14 A. I testified about the history and the nature of the
15 Taliban, and the Haqqani Network. That is a faction affiliated
16 with the Taliban. I had talked about their tactics and
17 techniques, how they operated on the battlefield, the kinds of
18 weapons they were using, and essentially the war from their
19 perspective.

20 Q. I want to ask you about some of those topics that you have
21 previously testified about. Let's start with the history of
22 the Taliban itself. Can you just give the Court a very brief
23 overview of how and when the Taliban formed?

24 A. Sure.

25 So, the Taliban formed in the aftermath, the

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1 withdrawal of the Soviet Army. The Soviets had occupied the
2 country in support of the then communist government of
3 Afghanistan from 1979 to 1989. When they withdrew, the forces
4 that had been opposing the communist government continued to
5 fight the government which remained in tact, continued to
6 operate until approximately 1992. When the communist
7 government was overthrown, these opposition elements that were
8 collectively referred to as the Mujahideen, they overran the
9 capitol, and with the support of some members of the
10 international community, established a government. But these
11 different factions were opposed to one another. They were
12 competing for resources, they were fighting over stores of
13 weapons that the Soviet Army had left behind, and it led to a
14 multi-faceted civil war in the country that was essentially
15 more destructive and more hurtful to the Afghan people than the
16 actual Soviet occupation had been. And in that very chaotic,
17 very violent environment, the people of southern Afghanistan
18 centered around Kandahar, which is the main population in the
19 south, reached out to the learned Islamic leaders in their
20 community and sought their assistance in re-establishing law
21 and order.

22 So, these Islamic scholars, who many of whom were
23 educated in madrasas, which are Islamic schools, in Pakistan,
24 came together and with armed elements around them, were able to
25 establish law and order and secure Kandahar City. And this

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1 group of Islamic scholars started to become known as the
2 Taliban, which means students, because they were students of
3 Islam.

4 The leader of that group at that time was Mullah
5 Omar -- Mullah Mohammed Omar -- and 1994 was the time period in
6 which they had succeeded in establishing their writ over
7 Kandahar city.

8 Q. Did there come a time in or around 1996 when members of the
9 Taliban took any particular action with respect to the capital
10 of Afghanistan?

11 A. They did.

12 So, after securing Kandahar, the Taliban expanded to
13 the west initially and then after that to the east through
14 eastern Afghanistan, and early 1996 they captured the capital
15 and essentially deposed that Mujahideen government that had
16 been in place since the fall of the communist government.

17 Q. After the Taliban captured Kabul in or around 1996, what
18 control, if any, did the Taliban exert over Afghanistan?

19 A. The Taliban had de facto control over about 90 percent of
20 the country in that time period after 1996. They continued to
21 fight against some elements, some of those Mujahideen groups,
22 particularly in northern Afghanistan, that were refusing to
23 allow the Taliban to control the areas that they were from in
24 northern Afghanistan so that fight continued.

25 Q. After 1996, was the Taliban internationally recognized as

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1 the government of Afghanistan?

2 A. The Taliban regime was not recognized.

3 Q. Were there any countries that did in fact recognize the
4 Taliban regime as the government of Afghanistan?

5 A. There were three: Saudi Arabia, Pakistan, and United Arab
6 Emirates.

7 Q. Why did the rest of the international community refuse to
8 recognize the Taliban as the legitimate government of
9 Afghanistan?

10 A. There were multiple reasons. For one, they had deposed the
11 government that had been in place since the fall of the
12 communist government and that was the government that had been
13 supported broadly by the international community. The Taliban
14 also had a very, very bad human rights record and continued to
15 expand upon that poor human rights record while they were in
16 power, particularly in their punishment of offenses that had
17 been committed by women. Their imposition of Islamic law, as
18 they defined it, was very extreme. And so, the international
19 community looked at that as one of the reasons that they had
20 refused to recognize them.

21 The Taliban was also, at that period of time,
22 harboring portions of Al Qaeda and specifically the leaders of
23 the Al Qaeda movement, Osama bin Laden, Ayman Al Zawahiri who
24 was his deputy, they were in Afghanistan during that time
25 period. And then Afghanistan also had become the world's

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1 number one producer of illicit heroin through the farming and
2 processing of opium. They were producing this illicit heroin
3 that was being trafficked throughout the world.

4 Q. Prior to approximately 2001 and after the Taliban took over
5 the capital in 1996, did the Taliban become signatory to any
6 international treaties?

7 A. No, they did not.

8 Q. I want to direct your attention now to approximately
9 October of 2001. What involvement, if any, did the United
10 States have in Afghanistan at that time?

11 A. It was in October of 2001 that the United States invaded
12 Afghanistan to overthrow the Taliban government that was
13 harboring the perpetrators of the 9/11 attacks and to seek to
14 capture or detain those individuals.

15 Q. Now, after the United States overthrew the Taliban regime
16 in October of 2001 what, if any government structure, was put
17 in place in Afghanistan?

18 A. So, in the aftermath of the Taliban having been overthrown
19 with no government structure in place, the international
20 community worked very quickly to try to establish a
21 transitional government that would eventually lead to a more
22 formal government.

23 Q. Was that transitional government internationally recognized
24 as the legitimate government of Afghanistan?

25 A. It was. It was in December of 2001, actually. The

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1 international community held a conference in Bonn, Germany,
2 with -- with many representatives of Afghan society, different
3 tribal elders were there, and they collectively laid the
4 foundation for that transitional government. And when it
5 eventually formed in 2002, the international community was
6 behind it.

7 Q. When the Taliban leaders, when the United States overthrew
8 the Taliban in October of 2001 where, if anywhere, did Taliban
9 leaders go?

10 A. Those Taliban leaders who had not been killed or captured
11 in the early weeks of the war fled into Pakistan.

12 MR. ROBLES: Mr. Hanchet, can you please pull up what
13 is in evidence as Government Exhibit 108?

14 Q. What are we looking at here, Mr. Adams?

15 A. This is a map of Afghanistan and the surrounding region.

16 Q. Can you, with your finger, can you draw on the map, can you
17 identify for the Court where, in particular in Pakistan,
18 Taliban leaders fled to after October of 2001?

19 A. So Mullah Omar and the core Taliban leaders who were ruling
20 the country from Kandahar, which is here, they predominantly
21 fled south into Balochistan in Pakistan, to in and around
22 Quetta is the name of the city where they went. The fighters
23 in the east fled into the Pakistan tribal regions that were
24 along the border in those areas.

25 Q. Are you aware or are you familiar with the term: Federally

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1 administered tribal areas?

2 A. I am.

3 Q. What is that?

4 A. Federally administered tribal areas is an area along the
5 Pakistan/Afghanistan border. It was within Pakistan but the
6 Pakistan government had an agreement with the tribes that lived
7 in that area that the tribes were able to govern autonomously
8 within the boundaries of that area and so the Pakistani
9 government did not have as direct control over what was going
10 on in those areas as they did in other parts of the country.

11 Q. And did members, just to be clear, did members of the
12 Taliban flee to those federally administered tribal areas?

13 A. They did, yes. Those areas along Eastern Afghanistan that
14 I have drawn, those -- that area roughly in here, this is where
15 the federally administered tribal areas were.

16 Q. After Taliban leaders fled to Pakistan, were any Taliban
17 members still present in Afghanistan?

18 A. You are talking members or leaders?

19 Q. Members. I'm sorry.

20 A. So, there were members of the Taliban, Taliban loyalists
21 still inside of Afghanistan thereafter; yes.

22 Q. Now I want to pause for a second and ask you a few
23 questions specifically about Pakistan. At any point after 2001
24 did the United States consider itself to be in an armed
25 conflict with Pakistan?

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1 A. No.

2 Q. What, if any support, was the United States providing to
3 Pakistan in or around 2008?

4 A. So we were assisting Pakistan in a number of ways because
5 of the nature of the conflict in Afghanistan, the nature of the
6 Afghanistan/Pakistan border. There were, in addition to the
7 Taliban, there were a number of other violent extremist
8 organizations that were operating along the
9 Afghanistan/Pakistan border. So, Pakistan had its own fight on
10 its side of the border against individuals who very much liked
11 the Taliban so we were providing military support to the
12 Pakistan government, providing them the opportunity to purchase
13 aircraft, we were providing funding to them to help support
14 their operations against Al Qaeda and these other violent
15 extremist organizations that were affiliated with Al Qaeda
16 inside the borders of Pakistan.

17 Q. Was the United States transporting any supply through
18 Pakistan into Afghanistan?

19 A. We were, yes.

20 Q. The bulk of our food, much of the fuel that was being used
21 to resource the coalition inside of Afghanistan was being
22 driven across the border from Pakistan into Afghanistan, so it
23 was being brought into the ports in Pakistan and driven along
24 ground lines of communication, along the main highway networks
25 in Pakistan.

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1 Q. So is it fair to say that in or around 2008 the United
2 States viewed Pakistan as an ally in the region?

3 A. Absolutely.

4 Q. Was the Taliban ever made officially part of the Pakistan
5 state?

6 A. No.

7 Q. Were there ever any public pronouncements reflecting the
8 Taliban considered itself to be a part of Pakistan?

9 A. No.

10 Q. And similarly, were there ever any public pronouncements by
11 Pakistan that it considered the Taliban to be part of the state
12 of Pakistan?

13 A. No.

14 Q. Were any Taliban members ever made part of the Pakistani
15 government?

16 A. No.

17 Q. Did Pakistan ever permit the United States to conduct
18 military operations against the Taliban within Pakistan
19 borders?

20 A. There were a limited number of circumstances where the
21 Pakistan military was aware of and did authorize us to conduct
22 strikes, meaning aircraft strikes or rocket strikes, across the
23 border into their territory. But never ground operations.

24 Q. Understood.

25 Directing your attention to approximately 2004, what

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1 if any significant event occurred in 2004 with respect to the
2 government of the Afghanistan?

3 A. So, after the establishment of the transitional government,
4 they developed a constitution which was ratified and based on
5 that constitution that the Afghan government developed with the
6 help of the international community. They held their first
7 democratic elections for president in 2004.

8 Q. And who was elected president?

9 A. That was Hamid Karzai who was elected.

10 Q. Did the international community recognize the Karzai
11 government, post-2004, as the legitimate government of
12 Afghanistan?

13 A. Yes.

14 Q. And between approximately 2002 and let's say 2009, how, if
15 at all, did the United States characterize the Taliban's role
16 in Afghanistan?

17 A. How did the Afghan government characterize?

18 Q. How did the United States.

19 A. The United States, we considered the Taliban to be an
20 insurgency that was seeking to overthrow the government of
21 Hamid Karzai.

22 Q. And did the international community also share that view?

23 A. I would say that broadly within the international community
24 that was the understanding, yes.

25 Q. What, if any designation, did the United States state

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1 department give to the Taliban in or around approximately 2002?

2 A. In 2002 the state department designated the Taliban and
3 Mullah Omar individually as specially designated -- what is the
4 term -- specially designated global terrorist.

5 Q. And just broadly speaking what, if any effect, did that
6 designation have?

7 A. It was primarily financial. It froze the assets of
8 these -- of the Taliban regime members and of Mullah Omar, any
9 assets that they had overseas.

10 Q. Now, you have testified that the goal of the Taliban
11 insurgency was to overthrow the Afghan government. Did there
12 come a time when the Taliban was in fact able to overthrow the
13 Afghan government?

14 A. In August of 2021.

15 Q. Prior to August of 2021, did the Taliban ever exert any
16 control over the government of Afghanistan? And I should
17 clarify, after the Taliban -- so between 2002 and 2020, did the
18 Taliban ever exert any control over the government of
19 Afghanistan?

20 A. Not over the government itself, no.

21 Q. At any point during that period was the Taliban
22 internationally considered as its own state?

23 A. No.

24 Q. Now, between 2002 and 2020, I think you testified earlier
25 that some Taliban leaders were in Pakistan and other members

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1 were in Afghanistan.

2 A. Yes.

3 Q. Is it fair to say the Taliban did not operate during that
4 period within any fixed geographical borders?

5 A. No, they did not.

6 Q. During that period did the Taliban ever exert any control
7 over a permanent fixed population?

8 A. Not over a permanent population. There were instances
9 certainly where they had military dominance, particularly in
10 the absence of any opposition, and they would have military
11 control over a remote area, but never at any point prior to
12 2021 did they exert any kind of permanent control over
13 populations.

14 Q. So I want to direct your attention now specifically to
15 approximately 2008. Can you please just generally describe
16 what the Taliban's leadership structure looked like in or
17 around 2008?

18 A. By 2008, the Taliban leadership had coalesced in Pakistan
19 around Mullah Omar. He had established a council that we refer
20 to as the senior shira, and this council was an advisory
21 council. They consisted primarily of former regime members and
22 some Taliban scholars. These were primarily individuals who
23 had been part of the movement from the beginning. And from
24 amongst this group that was around Mullah Omar, they
25 established a set of commissions that were responsible for

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1 things such as communications with the media. They had a
2 political affairs commission. They had a military commission
3 that was responsible for directing military operations. And
4 then by 2008 this core group in Pakistan had appointed
5 governors over the different provinces, over the 34 provinces
6 of Afghanistan, and then beneath them there was also -- this
7 was a bit hit or miss but there were also district-level
8 officials who had been appointed, and then there was a sort of
9 a mirroring military structure that was ostensibly in place.
10 And so, this was the theoretical structure of the Taliban, but
11 once you got down to particularly below the provincial level,
12 that was not necessarily the structure as it was in practice.

13 Q. What do you mean by that, that that the theoretical
14 structure was not what it was?

15 A. Right. So this structure was what the Taliban leadership
16 developed as -- it was aspirational. This is what they sought
17 to have as their organizational structure. But the Taliban did
18 not have firm connections to all of the societal groups in
19 these different parts of the country and they weren't
20 necessarily welcomed within many parts of the country. And
21 then you had the additional fact that they were under constant
22 threat from the coalition and from the Afghan Army that we were
23 developing. So, from -- during the 2008 time period it would
24 not have been -- it would not have been -- let me say it this
25 way. The provincial governments that the Taliban had appointed

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1 did not reside inside of the provinces that they were
2 supposedly governing. Most of them, if not all, were in
3 Pakistan. The district-level leaders, it was the same in most
4 parts of the country, those individuals were not within the
5 boundaries that they were ostensibly governing. The only
6 individuals who were really inside of Afghanistan were these
7 low-level commanders and their fighters who were operating with
8 significant autonomy without the direct supervision or without
9 direction from a military hierarchy above them.

10 Q. Now, just to be clear, was the Taliban offering any
11 governmental services to the people of Afghanistan in 2008?

12 A. The only service that the Taliban ever provided as the
13 supposed government, as a shadow government, was legal. They
14 would come into areas and they would resolve disputes that
15 existed between different parties and so -- and this was based
16 on the fact that these -- some of these Taliban members, not
17 all of them, but there were some of these Taliban members who
18 were learned in Islamic law, at least to a degree, so they were
19 respected within the local populations because this was the
20 traditional way in which disputes were resolved. The learned
21 scholars would come in and interpret Islamic law and resolve
22 these disputes in accordance with that law as they understood
23 it.

24 Q. So, other than resolving certain disputes under Islamic
25 law, is it fair to say the Taliban was not offering any

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1 governmental services to the people of Afghanistan?

2 A. That's correct.

3 Q. Now, you mentioned earlier, you testified earlier about the
4 military structure.

5 A. Yes.

6 Q. Can you describe, in a little bit more detail, how, if at
7 all -- I'm sorry. I withdraw that.

8 Was there an organized military structure with the
9 Taliban in or around 2008?

10 A. It was the same -- I would say it was the same as the
11 government structure. Aspirationally they wanted to have this
12 hierarchical structure, but in practice the elements that were
13 actually fighting, the elements that were conducting attacks at
14 the local level, did not have a tight link to a hierarchical
15 structure above them that was either providing direction in the
16 kinds of attacks they should conduct, in the areas that they
17 should operate in. The guidance that they would have received
18 would have been very broad regarding the kinds of targets that
19 they should be focused on, the kinds of attacks that they
20 should conduct. And whether they actually adhered to that
21 guidance, there was no one controlling that at the local level.
22 The local level commanders were operating with autonomy.

23 THE COURT: Counsel, if I may inquire?

24 Sir, you have just now spoken about two different
25 things in the last couple of minutes and both of which you

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1 refer to with the adjective "aspirational" and one was the
2 government structure and the other was the military structure.
3 I am just wondering, sir, in as much as you aren't part of the
4 Taliban then, how do you know this? What, in your research --
5 how are you able to make these statements? Because, in some
6 respects, you are stating a negative, you are suggesting
7 something didn't exist or that there was a way it was on paper
8 and a way it was in real life, but I am just trying to figure
9 out how you know that, sir.

10 THE WITNESS: OK, your Honor. So we will get into
11 this momentarily.

12 THE COURT: Sorry.

13 THE WITNESS: Well, no. The fact that there were
14 documents that the Taliban was producing that laid out how this
15 organizational structure was supposed to exist and there were
16 rules regarding how these different elements were supposed to
17 operate that defined how they should be communicating with a
18 command structure above them. But then, based on the body of
19 primarily classified reporting that we had regarding the
20 locations and communications between these various elements, we
21 understood very clearly that most of what was happening on the
22 battlefield was not the result of any kind of close direction
23 through what we would recognize as a military hierarchy.

24 Does that make sense?

25 THE COURT: It does. Thank you.

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1 Thank you, counsel. I didn't mean to hijack your
2 questioning.

3 MR. ROBLES: No problem.

4 BY MR. ROBLES:

5 Q. Mr. Adams, just taking a step back, in a traditional
6 military structure, say for example the United States, would
7 any attack carried out by a unit, military unit in the United
8 States, need to get approval from leadership?

9 A. Yes. If nothing else, there would be a defined task and a
10 purpose, and so that task and purpose would identify here is
11 where you are supposed to -- here is the area where you are
12 supposed to be operating and this is the objective that you are
13 supposed to achieve through a particular type of an operation.
14 And then, that local leader, that local, whether it's a
15 lieutenant, a captain that is down at that low level, would
16 develop the mission for that particular operation. But it
17 would be -- it would be -- it would be a very incorrect thing
18 for one of those units to be operating without the direction,
19 without the understanding of their higher headquarters.

20 Q. And you testified about this a moment ago but is it fair to
21 say that based on your experience and the information that was
22 available to you, that local Taliban commanders were carrying
23 out attacks without necessarily getting approval from, let's
24 say, the overall Taliban leadership?

25 A. Yes. I would say that was the norm.

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1 Q. Now we will get into this in more detail in a moment but,
2 generally speaking, what types of attacks were members of the
3 Taliban carrying out against U.S. military personnel in or
4 around 2008?

5 A. Most of the attacks that were happening during that time
6 frame would have been small arms attacks, ambushes, or raids
7 that they would conduct against stronger positions. They were
8 also using mortars or rockets that they would fire onto harder
9 positions. We were beginning to see greater sophistication in
10 the use of improvised explosive devices where they were
11 adapting military explosives, whether that was mortars, whether
12 that was grenades, or homemade explosives that was becoming an
13 issue, and then they were experimenting with different ways to
14 trigger these devices to go off either through what we call
15 command directed where an individual would actually initiate
16 the device or where it could be triggered by a vehicle driving
17 over it or something of that nature. And then, finally, we had
18 seen for a few years prior to 2008, this steady and fairly
19 sharp increase in the number of suicide attacks that were
20 happening. In 2008 there was a total of 190 suicide attacks
21 that occurred throughout the country.

22 Q. Now, were you also seeing, around that time, attacks
23 against non-military personnel?

24 A. Yes.

25 Q. Can you describe, at a high level, what types of attacks

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1 you were seeing and any casualties that were suffered?

2 A. So we saw attacks against non-government organizations that
3 were operating, particularly in the rural areas. We saw
4 attacks against journalists, we saw attacks against
5 construction companies that were working on infrastructure
6 projects. In January of 2008, there was a very complex attack
7 that occurred in a five-star hotel inside Kabul where four
8 suicide bombers attempted to to enter the hotel and two of them
9 actually got inside the hotel and began shooting at civilians
10 inside of the hotel. There was a large suicide attack against
11 the Indian embassy in 2008, in July. That attack, it killed
12 two Indian government officials who happened to be going
13 through the gate at the time. But, there were dozens of other
14 people killed, the vast majority of those were Afghan civilians
15 who had no connection with the embassy at all, that just
16 happened to be in the area.

17 Q. Looking at just the two attacks you just testified about,
18 did any Taliban spokesperson take credit for those suicide
19 attacks?

20 A. Yes, they did.

21 Q. In or around 2008, was the Taliban working with any other
22 insurgency groups in Afghanistan?

23 A. They were. So they were working very closely with a group
24 that we refer to as the Haqqani Network, the Haqqani Network
25 was, for all intents and purposes, they were Taliban. That

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1 term "Haqqani Network" was a term that we used to differentiate
2 a part of the Taliban movement that operated with greater
3 autonomy than we saw other Taliban elements operating with.
4 They operated primarily in eastern and southeastern
5 Afghanistan. And then some of the Pakistani violent extremist
6 organizations that I mentioned previously, groups like Lashar-E
7 Tayyiba and then Jaish-E Muhamad, and then the remnants of
8 Al Qaeda that were still in the Afghanistan/Pakistan border
9 region.

10 Q. You mentioned earlier that there were certain rules that
11 the Taliban sought to pass in response to the Court's question.

12 MR. ROBLES: Mr. Hanchet, can you please pull up
13 Government Exhibit 105?

14 Q. Mr. Adams, what are we looking at on the screen here?

15 A. This is an English translation of a document that was
16 recovered, was found being distributed within Afghanistan in
17 2006 called, in Pashto it was called the Layha, but we called
18 it, broadly, the Taliban Code of Conduct.

19 Q. And, generally, what did this document purport to do?

20 A. So, in addition to establishing the organizational
21 structure of the Taliban, how they saw themselves as an
22 organization, it also gave direction regarding how the Taliban
23 are Taliban fighters should operate, the kinds of -- the way
24 that they should comport themselves as a movement.

25 Q. And what year is this document from?

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1 A. This version is from 2006.

2 MR. ROBLES: Mr. Hanchet, can you please go to Rule
3 no. 26, paragraph 26.

4 Q. Mr. Adams, looking at Rule no. 26, can you describe, at a
5 high level, what this is about?

6 A. This refers to the non-government organizations that were
7 operating in Afghanistan. The Taliban defined them as tools of
8 the infidels, infidels being non-Muslims, and that was the way
9 they referred to the international community, the coalition,
10 and others that were there. They basically state that these
11 groups were there to destroy Islam and that made them a
12 relevant target for attacks.

13 Q. To be clear, these are civilian groups; right?

14 A. Yes.

15 Q. Now the line that says: If a school fails to heed a
16 warning to close, it must be burned; can you tell us a little
17 bit about that?

18 A. Yes. So this happened quite regularly during that period
19 of time and particularly, again, in the rural areas where the
20 Afghan security forces were spread very thin. The Taliban
21 would come into these communities where a school was operating,
22 whether it had been built by a non-government organization or
23 whether it was happening in a structure that already existed,
24 and what we would typically find the Taliban would first warn
25 the community that the school needed to close, they would leave

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1 a letter tacked to the door at night, and if the school
2 continued to operate, the Taliban would simply burn it down.

3 Q. Now, between 2006 and approximately 2008, were you aware of
4 any other Taliban attacks on other NGO efforts in Afghanistan?

5 A. Yes. I mentioned previously attacks on infrastructure
6 projects. Some of the work that was being done, there were a
7 lot of roads that were being built as a way to help the Afghan
8 economy, to help with the transport of goods in and out of the
9 country, and these road construction groups were being, very
10 regularly, targeted. There were dam projects that were
11 targeted. There were cell towers were being burned down.

12 And so, there were a number of attacks that were
13 happening against groups that were involved in building the
14 infrastructure.

15 Q. Now, when these attacks on the infrastructure projects were
16 taking place, were there any civilian casualties?

17 A. Yes.

18 Q. Can you describe, just generally what, based on your
19 experience, the information that you obtained during your years
20 in Afghanistan, what were the types of things that the U.S.
21 government saw the Taliban members doing when they were
22 attacking these infrastructure projects?

23 A. So, with the road construction crews we would often see
24 mortar attacks against these construction workers or against
25 the camps where they were living. We saw bombs used to destroy

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1 bridges or culverts that were being constructed. And then of
2 course there were IEDs that were being placed in the roads and
3 then the roads were being destroyed. There were foreign NGO
4 workers were being kidnapped quite regularly in various parts
5 of the country. Then there was just the simple murder of these
6 individuals, whether in rural areas or in the cities.

7 Q. And what were the ways in which these individuals, these
8 civilians, were being murdered by members of the Taliban?

9 A. In different ways. We would see their vehicles just being
10 shot up out in the middle of nowhere was probably the most
11 common.

12 Q. In addition to the 2006 code of conduct you just testified
13 about, were there others that were later passed?

14 A. Yes. So this document from 2006 was updated and revised in
15 2009, and then subsequently again in 2010, and then I believe
16 in 2013 we saw yet another version.

17 MR. ROBLES: Mr. Hanchet, can you please pull up
18 Government Exhibit 106?

19 Q. Mr. Adams, what is Government Exhibit 106?

20 A. This is the 2009 version of the code of conduct translated
21 into English.

22 MR. ROBLES: Mr. Hanchet, please go to page 17,
23 section 2? Can you zoom in on that part of the page, please,
24 that half of the page?

25 Q. What is this section of the 2009 code of conduct

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1 describing, Mr. Adams?

2 A. This section defines the rules regarding the handling of
3 prisoners or captives that the Taliban would take on the
4 battlefield.

5 Q. Generally speaking, what does the rule describe needs to be
6 done when Taliban members take a prisoner?

7 A. So, at a high level, if the Taliban captured prisoners, the
8 intent was that these prisoners would be transferred back to a
9 location where Taliban leaders would be able to make a
10 determination about what would happen with them.

11 Q. Now, in practice, were these rules regarding prisoners
12 being followed generally by members of the Taliban?

13 A. There were certainly a vast number of instances when they
14 were not followed. In most cases, particularly when we saw
15 Afghan soldiers or Afghan police who were captured, we
16 routinely saw these individuals had been executed, either just
17 shot or beheaded. That was the regular way in which it
18 appeared that they were being handled.

19 I can only think of -- there were only a couple of
20 instances where we had foreign soldiers that were captured. In
21 those cases they were brought back, we didn't have beheadings
22 and things of foreign soldiers. Again, those instances were
23 very, very few where that actually happened.

24 Q. And when you say that they were killing members of the
25 Afghan national Army, was the Afghan national Army working with

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Adams - Direct

1 the United States at that point?

2 A. Yes, they were.

3 Q. Were there any prisoner of war camps that you are aware of
4 that the Taliban had in Afghanistan?

5 A. No. We never saw any reflections or indications of a
6 prisoner of war camp.

7 Q. Are you aware of any Taliban members being disciplined for
8 the way they treated, for example, Afghan National Police, who
9 had been captured?

10 A. I'm not aware of any Taliban commanders or fighters having
11 been disciplined for that, no.

12 Q. So this section that governs how the Taliban is to treat
13 prisoners or individuals that are captured, is this one of
14 those sections you mentioned earlier that, in practice, was not
15 followed?

16 A. Yes, I would say that.

17 MR. ROBLES: Mr. Hanchet, can you go to page 18,
18 please, and zoom in on Section 4?

19 Q. Mr. Adams, can you describe what this section refers to?

20 A. This section refers to civilians, Afghan civilians or
21 civilians from other nations who were employed transporting
22 either fuel or food or other items for, that were in support of
23 either the coalition or the Afghan government and its military.

24 Q. And in rule no. 21 it says: If these people persist in
25 their course, wherever the Mujahideen get the chance, they

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1 should shoot and kill them.

2 What is that referring to?

3 A. So, as it states earlier, they did have the option of
4 warning these individuals to stop working with the coalition
5 and with the Afghan government, but if they continued to
6 perform that work then all bets are off and they were -- the
7 Taliban were at liberty to just shoot these individuals.

8 Q. So, fair to say that this rule directs or allows Taliban
9 members to kill civilians who don't listen to what the Taliban
10 is saying?

11 A. Yes. I believe there is no other understanding of that
12 rule.

13 MR. ROBLES: Can we please go to page no. 21, Rule 41?

14 Q. Mr. Adams, what does Rule 41 describe?

15 A. Rule 41, when they talk martyrdom operations, this referred
16 to suicide bombings.

17 Q. And can you describe, generally, what this rule states?

18 A. So the Taliban leadership was trying to gain control over
19 how these suicide bombings were happening and so there was an
20 effort to try to normalize this within the movement but also to
21 avoid any negative perceptions building around their use of
22 suicide bombings. And so, that first rule about that the
23 Mujahed be well trained before the attack, they wanted to make
24 sure that the individuals they were selecting were capable of
25 conducting the attack that they were being chosen for.

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1 The second one, it should take place against important
2 targets and major. Because this was a finite resource, they
3 didn't have hundreds and hundreds of people who were willing to
4 conduct an attack like this or that they believed was capable
5 of doing it, and so they wanted to use them only against high
6 priority targets where they could get the best possible value

7 Q. Fair to say that this rule in the Taliban code of conduct,
8 that the Taliban leadership was condoning the use of suicide
9 attacks?

10 A. Absolutely.

11 Q. And you mentioned earlier that the rule states that suicide
12 bombers would need to be well trained. In practice, what, if
13 any observation, did you make about any individuals who may
14 have been interdicted before they carried out a suicide attack?

15 A. So that happened rarely, that we were able to interdict an
16 individual before they conducted a bombing, but there were
17 instances in which individuals were interdicted. That
18 typically occurred because the individual was either unwilling
19 to follow through with the attack or they weren't
20 well-instructed in how to conduct the attack and then they
21 would just sort of fall apart in the moment and could be
22 interdicted.

23 So, some of these individuals were fairly young,
24 teenagers, who had been essentially compelled either to wear
25 the vest or had it strapped on them, they weren't sure how to

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1 remove it. We also saw instances where there were individuals
2 of limited mental capacity who were being strapped with
3 explosives and sent to conduct these attacks. It was very,
4 very common to find individuals who were prepared to conduct
5 these attacks who had been drugged.

6 And so, that was what we normally saw when we
7 interdicted these individuals.

8 Q. How, if at all, were the bombs or weapons used for these
9 suicide attacks concealed?

10 A. If it was a -- if the person was wearing the explosives
11 they would wear it underneath their clothing so that it
12 couldn't be easily identified or we would find these explosives
13 concealed in vehicles. We sometimes saw them concealed in
14 animal, like a saddle bags or something on an animal that the
15 individual was using to move the explosives towards the target.

16 Q. And you testified about this earlier but was Taliban
17 leadership claiming credit for these suicide attacks that were
18 happening in Afghanistan?

19 A. Yes, they were.

20 There came a point when they recognized that certain
21 attacks had reflected very negatively on them and they were
22 being attacked by the press for having committed attacks
23 against civilians or against children, and so in some of these
24 instances, depending on the outcome, we would see the Taliban
25 either denounce the attack and offer that perhaps some other

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1 organization had conducted it, or they were simply silent. But
2 normally if we saw an attack against one of what they would
3 have considered an important target or an important facility,
4 they were very quick to claim these operations.

5 Q. Now, did any of the Taliban rules and codes of conduct talk
6 about dismemberment in any way?

7 A. Yes. It was in the 2009 version and it forbids
8 dismemberment.

9 Q. Was that rule being followed, in practice?

10 A. It was not. That was the reason for the rule.

11 It was very common for the Taliban to dismember
12 individuals. A great example of that is when the international
13 community assisted the Afghans in setting up their democratic
14 election system, because it was very rudimentary in terms of
15 technology, they were using indelible ink -- so, when an
16 individual would vote, they would stick their finger in this
17 bottle of ink so that it precluded someone from being able to
18 vote twice because you could see that someone had voted. And
19 we saw that Taliban would go into these villages afterwards and
20 were cutting off the fingers of anyone who had this ink on
21 their fingers. And it was also common to see ears cut off,
22 noses cut off. And so, this is specifically forbidden in the
23 2009 version of the code of conduct.

24 Q. Although it was expressly forbidden, in practice, were you
25 still seeing dismemberments being carried out?

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1 A. We still did see it. The 2009 presidential election, after
2 that this came out, we saw the fingers being cut off again and
3 other instances where it was taking place.

4 Q. OK.

5 MR. ROBLES: Mr. Hanchet, can you please go to page
6 no. 23 and to rule no. 63, please?

7 Q. Mr. Adams, can you please describe what this rule in the
8 Taliban code of conduct sets forth?

9 A. So this rule specifically tells the Taliban fighters that
10 they should blend in with the population so that they are
11 indistinguishable.

12 Q. And what is the reason for that?

13 A. As it states here, this will help the Mujahideen with
14 security. So, again, if they're not identifiable, then it
15 prevents them from being captured or killed.

16 Q. Fair to say that this is a Taliban rule specifically
17 instructing Taliban members to dress like civilians?

18 A. Yes. The other bit at the end there, the last sentence, it
19 also gives them the ability to move around easily so it
20 provided them the ability to approach their targets without
21 being identified readily. And so, yes, this is explicit
22 instruction to not wear anything that would be understood as a
23 uniform.

24 Q. Were members of the Taliban in Afghanistan wearing any
25 particular uniforms in or around 2008?

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Adams - Direct

1 A. No, they were not.

2 Q. Were they bearing any sort of distinctive insignia that
3 could tell them apart from members of the civilian population?

4 A. No.

5 Q. Was there anything that the Taliban members were wearing
6 that could differentiate them from civilians?

7 A. There is no way to differentiate. There were certain
8 clothing items that people began to associate with the Taliban,
9 for example, black turbans. Black turbans were very common in
10 Southern Afghanistan and so -- and in other parts of the
11 country the Taliban were not wearing black turbans, they were
12 wearing whatever the local headwear happened to be, so that the
13 turban was more a fashion choice than a uniform.

14 Q. Fair to say that if someone was wearing a black turban, you
15 wouldn't necessarily be able to tell they were a member of the
16 Taliban? Is that right?

17 A. Absolutely not.

18 Q. Did members of the Taliban openly carry weapons?

19 A. They did.

20 Q. Was that atypical in Afghanistan?

21 A. It was not atypical.

22 Q. Why not?

23 A. Afghanistan has a deep and rich history as a warrior
24 society, that warriors are glorified within the society, and so
25 to carry weapons for boys and for men, it is very, very common

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1 as a way to demonstrate one's warrior ethos. And so, for the
2 Taliban to carry weapons openly was -- did not set them apart
3 from other fighting-age men in the society.

4 Q. And while they carried certain weapons openly, were there
5 certain weapons that the Taliban concealed?

6 A. Yes. As I mentioned before, when conducting suicide
7 attacks, it was always the case that they would conceal the
8 explosive device.

9 Q. Mr. Adams, were members of the Taliban also carrying out
10 kidnappings in or around 2008?

11 A. Yes, they were.

12 Q. And, generally speaking, what were the types of people that
13 were being kidnapped by members of the Taliban?

14 A. It was in the 2008 time period, the kidnappings were almost
15 exclusively civilians, and in many cases they were foreign
16 civilians, because the Taliban had found that by kidnapping
17 foreign civilians there was an opportunity to collect ransom,
18 foreign governments or families of these individuals would pay
19 a high price for their return. And they also had found that it
20 was possible to negotiate the release of Taliban prisoners that
21 were being held by the Afghan government in exchange for these
22 foreign hostages that they were holding.

23 Q. Mr. Adams, based on what you learned and your observations
24 about the Taliban's operations in Afghanistan in or around
25 2008, were their actions in accordance with the laws and

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Adams - Direct

1 customs of war?

2 A. They're certainly not in line with the customs of war as I
3 was taught and as I understand.

4 (Continued on next page)

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1 Q. Why is that? What were they doing that was not in
2 accordance with the laws and customs of war?

3 A. I would say for the reasons that we have discussed, the
4 fact that they weren't wearing uniforms that identified them as
5 combatants, the targeting of civilians, the targeting of
6 civilian infrastructure, the lack of an identifiable chain of
7 command that could control the ways in which fighters were
8 operating on the ground. I can't think of many aspects of the
9 laws of armed conflict where they were systematically or
10 routinely adhering to them.

11 MR. ROBLES: One moment, your Honor.

12 Nothing further, your Honor.

13 THE COURT: Cross-examination.

14 CROSS-EXAMINATION

15 BY MS. WERNER:

16 Q. Good afternoon, Mr. Adams.

17 A. Good afternoon.

18 Q. In late 2001, at the time of the U.S. invasion, despite
19 some lingering skirmishes in the north, Afghanistan was in
20 control of the Taliban?

21 A. Prior to 2001?

22 Q. In late 2001, at the time of our invasion.

23 A. Yes.

24 Q. The Taliban was the government?

25 A. Yes, they were.

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Adams - Cross

1 Q. It had military control of Afghanistan?

2 A. Yes.

3 Q. The Taliban had an army?

4 A. Yes.

5 Q. And today the Taliban is once again in control of
6 Afghanistan?

7 A. Yes.

8 Q. In 2020, the U.S. negotiated its withdrawal from
9 Afghanistan and signed a peace agreement with the Taliban?

10 A. That's correct.

11 Q. This is not your first time testifying about the Taliban
12 and the American war in Afghanistan?

13 A. That's correct.

14 Q. In 2015, when you testified in the *Hamidullin* case, that
15 was very different moment in the war, fair to say?

16 A. It was, yes.

17 Q. The U.S. had not yet withdrawn?

18 A. Right.

19 Q. It had not yet signed that peace agreement?

20 A. Correct.

21 Q. You on direct examination used the term "insurgent." By
22 insurgency, you mean groups that were opposing the Afghan
23 government that the United States helped to install, correct?

24 A. That's correct.

25 Q. The United States considered the Taliban to be insurgents?

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Adams - Cross

1 A. Yes.

2 Q. Because it was fighting the government that was placed
3 after the U.S. invasion?

4 A. Yes. Because they were fighting the government that had
5 been established, that was recognized by the international
6 community, including the United Nations, as the official
7 government of Afghanistan.

8 Q. The Taliban did not view itself as an insurgency?

9 A. They did not.

10 Q. They viewed themselves as the legitimate government of
11 Afghanistan?

12 A. That was their claim.

13 Q. They viewed themselves as a government in exile?

14 A. That was their claim.

15 Q. And they viewed the United States-backed government as a
16 puppet government?

17 A. That's correct.

18 Q. You spoke about this on direct, but briefly, the Taliban
19 emerged from the Mujahideen movement that fought the Soviets?

20 A. Right.

21 Q. And that was a movement that the United States supported
22 and helped to arm?

23 A. Yes.

24 Q. Many original members of the Taliban came out of that
25 conflict?

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Adams - Cross

1 A. That's right.

2 Q. And you spoke about the civil war and the violence of the
3 period following the Soviet Afghan War. The Taliban came to
4 power following that period of chaos to bring law and order to
5 the country, correct?

6 A. That's correct.

7 Q. And putting aside whatever criticisms you might have of the
8 Taliban government, you would agree that after the Taliban came
9 to power, the country was more ordered, less violent, less
10 anarchic than during the civil war time?

11 A. Speaking about the 90s?

12 Q. Yes.

13 A. Yes, I would say that.

14 Q. The Taliban, when they came to power, were the most stable
15 government that Afghanistan had seen in 20 years?

16 A. I would not say that they were the most stable. The
17 Communist government was fairly stable. It faced opposition,
18 but it was well armed, it was able to exert law and order.
19 Again, it was not -- it was no less functional, probably far
20 more functional than what the Taliban government was.

21 Q. But its period of rule was marked by war and conflict,
22 correct?

23 A. That's correct. As was the period in which the Taliban
24 regime was in power. It was still a civil war going on.

25 Q. During the initial months of the American war in

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Adams - Cross

1 Afghanistan, the Taliban maintained control in some parts of
2 the country, such as the south?

3 A. In the immediate, are you saying the immediate weeks?

4 Q. Yes.

5 A. Yes. Until they were forcibly expelled from the country,
6 that's true.

7 Q. Eventually United States and northern alliance forces
8 pushed the Taliban southward?

9 A. Yes.

10 Q. And eventually Taliban leadership fell back from those
11 parts of the country as well?

12 A. Yes.

13 Q. But the Taliban never surrendered?

14 A. No, they did not.

15 Q. They never relinquished their claim to being the legitimate
16 government of Afghanistan?

17 A. That's correct.

18 Q. When Mullah Omar left, he did not retreat into retirement,
19 he retreated to continue governing the Taliban and to continue
20 the Taliban movement?

21 A. That's correct.

22 Q. He told his followers that the war would continue against
23 the crusader invaders, to use his term?

24 A. Yes.

25 Q. And many Taliban leaders, you said this already, fled to

O888NAJ5

Adams - Cross

1 Pakistan to plan the Taliban's next steps?

2 A. Yes.

3 Q. Although many leaders fled, the Taliban still had loyalists
4 and leaders in Afghanistan?

5 A. That's true.

6 Q. And the Taliban remained influential in many parts of the
7 country?

8 A. I would not say many. In the early years of the war, they
9 had very minimal influence because they had very little
10 presence. It was only in later years that they were able to
11 build a force that was large enough to exert any kind of de
12 facto control.

13 Q. Certainly, during those early years, they still had
14 loyalists in the south and in the east?

15 A. They did have loyalists, but those loyalists were not
16 active in attempting to oppose what was happening inside the
17 country. It was very little violence in those early years
18 until about 2006 time frame, very little violence in the
19 country.

20 Q. But they still had supporters?

21 A. They had individuals who were aligned with them
22 ideologically, but were not functioning in any kind of an
23 oppositionist way. They weren't conducting attacks. They
24 weren't trying to govern. They weren't trying to prevent the
25 coalition or the budding Afghan government and military from

1 operating.

2 Q. I am not trying to be cheeky, but is supporters another
3 word for individuals who had sympathy for the government or
4 shared ideological views with them? Is supporters not the
5 right word?

6 A. Okay.

7 THE COURT: Let's please move on.

8 Q. Following the initial months of the war when the Taliban
9 was pushed back, the Taliban continued fighting, they came back
10 and continued fighting?

11 THE COURT: What time frame, please?

12 Q. As early as 2001. The fighting never stopped, right?

13 A. It's hard to say that they continued fighting because,
14 again, there was very, very little, there was very little
15 violence in the country in that 2002 to 2006 time period. We
16 are talking, perhaps, a dozen attacks a month across a country
17 that's the size of Texas. And so to say that the Taliban were
18 fighting during that period of time, I don't know that that's
19 accurate.

20 Q. In the early 2000s, the earliest years of the war, the
21 Taliban movement was growing?

22 A. It was growing, yes.

23 Q. And by 2003, it was getting on its feet again after
24 sustaining some early losses?

25 A. Yes.

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Adams - Cross

1 Q. By the end of 2006, the Taliban had taken control of
2 several provinces?

3 A. No. I would not say that that is accurate. By 2006, they
4 were very active in a few provinces in the south, and they were
5 conducting more attacks. But it would not be accurate to say
6 that they had gained control over those provinces.

7 Q. They had a good deal of control in Helmand and Kandahar,
8 certainly?

9 A. They had control in very remote areas, but the population
10 centers were always under the control of the official Afghan
11 government.

12 Q. Isn't it true that by the end of 2006, the Taliban had
13 taken control of most of Zabul, Farah, Uruzgan, and Ghazni
14 provinces as well?

15 A. Again, the rural areas. So if you were to look at them and
16 say they control 80 percent of the geographic territory, that
17 may have been true, but that 80 percent is barren and no one
18 lives in it. So we couldn't necessarily say they control this
19 geographic terrain because they are not sitting in it either.
20 It's simply not being contested. So the Taliban has freedom of
21 movement through there, because no one there is to stop them,
22 but to say they actually control it would not be accurate.

23 Q. You would agree that the Taliban was exerting some military
24 control in broad geographic regions of Afghanistan as of 2006,
25 right?

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Adams - Cross

1 A. In remote areas they had freedom of movement and a
2 presence.

3 Q. By remote you mean non-urban?

4 A. Correct. Very austere environments, where if you flew over
5 and looked down you would say no one is there. And those are
6 the areas where people would have said in those time periods
7 the Taliban controls this area because they have freedom of
8 movement there and no one is stopping them. But there was no,
9 from a counter-insurgency perspective, with the limited forces
10 that were available, it was an operational decision to not try
11 to prevent the Taliban from being anywhere.

12 And so, if they were in those areas, that did not
13 provide them with any value because there was no population.
14 There were no resources, there was no way for them to recruit.
15 Because there was no population, then those areas were
16 essentially -- it was deliberately allowed for the Taliban to
17 be there so that we could focus on the areas that actually
18 mattered, which was the road networks and the population
19 centers. That is in line with counter-insurgency theory and
20 doctrine, and so that was the way we were operating.

21 Q. It wasn't the case, just looking at 2006 to 2008, the
22 Taliban was sitting in unoccupied areas; they were conducting
23 thousands of military attacks each year, right?

24 A. They were conducting attacks, yes.

25 Q. They weren't just sitting in barren desert land?

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Adams - Cross

1 A. You were talking about control. If they controlled
2 anything, they controlled barren desert land. But they were
3 conducting attacks against the road networks and in the urban
4 centers, but they didn't control those areas, that's where they
5 were going to conduct violence.

6 Q. They were actively fighting for more control?

7 A. They sought more control, yes.

8 Q. Indeed, the troop surge of 2008 and 2009 was implemented
9 because the United States realized that the Taliban was
10 expanding in capability and expanding geographically in
11 Afghanistan?

12 A. That's correct.

13 Q. The Taliban had an organizational structure, right?

14 A. Again, it was aspirational. Parts of the movement, it was
15 identifiable and practical, but not throughout the entire
16 movement, no.

17 Q. It wasn't all aspirational. Mullah Omar was at the top,
18 right?

19 A. Yes.

20 Q. And he had deputies?

21 A. Yes.

22 Q. And beneath them was the Quetta Shura, the governing
23 council?

24 A. Yes.

25 Q. And the Quetta Shura worked to disseminate Mullah Omar's

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Adams - Cross

1 guidance?

2 A. Yes.

3 Q. And then there were committees that were in charge of
4 different issue areas?

5 A. There were committees on paper. How well those committees
6 operated, whether or not they actually performed the intended
7 function, that was a different story.

8 Q. Well, there was a military committee?

9 A. Yes.

10 Q. There was a political committee?

11 A. Yes.

12 Q. There was an informational committee?

13 A. Yes.

14 Q. And beneath those committees, there were commanders with
15 responsibility for individual provinces and districts?

16 A. On paper, yes.

17 Q. The Taliban had a command and control architecture where
18 district level commanders were responsible for attacks in
19 particular areas, correct?

20 A. That was the intention. That's the structure as they
21 described it. That is not necessarily the way that the
22 organization functioned throughout the entire country.

23 MS. WERNER: Just one moment.

24 Q. You have testified about the Taliban previously?

25 A. Yes.

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Adams - Cross

1 Q. Didn't you testify that there was a command and control
2 architecture within the Taliban where a district level
3 commander would be responsible for attacks that are occurring
4 in his particular area?

5 A. If that's what I said, yes. Now, the context around, I
6 don't know what else I said. But that was, as I have
7 explained, that was the intention, and in some areas that is
8 how it functioned. But once you got outside of areas where the
9 Taliban had traditionally exercised command and control, they
10 no longer were able to exercise that level of command and
11 control. Once you get into remote valleys in eastern and
12 northern Afghanistan, those links back to Quetta became either
13 very, very weak or nonexistent.

14 Q. So there were places where the structure was stronger and
15 places where the structure was weaker?

16 A. That's correct.

17 Q. Within districts, let's turn to the district level, there
18 were fighters organized into groups with distinct leaders?

19 A. Yes. There were individuals, due to charisma, due to their
20 ability to gain access to resources, that other fighters would
21 follow, yes. These individuals were not always appointed by
22 Taliban leaders elsewhere. It was simply the individual that
23 everyone in the local level would follow.

24 Q. And sometimes they were appointed?

25 A. In some cases they were.

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Adams - Cross

1 Q. Some of these individual groups worked together on military
2 operations?

3 A. At times, yes.

4 Q. And these fighters by and large carried their weapons
5 openly?

6 A. Yes.

7 Q. Turning from this military structure to the political
8 structure, during, let's say, the 2007 to 2009 period, there
9 was an organizational structure of political leaders who were
10 tasked with governing certain provinces and regions; is that
11 fair to say?

12 A. There were individuals appointed at the provincial level.
13 In some districts, they were also appointed, but not in all.

14 Q. By 2009, the Taliban had appointed governors that it
15 considered to have authority over all but one of Afghanistan's
16 34 provinces?

17 A. That's correct.

18 Q. At certain times during the 20-year war, there were
19 governors who were appointed to have an authority over
20 provinces where the U.S. forces were struggling and where the
21 Afghan government had little capacity to govern those regions?

22 A. You're saying there were Taliban officials appointed there
23 in those areas? Yes.

24 Q. It's a bad question. I think you have answered it. Let me
25 rephrase it.

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Adams - Cross

1 There were times during the war where there were
2 regions of the country where the Afghan government, installed
3 after 2001, was struggling and not exerting control
4 effectively?

5 A. Yes.

6 Q. And the Taliban had governors that were appointed to be in
7 charge of those areas?

8 A. There were governors appointed. Whether or not they
9 actually functioned and actually administered is a different
10 question. Because we didn't see Taliban government structures
11 at the local level. There wasn't a city hall where you go and
12 talk to your Taliban governor and ask for any kind of
13 government services that any of us would recognize. That type
14 of government and governance did not exist under the Taliban
15 shadow government structure.

16 Q. There was the legal system?

17 A. There were judges. That's as far as their legal system
18 went. So you had an individual who was more learned in Islamic
19 law, who people looked at and respected, and if he said, you
20 stole his goat, you have to give the goat back, the local
21 citizenry would respect that decision.

22 Q. Judges with the respect of the local population?

23 A. Yes.

24 Q. Dating back to the rise of the Taliban movement after --

25 A. This was --

1 THE COURT: Let her finish the question.

2 Q. Those judges emerged from the Taliban movement bringing law
3 and order following the civil war, fair to say?

4 A. I would say -- what I was going to say is that
5 traditional -- that traditional judicial structure predated the
6 Taliban by a thousand or more years. Because this is how these
7 communities resolved disputes within their own communities and
8 amongst themselves and neighboring communities, is individuals
9 who were respected, due to their wisdom, due to their learning,
10 were sought to resolve disputes. And these judges who aligned
11 themselves ideologically with the Taliban, and functioned with
12 the protection of the Taliban fighters in the area, those were
13 the individuals who were seen as these Taliban judges who were
14 providing some form of legal authority for the Taliban locally.

15 Q. So one reason local civilians supported the Taliban in
16 certain areas was because they offered a justice system that
17 was rooted in his Afghan concepts of religion and identity?

18 A. Correct.

19 Q. And the Taliban judges were offering a justice system that
20 reflected those things?

21 A. That's true.

22 Q. The Taliban did have codes of conduct that offered a
23 guidance to its fighters?

24 A. Yes.

25 Q. As early as 2003, the United States was aware of Taliban

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Adams - Cross

1 leadership establishing guidelines for its fighters?

2 A. That's true.

3 Q. By 2006, as you were asked about on direct, there was a
4 written code of conduct?

5 A. Right.

6 Q. And it described the Taliban organizational structure?

7 A. Yes.

8 Q. It provided guidance to Taliban fighters on what kind of
9 operations they can conduct and what kind they should avoid?

10 A. Yes.

11 Q. And that was updated in 2009?

12 A. Right.

13 Q. When it was updated, it aimed to clarify and emphasize
14 certain rules?

15 A. Correct.

16 Q. It May 2009, the United States was actually recovering
17 copies of the code of conduct on the battlefield?

18 A. That's right.

19 Q. Meaning that fighters were carrying it?

20 A. Yes.

21 Q. You have talked about examples where the code was not
22 always followed, but you certainly wouldn't have always been
23 privy to information about instances where the code was
24 followed, right?

25 A. No.

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Adams - Cross

1 Q. You would not be aware of those moments where a captured
2 soldier was brought to Taliban leadership in accordance with
3 the code?

4 A. I mean, I would say I would not -- we would not have been
5 aware of every instance in which that happened, but I think
6 it's fair to say that, if it was happening routinely, we would
7 have been aware of some of those instances, yes.

8 Q. And not all of them?

9 A. Not all, right.

10 Q. You can tell from the code that one of the Taliban's goals
11 was to gain the support of the population?

12 A. Yes.

13 Q. And when a local population complained about a leader, the
14 Taliban leadership didn't ignore it, they moved those leaders?

15 A. Correct.

16 Q. That was the command structure; they could place leaders
17 and move them if the local population complained?

18 A. Yes.

19 Q. Indeed, the code of conduct called for the expulsion of
20 leaders from the Taliban when they ran afoul of the local
21 population and its desires?

22 A. That was the punishment. The punishment was expulsion from
23 the Taliban.

24 Q. And one reason that punishment was called for was because
25 the Taliban did want the support of the local population?

O888NAJ5

Adams - Cross

1 A. Right.

2 Q. And you're aware that by 2009 an Asia foundation survey
3 found that 56 percent of Afghans did have sympathy for the
4 Taliban?

5 A. I am not familiar with that particular document that you're
6 talking about. I mean, it's fair to say there would have been
7 sympathy. I can't really speak to -- I am sure there were
8 other questions, there were other findings within that report
9 that probably provide some great context to that issue.

10 Q. Over the years, the Taliban did regain support and sympathy
11 among the local population?

12 A. I would say that they gained the support of segments of the
13 population. In the areas that were aligned ethnically and
14 tribally with them, that's where they found ready support and
15 sympathy. Outside the areas where they were aligned with the
16 local ethnic groups and tribal groups, I would not say that was
17 the case, no.

18 Q. We know that the Taliban ultimately prevailed and became
19 the government again?

20 A. Yes.

21 Q. From the time of the initial U.S. invasion until the
22 withdrawal of troops, the United States never left Afghanistan?

23 A. That's correct.

24 Q. If you were to look at a graph of our troop presence over
25 the course of the war, you would see a steady increase, and

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Adams - Cross

1 then eventually a major surge around 2008 through 2011, right?

2 A. Right.

3 Q. We have discussed that the reason for that surge was the
4 Taliban's expanding capability and geographic control?

5 A. Correct.

6 Q. In 2007 and 2008, particularly, hostilities and violence
7 were increasing?

8 A. That's correct.

9 Q. The Taliban was growing stronger and its attacks involved
10 larger numbers of fighters?

11 A. Yes.

12 Q. At that point, the Taliban was engaged in thousands of
13 military attacks each year?

14 A. Right.

15 Q. You highlighted the fact that some of those attacks
16 impacted civilians, but you would agree that many of them were
17 military-type attacks on military targets?

18 A. Yes.

19 Q. Attacks on United States and coalition forces?

20 A. Right.

21 Q. Most of those involved small arms?

22 A. Yes.

23 Q. But there were attacks involving larger weapons and attacks
24 involving RPGs?

25 A. Yes.

O888NAJ5

Adams - Cross

- 1 Q. There were attacks on military bases and FOBs?
- 2 A. Yes.
- 3 Q. Using rockets?
- 4 A. Right.
- 5 Q. Not all of these attacks were suicide attacks?
- 6 A. No.
- 7 Q. In 2008 and 2009, the United States had significant areas
8 of responsibility within Afghanistan?
- 9 A. Yes.
- 10 Q. There were areas that were under the operational control of
11 U.S. forces?
- 12 A. That's correct.
- 13 Q. In those areas, the U.S. armed forces were responsible for
14 fighting the Taliban?
- 15 A. Yes.
- 16 Q. And those were areas of significant importance to the U.S.
17 military?
- 18 A. Yes.
- 19 Q. Such as Khost province?
- 20 A. Yes.
- 21 Q. Neighboring Pakistan?
- 22 A. That's correct.
- 23 Q. And Khost was a province with a strong Taliban presence?
- 24 A. Yes.
- 25 Q. In those areas where the U.S. had major responsibility for

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Adams - Cross

1 controlling the terrain and fighting the Taliban, the nascent
2 Afghan government was not capable of controlling those areas
3 without the military backing of the United States?

4 A. That's true.

5 Q. In Wardak province in 2008 the U.S. had a significant
6 presence?

7 A. I would not say it was a significant presence. It was a
8 relatively small presence given the size of Wardak province.

9 Q. Certainly there was U.S. military presence?

10 A. Yes, there was U.S. military presence.

11 Q. And there were also numerous Taliban fighters staging
12 attacks in Wardak in 2008?

13 A. That's correct.

14 Q. There were numerous armed clashes between the two forces?

15 A. Yes.

16 Q. I want to turn to the Afghan government that was installed
17 after the U.S. invasion.

18 After the invasion, this government was created with
19 the assistance of the United Nations and the United States?

20 A. Yes.

21 Q. The goal was a transitional government that would be
22 followed eventually by elections?

23 A. Yes.

24 Q. And the transitional government was selected at an assembly
25 of loya jirga?

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Adams - Cross

1 A. Yes.

2 Q. And that was called for, the assembly, by the Bonn
3 agreement and by the Bush administration?

4 A. Yes.

5 Q. Elections did not take place until 2004?

6 A. Right.

7 Q. And there was another round of elections in 2009?

8 A. Presidential elections, yes.

9 Q. And you're aware of the fact that the elections involved
10 allegations and reports of massive fraud?

11 A. Yes, I am.

12 Q. Ghost polling centers that were listed on paper, but in
13 fact did not exist, things like that?

14 A. That's correct.

15 Q. The United States criticized Hamid Karzai, his government,
16 for the fraud in those elections?

17 A. Yes.

18 Q. Would it be fair to say that the relationship between the
19 U.S. government and the Karzai government soured in part due to
20 those allegations?

21 A. Yes.

22 Q. Partially as a result of that, and partially because of the
23 war -- let me strike that.

24 In addition to that conflict about the elections,
25 Hamid Karzai also was critical of the U.S. government for its

1 operations during the war?

2 A. Yes. During that same period of time, yes.

3 Q. 2008, 2009, and 2010?

4 A. Later. It was more, I would say probably the '13, '14, '15
5 time period is when President Karzai became very openly
6 critical of the U.S. conduct with the war.

7 Q. One of the things he was critical of was how many civilian
8 deaths the U.S. was responsible for?

9 A. Yes. Again, during that later time period, yes.

10 Q. He was also critical of the United States for tactics like
11 night raids on the local population's homes?

12 MR. ROBLES: Objection. Relevance.

13 THE COURT: I will allow it.

14 A. Yes.

15 Q. I will move to another topic, which is something you
16 discussed at length on direct examination. Pakistan's role in
17 the war.

18 Pakistan was implicated in the war from its earliest
19 days, right?

20 A. It was a what?

21 Q. It was involved or implicated in this conflict from its
22 earliest days?

23 A. Yes.

24 Q. In fact, Pakistan, or at least the ISI, its intelligence
25 force, was instrumental in the emergence of the Taliban

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Adams - Cross

1 movement well before the U.S. invasion?

2 A. Yes, they were.

3 Q. Prior to 2001, Pakistan provided the Taliban regime with
4 significant political, financial, military, and logistical
5 support?

6 A. Prior to 2001, yes.

7 Q. And that support consisted of arms, ammunition, equipment,
8 fuel, supplies, is that fair to say?

9 A. That's fair to say. I don't know the details of exactly
10 what Pakistan provided them, but that's likely true.

11 Q. You're aware that Pakistan also provided the Taliban with
12 military guidance and training?

13 A. Are we still talking pre --

14 Q. Prior to 2001, yes.

15 A. I believe that's probably true to an extent.

16 Q. And that support continued following the U.S. invasion?

17 A. Again, to an indeterminate degree. It was never really
18 clear what exactly the Pakistani government was doing versus
19 what elements, individuals within ISI were doing.

20 Q. There were reports of ISI representatives participating in
21 the Quetta Shura?

22 A. Are you talking about like news reports?

23 Q. Intelligence reports, government reports. Obviously, don't
24 say anything that you can't because of classification, but
25 you're aware that the U.S. government had reason to at least

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Adams - Cross

1 suspect that there were ISI officers sitting on the Quetta
2 Shura?

3 A. We were aware of close communications between them, that
4 there were individuals from the Pakistani intelligence services
5 who were at least in close contact with Taliban senior leaders,
6 who were residing within their country under their protection.

7 Q. Focusing in on the earliest days of the war, Pakistani
8 fighters joined in opposition against the U.S. invasion?

9 A. Yes.

10 Q. Indeed, about 10,000 Pakistani fighters came into
11 Afghanistan during the first weeks of the war?

12 A. I don't know that number, but that would not be -- I
13 wouldn't doubt that.

14 Q. And in late 2001, the ISI's commanding general told the
15 Taliban ambassador in Pakistan, We want to assure you that you
16 will not be alone in this jihad against America, we will be
17 with you?

18 A. I don't know the source of that statement.

19 Q. Have you heard that before?

20 A. Not that exact statement, no.

21 Q. But you have heard statements that ISI leadership professed
22 allegiance to the Taliban following the initial U.S. invasion?

23 A. I can't say I am familiar with anything that I would
24 consider to be verifiable where the ISI gave them that
25 assurance.

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Adams - Cross

1 Q. You're aware that in 2004 Musharraf specifically proclaimed
2 that they would assist the Taliban again, that Pakistan would
3 provide assistance once again?

4 A. I do not know what the source of that would be. In that
5 period of time, Musharraf was openly insisting that the Taliban
6 were not in Pakistan. So I don't know where that statement
7 would have come from.

8 Q. Well, that wasn't true that the Taliban were not in
9 Pakistan?

10 A. That is correct, that was not true. So I don't know at
11 what point Musharraf would have said, and it would have been
12 openly known, that they were supporting the Taliban, because he
13 was intentionally obscuring that relationship.

14 Q. And, in fact, the Taliban leadership had largely fled into
15 Pakistan following the initial U.S. invasion?

16 A. That's true.

17 Q. You're aware that Hamid Karzai saw Pakistan as an enemy
18 rather than an ally in the war?

19 A. That's true.

20 Q. You're aware that many analysts believed that the ISI was
21 motivated in its support to the Taliban because of its
22 concerns, Pakistan's concerns, regarding a relationship between
23 India and another Afghan government?

24 A. That's true.

25 Q. And you're aware of research indicating that some Taliban

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Adams - Cross

1 fighters participated in the fight, under pressure from
2 Pakistan, because their families were living in Pakistan and
3 they felt that they had no choice but to fight?

4 A. That's true. I am aware that Pakistan used the presence of
5 these Taliban leaders and their families inside of Afghanistan
6 as a way to manipulate their movement.

7 Q. To continue fighting?

8 A. That's correct.

9 Q. You're aware that a joint United States NATO and Afghan
10 intelligence assessment from June 2006 concluded that a large
11 number of those fighting with the Pakistan were doing so under
12 duress as a result of pressure from the ISI?

13 A. I am not familiar with the report, but that aligns with my
14 understanding of our beliefs at that time.

15 Q. There was reason to believe, indeed, that this policy of
16 Pakistani support, government support, for the Taliban, was
17 approved at the highest levels of Pakistan civilian government?

18 A. There is reason to believe that the highest levels of the
19 government knew about some degree of support. Whether or not
20 they knew precisely what was happening and precisely what level
21 and where and how, it's debatable, it's not verifiable.

22 Q. Looking back, many analysts who study this war closely or
23 participated in the U.S. efforts in the war feel that Pakistan
24 was not an ally and, in fact, it prevented the U.S. from
25 winning its war against the Taliban?

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Adams - Cross

1 A. Again, that's opinion. As I mentioned earlier, we also
2 could not have conducted the war the way that we did without
3 the direct support of Pakistan. They allowed us to fly our
4 planes through their airspace. They allowed us to transport
5 our logistics across their highways. They were supporting our
6 efforts to locate and detain al Qaeda leaders inside their own
7 country, and at times even Taliban leaders inside of their
8 country.

9 Q. While also providing safe harbor to Taliban leadership
10 within their country and helping to arm and train Taliban
11 fighters?

12 A. Yes. It was a very complicated relationship.

13 Q. Let's turn to another topic that was discussed at length on
14 direct examination, which is the claim you have made that some
15 of the Taliban's actions were out of step with the laws of war?

16 A. Yes.

17 Q. You have spoken to the government about some of the
18 Taliban's attack methods?

19 A. Yes.

20 Q. And you spoke about suicide attacks in particular.

21 Now, suicide attacks, even if the United States does
22 not use them in our military efforts, they are not per se
23 violative of the law of war, right?

24 A. As far as I know, the laws of armed conflict do not
25 specifically mention them, but I am not an expert on the law of

1 war.

2 Q. And there are other examples in international warfare of
3 suicide attacks, such as kamikaze pilots, right?

4 A. There are certainly examples like kamikazes where suicide
5 was the means of conducting attack, yes.

6 Q. The question of suicide attacks is actually more about the
7 target of the attacks than the fact of an attack being a
8 suicide attack, right? The question is, are you targeting
9 civilians or military targets?

10 THE COURT: He said to you earlier he is not an expert
11 on the law of war. I am not going to let you continue to ask
12 questions about the law of war. So you have got one or two
13 more, and then I think you should move on to something he can
14 profess to be an expert in.

15 MS. WERNER: Certainly, your Honor. I do think the
16 government opened the door to that by eliciting his opinions on
17 Taliban compliance within the law.

18 THE COURT: Yes. But if he tells you again he is not
19 an expert on the law of war, then that's going to be your
20 answer.

21 BY MS. WERNER:

22 Q. Can you answer that last question or would you like me to
23 rephrase it?

24 A. Ask the question again.

25 Q. Here's the question. When we are looking at a suicide

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Adams - Cross

1 attack, the question, under the law of war, as you have been
2 trained in it, recognizing you're not a lawyer but the
3 government asked you about it, the question is, who is the
4 attack targeting? The question for the attack's legality is
5 not was it a suicide attack or an IED attack, right?

6 A. That makes sense.

7 Q. That's your understanding?

8 A. Yes.

9 Q. And when you're looking at any attack, suicide or
10 otherwise, one of the most important questions is of
11 proportionality; is that fair to say?

12 A. Are you saying in terms of determining whether or not the
13 attack was legally justifiable?

14 Q. Yes.

15 MR. ROBLES: Objection, your Honor.

16 MS. WERNER: I can move on, your Honor. That's fine.

17 THE COURT: Please.

18 BY MS. WERNER:

19 Q. The Taliban code of conduct said to avoid killing
20 civilians?

21 A. In 2009, the code of conduct did make that clear, yes.

22 Q. And the Taliban code of conduct also included four
23 conditions that were supposed to be met for suicide attacks?

24 A. That's correct.

25 Q. You testified that there were instances where those

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Adams - Cross

1 conditions were not met?

2 A. Yes.

3 Q. But you acknowledge that those examples were the rare
4 examples where you were able to stop an attack or where the
5 United States stopped an attack before it happened?

6 A. That's right.

7 Q. You can't say whether attacks that were carried out
8 successfully followed those four principles set out in the
9 Taliban code of conduct?

10 A. That's correct.

11 Q. The core of the Taliban in 2008 and 2009 did have certain
12 norms, right?

13 A. Yes.

14 Q. In the *Hamidullin* case, you testified about the Haqqani
15 network?

16 A. Yes.

17 Q. And you described it as a much more brutal organization
18 than the core Taliban?

19 A. Correct.

20 Q. The Haqqani network targeted civilians far less
21 discriminately than the core Taliban organization?

22 A. That's correct.

23 Q. And it committed kidnappings that the core of the Taliban
24 movement would not have advocated?

25 A. Correct.

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Adams - Cross

1 Q. You would agree, Mr. Adams, that in every army in the world
2 there are some soldiers that commit war crimes?

3 A. Yes, I would say that's true.

4 Q. And American soldiers have committed war crimes?

5 A. Yes.

6 Q. American soldiers committed war crimes in Iraq?

7 A. Yes.

8 MR. ROBLES: Objection.

9 Q. In Vietnam?

10 A. Yes, that's my understanding.

11 THE COURT: Counsel, the point is made.

12 Q. In Afghanistan, the United States government was
13 responsible for thousands of civilian casualties?

14 MR. ROBLES: Objection.

15 THE COURT: I will allow it.

16 A. Based on my reading of reports from the United Nations and
17 others, that's true.

18 Q. And the United States also in Afghanistan during the war
19 worked with warlords who murdered civilians, slaughtered
20 prisoners, and otherwise violated the laws of war?

21 MR. ROBLES: Objection.

22 THE COURT: I will allow it.

23 A. We were allied with, especially in the early days,
24 individuals who were accused of such violations.

25 Q. You testified, we have discussed this, in the *Hamidullin*

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Adams - Redirect

1 trial, and that was a trial of a Russian national who was
2 fighting with the Haqqani network?

3 A. That's correct.

4 Q. You're not aware of any Pashto-speaking Afghan national
5 other than Mr. Najibullah who has been prosecuted by the U.S.
6 for acts of combat carried out in the name of the Taliban?

7 MR. ROBLES: Objection.

8 THE COURT: I will allow it.

9 A. I am personally not aware of any.

10 MS. WERNER: No further questions.

11 THE COURT: Thank you.

12 Redirect.

13 MR. ROBLES: Just very briefly, your Honor.

14 REDIRECT EXAMINATION

15 BY MR. ROBLES:

16 Q. Mr. Adams, you were asked on cross-examination about
17 attacks on military targets in Wardak province in and around
18 2008. Do you remember that?

19 A. Yes.

20 Q. Were there also Taliban attacks on civilian targets in
21 Wardak province in 2008?

22 A. Yes, there were.

23 Q. Did that include attacking civilian trucks that were
24 carrying food and fuel for coalition forces?

25 A. Yes.

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Adams - Redirect

1 Q. Did those attacks by the Taliban in Wardak province against
2 civilians result in casualties?

3 A. Yes, they did.

4 Q. Did it result in civilians being beheaded?

5 A. Yes.

6 Q. Did the Taliban claim responsibility for these attacks?

7 A. Yes.

8 Q. You were asked also about sort of rogue actors. Was it a
9 rare occurrence to see members of the Taliban killing
10 civilians?

11 A. It was not rare, it was not rare, it was very typical,
12 especially in the case of suicide bombings, for either an
13 individual wearing a vest or a belt or driving a vehicle to
14 conduct a suicide attack that did not kill civilians.

15 Q. Were those suicide attacks at times carried out in
16 locations that were not military targets?

17 A. Yes. I mentioned the hotel, the Serena Hotel in January of
18 2008 was an excellent example. There were no military
19 personnel there at the location at the time that that happened.

20 Q. Were Taliban members also kidnapping civilians?

21 A. Yes.

22 Q. Are you aware of any Taliban members being disciplined for
23 kidnapping civilians?

24 A. I am not aware of any Taliban being disciplined for that,
25 no.

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1 MR. ROBLES: One moment.

2 Nothing further, your Honor.

3 MS. WERNER: May I ask one question on recross?

4 THE COURT: One.

5 RECROSS-EXAMINATION

6 BY MS. WERNER:

7 Q. Mr. Adams, you were asked about the rarity of seeing
8 civilian deaths at the hands of the Taliban. Are you aware
9 that out of more than 2100 civilian casualties in Afghanistan
10 in 2008, 828 of those were killed or wounded by the United
11 States or its coalition partners?

12 MR. ROBLES: Objection.

13 THE COURT: Yes or no.

14 A. I am not aware of that figure.

15 THE COURT: That's the answer.

16 A. I don't know where that figure came from.

17 THE COURT: Sir, thank you very much. You may step
18 down.

19 (Witness excused)

20 THE COURT: The government is not calling additional
21 witnesses, correct?

22 MR. ROBLES: We are not.

23 THE COURT: Does the defense wish to take a
24 five-minute break before calling your witness?

25 Actually, the witness is begging for a five-minute

1 break. I will see you in five minutes. Thank you very much.

2 (Recess)

3 THE COURT: May I have the next witness, please.

4 MR. DALACK: The defense calls Rachel VanLandingham.

5 RACHEL VANLANDINGHAM,

6 called as a witness by the defendant,

7 having been duly sworn, testified as follows:

8 THE COURT: If you could please state and spell your
9 full name for the record.

10 THE WITNESS: Thank you, Judge Failla. Rachel
11 Elizabeth VanLandingham, R-a-c-h-e-l, E-l-i-z-a-b-e-t-h,
12 V-a-n-l-a-n-d-i-n-g-h-a-m.

13 THE COURT: Thank you so much.

14 Counsel, you may inquire.

15 DIRECT EXAMINATION

16 BY MR. DALACK:

17 Q. Good afternoon, Professor VanLandingham.

18 A. Good afternoon.

19 Q. I am not going to ask you to go into all of your
20 experience, but I would like to know a little bit about your
21 military background. Do you have a military background?

22 A. Yes, I do. I am a retired lieutenant colonel of the United
23 States Air Force.

24 Q. What were your responsibilities in that role?

25 A. I held quite a few different positions, but the pinnacle of

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VanLandingham - Direct

1 my career was as the chief of international law, at
2 headquarters, United States Central Command, from 2006 till
3 2010, where I was the primary legal adviser to our four star
4 commander regarding international law application to our armed
5 conflicts in both Afghanistan and Iraq.

6 Q. In your role at Central Command, did the U.S. government
7 rely on your interpretations and analysis of the laws of war?

8 A. Yes.

9 Q. Do you have any professional experience in Afghanistan?

10 A. Yes, I do. I rotated, deployed there for short deployments
11 numerous times between 2006, my last one was late 2008. I was
12 pregnant and did not go.

13 Q. What do you currently do?

14 A. I am currently a chaired professor of law at Southwestern
15 Law School. I am also an associate dean of research at
16 Southwestern Law School.

17 Q. What do you teach?

18 A. I teach criminal law, criminal procedure, law of war, and
19 national security law.

20 Q. As a part of your responsibilities as a tenured professor,
21 do you stay up-to-date on issues related to the law of armed
22 conflict?

23 A. Yes, very much so. I have always been a student of the law
24 and I have maintained that, including publications in the law
25 of war.

1 Q. Thank you, Professor VanLandingham.

2 This might be a bit of an odd question, but before
3 today, had you ever met Professor Christopher Jenks?

4 A. Yes. Chris and I met 19 years ago this month. We were
5 classmates in our LLM program, our master of laws, in
6 international operational law from one of the Army's schools.

7 (Continued on next page)

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VanLandingham - Direct

1 BY MR. DALACK:

2 Q. And do you agree with Professor Jenks' characterization of
3 America's war against Afghanistan as a non-international armed
4 conflict during the 2008 to 2009 period?

5 A. Not regarding the United States' international armed
6 conflict against the Taliban. There was a parallel
7 non-international armed conflict regarding the United States v.
8 Al Qaeda.

9 Q. How would you characterize, at a very high level, America's
10 war on Afghanistan against the Taliban that started in late
11 2001 and ended in 2020?

12 A. From the minute it began it was an international armed
13 conflict involving state authority on both sides of the
14 conflict.

15 Q. And, in your opinion, did it ever cease to be an
16 international armed conflict until 2020?

17 A. No.

18 Q. And why is that? At a high level at this point.

19 A. At a very high level --

20 THE COURT: I'm sorry, counsel. Just so that I am
21 clear, this is through 2021?

22 MR. DALACK: Through 2021, your Honor.

23 THE COURT: I needed an end date. Thank you so much.

24 THE WITNESS: Thank you, your Honor.

25 So the international armed conflict that there is

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VanLandingham - Direct

1 consensus here today that began in 2001 with the U.S. invasion
2 in October of 2001 continued because the Taliban maintained its
3 link to state authority, it continued to claim that it
4 represented the state of Afghanistan and never wavered in that
5 regard; and number two, the installed government never
6 exercised effective control over the territory of the state of
7 Afghanistan to any type of degree that would divest the Taliban
8 of its link to sovereign state authority.

9 BY MR. DALACK:

10 Q. Thank you, Professor VanLandingham.

11 In your opinion, what is a classic example of an
12 international armed conflict?

13 A. I was just in Lviv, Ukraine, at the end of last year;
14 Ukraine v. Russia.

15 Q. And what about a classic example of a non-international
16 armed conflict?

17 A. Unfortunately we have several ongoing right now. We have
18 the Sudan civil war. We have Libya is now transitioning to a
19 non-international armed conflict as well. We have the United
20 States' own civil war.

21 Q. Now, with respect to --

22 A. I wanted to add Syria.

23 Q. Sure. Go ahead.

24 A. There are quite a few non-international armed conflicts
25 continuing today.

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VanLandingham - Direct

1 Q. And what is the main distinguishing feature from an
2 international armed conflict and a non-international armed
3 conflict?

4 A. State sovereignty, state involvement on both sides of the
5 conflict with an international armed conflict and the lack of
6 any kind of connection to state authority within a
7 non-international armed conflict.

8 Q. I want to ask you a few general questions about the
9 timeline of the war in Afghanistan between 2001 and 2021.

10 A. Sure.

11 Q. At the time that the United States invaded Afghanistan in
12 October of 2001, who had effective control of Afghanistan?

13 A. The Taliban.

14 Q. And were there other international dimensions of the
15 conflict at the start?

16 A. No.

17 Q. Did the Taliban ever surrender to the United States
18 military forces at any point after October 2001 invasion?

19 A. It did not.

20 Q. Now, did there come a time during the war, between 2001 and
21 2021, that any other entity claimed a right to state authority
22 in Afghanistan?

23 A. Yes. The international community, led by the United
24 States, installed a government led by Hamid Karzai.

25 Q. And notwithstanding that installed government, are you

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1 aware of whether the Taliban was ever totally gone from
2 Afghanistan?

3 A. The Taliban was never totally gone from Afghanistan.

4 Q. And are you aware of whether the Taliban exercised
5 effective control over many parts of Afghanistan,
6 notwithstanding the installation of the government, the
7 different government?

8 A. Yes. The Taliban's control over parts of the Afghanistan
9 state territory waxed and waned over the years so it depends on
10 the year, but they maintained at least a continuous level of
11 effective control over at least some parts of Afghanistan
12 throughout that, over almost two decades.

13 Q. Did there come a time, after the U.S. invasion of
14 Afghanistan in October of 2001, that the Taliban were weakened?

15 A. Considerably so, yes.

16 Q. And what time period was that?

17 A. Primarily during 2002, even though we did see a major
18 conflict, a major battle fought between -- that involved
19 thousands of troops between the Taliban and allied forces and
20 the United States and allied forces in Anaconda, the Battle of
21 Anaconda in March 2002. But after that, the Taliban was
22 greatly weakened as we heard our earlier government expert also
23 state.

24 Q. Even after the Taliban was weakened, did hostilities ever
25 cease?

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1 A. Hostilities between the United States and its allied forces
2 and the Taliban never ceased.

3 Q. Do you know approximately how many attacks or so-called
4 enemy-initiated attacks by the Taliban there were in 2002?

5 MR. ADELSBERG: Your Honor, our understanding is this
6 is an expert on the Law of War, not on the facts of what
7 happened in Afghanistan in that time. I don't understand that
8 to be her expertise. So, we would object to this line of
9 questioning coming in through her.

10 MR. DALACK: Your Honor, we had intended to offer
11 Professor VanLandingham both on expert of Law of War and also
12 familiar as an expert on the sort of circumstances on the war
13 in Afghanistan. I'm happy to flush out her credentials as to
14 that latter aspect, if your Honor would like.

15 THE COURT: I want to see how you described her when
16 you submitted your letter. (pause)

17 I will allow it.

18 MR. DALACK: Thanks, Judge.

19 THE COURT: At least for now. If you stray further
20 and further afield, I may not.

21 MR. DALACK: Understood. Thank you, Judge.

22 BY MR. DALACK:

23 Q. In 2002, Professor VanLandingham, are you aware of
24 approximately how many enemy-initiated attacks, attacks by the
25 Taliban against U.S. forces and their allies, that there were?

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1 A. I'm aware from public reports that I have studied in the
2 course of my scholarship and my research that supports my
3 scholarship that there were over 300 enemy-initiated attacks
4 against the United States and coalition forces in 2002.

5 Q. And in 2008, are you generally familiar with how many
6 enemy-initiated attacks there were by the Taliban against U.S.
7 forces and their allies?

8 A. Yes. It had exponentially increased to over 20,000
9 attacks.

10 Q. Generally speaking, what happened between 2002 and 2008 in
11 the war between the United States and the Taliban?

12 A. The level of hostilities continued to increase as the
13 Taliban regained control and strengthened its forces through
14 the support of Pakistan.

15 Q. To your knowledge, did the Taliban ever abandon its claim
16 to state authority during any time period between 2001 and
17 2021?

18 A. They never abandoned their claim to state sovereignty.

19 Q. Are you familiar with something called the Doha Accords?

20 A. Yes.

21 Can I go back and clarify my answer?

22 Q. Sure.

23 A. They weren't claiming state sovereignty. Afghanistan was
24 seen as a state. They were claiming to be the government of
25 the Afghanistan which they never relinquished that claim

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1 throughout their 20 years of fighting.

2 Q. And why is that important?

3 A. It's important because the entire body of the Law of War of
4 the Geneva Convention says as being -- a most predominant
5 component of the Law of War, divide the world between, as we
6 have heard, between international armed conflict and
7 non-international armed conflict for the very purpose of states
8 maintaining their monopoly over the use of armed force. So
9 states created these regulations and these binding obligations
10 under treaty law because they wanted to zealously hold on to
11 that power and so they only allowed that power the authority to
12 be able to fight by those who had legitimately -- who could
13 claim a link and show a link to state authority, hence the
14 Taliban, who was the state, who did represent the state and
15 continued its representation of the state in various iterations
16 and its claim to over 20 years of fighting, makes it incredibly
17 vital to show that it was a continuation of that international
18 armed conflict throughout. That link to the state of
19 Afghanistan was never severed.

20 Q. Going back to the question I asked you about the Doha
21 Accords.

22 A. The Doha Accord was an agreement, is an agreement between
23 the Taliban and the United States in which the United States
24 agreed that the United States forces and international armed
25 forces would impart the state of Afghanistan by the fall of

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1 2001, which did occur.

2 Q. And what, if any significance, does the Doha Accord have to
3 the analysis that we will talk about under Article 2 of the
4 GPW?

5 A. It is a *de facto* acknowledgment and recognition by the
6 United States that the Taliban had control over Afghanistan or
7 else why would it be agreeing with the Taliban on what was
8 going on within the territory of Afghanistan.

9 Q. Thank you, Professor VanLandingham.

10 Let's pivot for a second to what is known as common
11 Article 2 of the third Geneva Convention or GPW. Are you OK if
12 I use those sort of shorthands?

13 A. Sure.

14 Q. What is the function of Article 2?

15 A. The function of Article 2 is to act as a trigger for the
16 application of all four of the Geneva Conventions of 1949.

17 Q. And what are its implications? Why is that important?

18 A. It's implications, why is it important that we have the all
19 four Geneva Conventions apply?

20 Q. Right.

21 A. Because they provide for the most robust set of
22 humanitarian protections where those caught up in armed
23 conflict, for those who suffer in armed conflict, prisoners,
24 detainees, civilians that are caught up in conflict, it
25 provides the maximum amount of protection for those

1 individuals, so it is very important to make the determination
2 of when those conventions actually apply.

3 Q. And under the Laws of War, do we look to Article 2 in
4 determining whether a conflict is an international armed
5 conflict?

6 A. We look to Article 2 to determine whether or not there have
7 been armed hostilities arising between two contracting parties,
8 which is the actual quote from Article 2. That would rise to
9 the level of international armed conflict, that would be an
10 international armed conflict. But Article 2 also applies to
11 incidents of partial or total occupation.

12 But, I think I might need you to rephrase the
13 question. We also look to what is called customary
14 international law.

15 THE COURT: You will have to excuse me, this could be
16 me and perhaps I just need smaller questions, but I am actually
17 not following her answers.

18 MR. DALACK: I'm sorry, your Honor.

19 THE COURT: And I know you want me to.

20 MR. DALACK: I do. Yes.

21 BY MR. DALACK:

22 Q. Professor VanLandingham, do you have an opinion as to
23 whether or not the war in Afghanistan, between the United
24 States and the Taliban, qualified as an international armed
25 conflict under Article 2 of the GPW?

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1 A. Yes.

2 Q. And what is your opinion?

3 A. That it is an international armed conflict, and that it was
4 an international armed conflict from its outset until its
5 conclusion in 2021.

6 Q. And how would you apply the factors in Article 2 of the GPW
7 to the conflict in Afghanistan?

8 A. Article 2 specifically provides that armed hostilities --
9 and that term is informed by customary international law --
10 that the United States, supported by Britain and others in
11 dropping bombs, primarily and invading with its other coalition
12 forces, constitutes armed hostilities. Because there were
13 armed hostilities arising between the United States and the
14 State of Afghanistan, which is a high contracting party, that
15 immediately triggered, that met the threshold of Article 2 to
16 be an international armed conflict, therefore applying all four
17 of the Geneva Conventions from that point.

18 Q. Is there any sort of doubt amongst scholars that at the
19 time the United States invaded Afghanistan in October of 2001,
20 that it initiated international armed conflict with Afghanistan
21 and its government, the Taliban?

22 A. No, there is no doubt. There is consensus that was an
23 international armed conflict.

24 Q. Are there any other reasons under Article 2 why the
25 conflict in Afghanistan would be classified as an international

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1 armed conflict?

2 A. Under Article 2?

3 Q. Yes.

4 A. Because it is arising between two high contracting parties.
5 The other high contracting party that it could be arising
6 between, based on the facts that have been developed earlier
7 today, as well as within my scholarship, my research, have been
8 that Pakistan was in overall control of the Taliban following
9 2001, and therefore, there was international armed conflict
10 between Pakistan and the United States and its coalition forces
11 with the Taliban being essentially an organ of Pakistan. And
12 the third reason would be that there was a period of partial or
13 total occupation -- I don't think it was ever total
14 occupation -- but Article 2 states that all four Geneva
15 Conventions apply, therefore being an international armed
16 conflict when there is an occurrence of a partial occupation.
17 And I can go into what a partial occupation is, if you would
18 like.

19 Q. We are going to get there in some detail later, Professor
20 VanLandingham, but generally speaking, can the nature of a
21 conflict, whether non-international or international, change
22 over time?

23 A. Very generally speaking, but the actual Geneva Conventions
24 themselves do not envision that, and particularly common
25 Article 2, which is the same throughout all four of the Geneva

1 Conventions because it triggers all four of the Geneva
2 Conventions, does not envision or does not lay out any kind of
3 guidance for an international armed conflict to metamorphosize
4 to a non-international armed conflict. Instead, it envisions a
5 general close of military operations as the end of that
6 international armed conflict.

7 Q. So this might be a redundant question then but when does
8 international armed conflict sort of end, formally, under the
9 Geneva Convention?

10 A. Under the Geneva Conventions it is when there is a general
11 close of military operations which is beyond the point of the
12 end of active hostilities, because the end of active
13 hostilities triggers certain obligations by parties to the
14 conflict such as to repatriate prisoners of war but then there
15 is usually mop up operations. And so, the Geneva Conventions
16 explicitly provide for, in the Fourth Convention, the general
17 close of military operations as being the terminating point,
18 the terminal point of international armed conflict.

19 Q. It seems that the definition of an international armed
20 conflict under Article 2 is quite broad. Do you know why that
21 is? Is that accurate?

22 A. Yes; because the drafters of the 1949 Geneva Conventions
23 wanted to provide the widest coverage of these humane
24 protections that were provided in the four Geneva Conventions
25 as they could.

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1 Q. Now, are you familiar with something known as the Afghan
2 Transitional Authority?

3 A. Yes.

4 Q. What is it?

5 A. That was the initial Hamid Karzai government that was
6 installed after the Bonn Agreement by the United States and
7 with the United Nations back in -- that the United States and
8 its partners asked various factions, not including the Taliban,
9 to join them in Germany and to hammer out an agreement of who
10 the United States and international parties would install, why
11 the United States international forces tried to maintain --
12 tried to exercise control over Afghanistan.

13 Q. Just briefly. At the time of the Bonn Agreement -- and
14 that's B-O-N-N-E for the court reporter?

15 A. No E.

16 THE COURT: No E.

17 MR. DALACK: Oh. Thanks very much. B-O-N-N.

18 Apologies.

19 Q. At the time of the Bonn Agreement, had the Taliban
20 abandoned or relinquished any claim it had to state authority?

21 A. No. The Taliban never relinquished, in any of its claim
22 nor its consideration of itself, as representing the State of
23 Afghanistan. It continued to fight.

24 Q. And you mentioned that the Taliban were not present when
25 the Bonn Agreement occurred. Do you know why that is?

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1 A. Yes. Because the invading powers of the United States and
2 its partners did not want the Taliban to have any seat at the
3 table. The Taliban was roundly hated by the West, by the
4 United States in particular and by the international community
5 because of its link to Al Qaeda and the 9/11 terrorist attacks
6 that occurred at the hands of Al Qaeda. And because of its
7 human rights record.

8 Q. Now, in your opinion, did the installation of the Karzai
9 regime -- the ATA -- the Afghan Transitional Authority, did
10 that mark a shift in the war from an international armed
11 conflict to a non-international armed conflict?

12 A. No, because that would be allowing a country to go in,
13 topple the government, and then put its own government in place
14 and say OK, anybody that is continuing to fight us, which used
15 to be the military or the armed force of the country we just
16 invaded, now we are no longer -- you no longer will be
17 considered legitimate fighters and no longer privy to those
18 protections provided in the Geneva Conventions.

19 Q. As far as you are aware and based on your research and
20 experience, could the Afghan Transitional Authority have
21 existed without the United States military presence in
22 Afghanistan?

23 A. No, it could not. And I would posit that none of the
24 Afghan -- the governments that claimed to represent the State
25 of Afghanistan from 2002 until 2021 when the Taliban regained

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1 full control, could have existed without the support of the
2 armed forces of the United States and the International
3 Security Assistance Forces of the international community and
4 NATO, the North Atlantic Treaty Organization.

5 Q. I want to talk to you just briefly now about the historical
6 parallel. Are you familiar with the Vichy government in France
7 during World War II?

8 A. Yes, because it was their example or their involvement with
9 the Free French, very much helped inform components of the
10 Geneva Conventions.

11 Q. Before we get into that, can you tell us a little bit about
12 how the Vichy government was, how it was installed?

13 A. Sure. The Germans invaded France, there was a Battle of
14 France in 1940, and the government of France signed an
15 armistice with Germany allowing Germany to occupy -- allowing
16 in air quotes -- but allowing German forces to occupy the
17 northern portion of France and the southern portion of France
18 was continued to be governed by the Pétain, Marshal Pétain's
19 government that was euphemistically called Vichy, France.

20 Q. Did the installation of the Vichy Regime in France, did it
21 transform the conflict between Germany and France from an
22 international armed conflict to non-international armed
23 conflict?

24 A. No, it did not.

25 Q. Why not?

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1 A. Because General Charles de Gaulle, who had been a tank
2 commander fighting for the French government during the battle
3 of -- he fought in World War I, but during the battle of
4 France, and at some point during that Battle of France, he was
5 actually an undersecretary to the French government which made
6 it pretty fascinating, he fled to England and exhorted his
7 countrymen and his colleagues to continue to fight and a year
8 and a half later he actually established himself called himself
9 a government-in-exile of the French and it came to be known as
10 the Free French. Importantly, he also brought with him some
11 former members, the current members of the French military that
12 did manage to evacuate from Dunkirk.

13 Q. Dunkirk you said?

14 A. Dunkirk. The beach is in France.

15 Q. Like the movie?

16 A. Yes.

17 Q. Now, pivoting for a second from the historical context, are
18 you familiar with something known as the International
19 Committee for the Red Cross, ICRC?

20 A. Yes, I am.

21 Q. Are you familiar with the ICRC statements from 2002 and
22 2007 that recognize the conflict in Afghanistan at that point
23 between the United States and the Taliban as a
24 non-international armed conflict?

25 A. Yes. That's how they characterized it.

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1 Q. Are you familiar with the context for that determination by
2 the ICRC?

3 A. Yes. Very much so.

4 Q. What was that context?

5 A. The International Committee of the Red Cross, looking
6 initially at statement in 2002, wanted access to be able to
7 ensure humane treatment, wanted access to prisoners, to
8 detainees in Afghanistan being held by primarily by the United
9 States at that point. However, the United States government,
10 in 2002, as alluded to earlier by a President Bush memo of
11 February 2002, did not consider its armed conflict in
12 Afghanistan as being either an international armed conflict or
13 a non-international armed conflict, meaning it did not believe
14 that the Geneva Conventions applied as a matter of law
15 whatsoever to its operations in Afghanistan. That is very
16 important because the ICRC is given a formal role in armed
17 conflicts by the Geneva Conventions.

18 Can I mention Common Article 3 at this point?

19 Q. Absolutely.

20 THE COURT: I'm sorry. Can you mention what, please?

21 THE WITNESS: Common Article 3 is a component of all
22 four of the Geneva Conventions. Just like Common Article 2,
23 which is the trigger for all four, common Article 3, also
24 called common because it is repeated in the four conventions,
25 outlines the bare bones, the bare minimum of humane protections

1 and some procedural safeguards that high state parties -- that
2 is states that are universally ratified -- have to give to
3 those caught up in conflict during non-international armed
4 conflicts. However, in 2002, the Bush administration was
5 saying we don't even believe that applies as a matter of law
6 because they argued that there was this third hybrid type of
7 law or hybrid type of war that was basically not regulated by
8 the Geneva Conventions that was law-free.

9 So, the ICRC, the context for the ICRC's
10 characterization in 2002 of the conflict being
11 non-international armed conflict, I believe, was a pragmatic
12 choice by the ICRC because if they could get the United States
13 to agree it was a NIAC, Common Article 3 gives the ICRC the
14 legal right to request access to detainees. And so, it gives
15 them a more formal role.

16 THE COURT: But what you are really saying is that the
17 ICRC bent their own standards just to have access to people.
18 It is the first time I am hearing this. It is news to me and
19 it is interesting. It is one thing to suggest that they've
20 done that as a practical matter but they wrote it into the
21 commentary. You are suggesting that -- I mean, it is one thing
22 to say, sure, you want it to be a non-international armed
23 conflict? We will agree with you. But they wrote it up as
24 same. That seems to be going -- if really what you are saying
25 is they were willing to forego their principles just to have

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1 access to detainees, that seems like they really went far in
2 that other direction but that is the argument you are making.

3 THE WITNESS: Judge Failla, I think my argument is
4 broader than that because that is not the only pragmatic
5 decision. They didn't make that pragmatic decision in
6 isolation of the factual situation on the ground which was not
7 known to many people. I think, in hindsight, looking back
8 today of what we actually know through the numerous SIGAR --
9 Special Inspector General for Afghanistan Reports -- that exist
10 showing how little the United States and international
11 community actually understood what was really going on on the
12 ground and what was really going on with the Taliban. I think
13 it was partially a lack of understanding of the true facts on
14 the ground and a pragmatic decision to go with what the rest of
15 the -- what the international community very much desired and
16 that the International Committee of the Red Cross, as its own
17 unique organization, it is not an international governmental
18 organization, it is not a non-governmental organization, it is
19 this hybrid, it depends on all of these powers for all of its
20 funding.

21 THE COURT: What distresses me is that earlier today
22 I'm being told that I should consider the commentaries of the
23 ICRC, both the original ones and the ones that -- the official
24 commentaries and the updated commentaries, and in fact the
25 defense is suggesting to me that there are some important

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1 points in the 2020 commentary that matter, but now that you are
2 telling me that the ICRC will do whatever it takes to aid or to
3 have access to detainees, then really you are telling me I
4 shouldn't believe anything in the commentaries, that there is
5 no persuasiveness in them at all.

6 Is that what you are saying?

7 THE WITNESS: No, I don't think that. I think that's
8 oversimplifying a very complex situation and that the ICRC
9 faced at the time. I think it was very difficult for them at
10 that point in 2002 to understand that the Taliban was
11 continuing its claim to authority to the State of Afghanistan
12 and continuing to maintain some kind of control within the
13 state of -- within the actual territory of Afghanistan and the
14 United States and its partners telling them that it's all over,
15 the game is over, Afghanistan is -- they're gone, we are
16 putting this government up here. There is no other state on
17 the other side, we can't find one. We don't have Charles
18 de Gaulle claiming and going to Winston Churchill. But,
19 looking back now, we can very much see that direct analogy
20 between what the Taliban was doing at the time and the example
21 from World War II that informs Common Article 2 through
22 Article 4 of the Geneva Convention.

23 MR. DALACK: Thank you.

24 BY MR. DALACK:

25 Q. During this time period, and by this time period I mean

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1 2007 to 2009 time period, did the Afghan Transitional Authority
2 or the Karzai regime have effective control over Afghanistan?

3 A. No.

4 Q. And were there still hostilities between the Taliban and
5 U.S. forces across Afghanistan?

6 A. In what year?

7 Q. 2007 to 2009.

8 A. Yes.

9 Q. And are you familiar with the term "shadow governors"?

10 A. Yes, I am.

11 Q. What are those?

12 A. They seem to be members of the Taliban that were running or
13 claiming to provide occupying government roles for various
14 provinces in Afghanistan at the same time you had the central
15 government trying to project its control over the decentralized
16 components of Afghanistan and their provinces.

17 Q. And would you characterize these shadow governors as an
18 extension of the Taliban's continuous claim to state authority
19 between 2007 and 2009?

20 A. Yes.

21 Q. I want to shift gears again and talk a little bit about
22 Article 4 to the GPW. What is the function of Article 4?

23 A. The function of Article 4 of the GPW is to provide
24 categories, to provide groups of individuals who would qualify,
25 who do qualify for prisoner of war status.

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1 Q. And is it a common article?

2 A. No.

3 Q. What is the significance of that?

4 A. It is only found in the Third Geneva Convention, the Geneva
5 Convention that deals with prisoners of war, because the other
6 Geneva Conventions deal with wounded and sick on the
7 battlefield, wounded and sick at sea, and the fourth deals with
8 civilians in occupied territories. So it is not common to the
9 other conventions in that it doesn't apply to the other
10 conventions, it only deals with prisoners of war.

11 Q. So why was Article 4 created then?

12 A. Article 4 was actually built upon an original articulation
13 of who gets prisoner of war status in a war that was first put
14 out in codified form in the Lieber Code commissioned by
15 President Lincoln during the U.S. Civil War. And this was
16 important because, along with prisoner of war status there is a
17 prisoner of war treatment and even individuals who are
18 civilians that follow, that are supply folks that are
19 contractors that follow an armed force, they even get prisoner
20 of war status, they get that treatment. But the combatants
21 that fall under prisoner of war status, the fighters what they
22 get if they are afforded prisoner of war status, is combatant
23 immunity, the protection from being criminally prosecuted by
24 the state for their lawful acts of war.

25 So, President Lincoln, under the Lieber Code -- or

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1 commissioned the Lieber Code and Francis Liber, who wrote it,
2 said it was very important to be clear who gets that prisoner
3 of war status so that they're not prosecuted as criminals for
4 their acts of violence and it only wanted to keep that
5 privilege, that protection to those who had been given the
6 right to fight by a state. It was to deal with individuals who
7 are bandits and marauders and resistance fighters that did not
8 have any mantle of state sovereignty of authority to fight. It
9 wanted to clearly distinguish between those who don't have any
10 connection with the state and can be treated as criminals for
11 their acts of violence and those who were fighting with state
12 authority.

13 Q. Let's unpack that.

14 Who gets prisoner of war protection under
15 Article 4(A)(1)?

16 A. Under 4(A)(1), those are the armed forces of a party to the
17 armed conflict, as well as militia and volunteer forces that
18 are considered part of the armed forces.

19 Q. And under your analysis, would members of the Taliban who
20 fought against the United States between 2001 and 2021, are
21 they entitled to prisoner of war status under 4(A)(1)?

22 A. Yes.

23 Q. Why is that?

24 A. Because they were the armed forces of the State of
25 Afghanistan in 2001 and that link to the State of Afghanistan,

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1 that authority to fight, was never severed.

2 Q. And what about under Article 4(A)(3)? Who gets prisoner of
3 war status under 4(A)(3)?

4 A. Article 4(A)(3) covers the exact same folks as 4(A)(1)
5 except that they're not recognized as belonging to a state
6 party by the opposing forces.

7 Q. I'm a little confused about that because we heard earlier
8 today from Professor Jenks that recognition is actually
9 required to receive prisoner of war coverage under 4(A)(3). Do
10 you agree with that?

11 A. No. The text of 4(A)(3) and its historical motivation is
12 from Charles de Gaulle's forces that were fighting -- claiming
13 to still be fighting for France even though there was a
14 parallel French government, the Vichy government running
15 effective control of France, indeed. But since he and his
16 fighters could still claim a direct link and link to the state
17 of France, that's why 4(A)(3) developed, specifically to allow
18 for situations in which you have state armed forces, a state
19 military such as that's what the Taliban was in 2001, that
20 continued to fight and continued to profess allegiance to
21 either -- either -- a government or to an authority, that they
22 will continue to maintain prisoner of war status. It was very
23 important for the drafters to ensure that forces like the Free
24 French -- and they also alluded to forces in Italy that had
25 been part of the Italian military as well that had continued to

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1 fight even though there was another government that was in
2 place that did not recognize them and the Germans did not
3 recognize them -- very important for the drafters to ensure
4 that they still maintained prisoner of war status because they
5 still had a link to the state.

6 Q. Let's talk a little bit more about the Free French. Do you
7 see any similarities between the Free French under Charles
8 de Gaulle and the Taliban between 2001 and 2021?

9 A. Yes, I do, and this is where we really have to look at the
10 facts that the law is based on versus subjective opinions of
11 how western the Taliban really is or is not, how much it looks
12 like a western military.

13 We know that the Taliban was the arm -- the Taliban
14 had its civilian regime of the government and it had fighters
15 that constituted the armed forces, the military of the
16 government of Afghanistan. So, once the United States and its
17 partners invaded in 2001, they fled like Charles de Gaulle
18 fled, they fled to Pakistan. Charles de Gaulle fled to Great
19 Britain. He took a year and a half before he even stated he
20 was running a government-in-exile and he exercised no control
21 over any component of France, northern or southern. But then
22 he went to Africa and was able to amass more of the regular
23 French forces who had been under the control of the Vichy
24 government but because France was a colonizing power, he was
25 able to take some of those forces that were there in western

1 Africa as part of the French colonies to work for him.

2 With the Taliban I see an even greater claim to state
3 authority because it did maintain a presence continuously in
4 Afghanistan, even though I don't think that is the sine qua
5 non. And it did maintain, just like Jean Pictet, as we heard
6 earlier, Jean Pictet in his commentary in 1960, specifically
7 talking about 4(A)(3), he said recognition is not an express
8 condition of 4(A)(3). He said sure it existed regarding
9 Charles de Gaulle because Winston Churchill was willing to say,
10 yeah, Charles de Gaulle, I think you are leader of Free French.
11 He said it immediately before he even had a
12 government-in-exile.

13 Q. You reference Jean Pictet.

14 MR. DALACK: If we can pull up Government Exhibit 118,
15 please, Ms. Reid, and go to page 63? It is no. 63, Ms. Reid.
16 And, Ms. Reid, could you for the witness and for the parties,
17 blow up the third to last paragraph?

18 THE COURT: The one that begins another?

19 MR. DALACK: Yes, your Honor. Thank you. That is a
20 better way of doing it.

21 BY MR. DALACK:

22 Q. You just testified that in his commentary, Jean Pictet
23 talked about how -- or discussed that recognition was not
24 necessary for coverage under 4(A)(3). Do you see that
25 reflected in this excerpt that I have blown up from the

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1 government's exhibit?

2 A. Yes. The last sentence.

3 Q. Can you read the last sentence into the record?

4 A. Sure.

5 It is not expressly stated that this government or
6 authority must, as a minimum requirement, be recognized by
7 third states, but this condition is consistent with the spirit
8 of the provision, which was founded on the specific case of the
9 forces of General de Gaulle.

10 Q. So how does this commentary from Jean Pictet fit into your
11 analysis as to the Taliban's entitlement to prisoner of war
12 status under 4(A)(3)?

13 A. And there is another component of this as well, if we could
14 go on further on this page?

15 Q. Please. Go ahead. With the sentence that continues: It
16 is also?

17 A. Yes.

18 Q. Go ahead.

19 A. He further states: It is also necessary that this
20 authority, which is not recognized by the adversary, should
21 either consider itself as representing one of the High
22 Contracting Parties or declare that it accepts the obligations
23 stipulated in the convention and wishes to apply them.

24 So, the Taliban considered itself as representing the
25 State of Afghanistan during all 20 years of the international

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1 armed conflict; and second, this says or declared the
2 obligations stipulated in the convention and wishes to apply
3 them. The reason General de Gaulle was very adamant or very,
4 very adamant, worked very hard to ensure that he had public
5 claims and went to the ICRC to state that, look, we are going
6 to abide by the conventions was because, at the time, the 1929
7 conventions were based on reciprocity. So he had to ensure
8 that he said he was following it or he would give Germany the
9 legal right to say none of this applies to you because, under
10 the 1929 Conventions, you had -- the High Contracting Parties
11 were only bound to adhere to the conventions with other High
12 Contracting Parties. So that's why that component was stressed
13 earlier in testimony today, that did occur by Charles
14 de Gaulle, but it was vis-à-vis a different obligation and
15 different paradigm whereas the 1949 Conventions are not not
16 based on reciprocity.

17 Q. Thank you, Professor VanLandingham.

18 What about 4(A)(2)? Who is entitled to prisoner of
19 war status under 4(A)(2)?

20 A. So, under 4(A)(2) -- and again, all of -- Common
21 Article 2's trigger application to High Contracting -- armed
22 hostilities arising between two or more High Contracting
23 Parties between two or more states. It doesn't tell us who is
24 a state. It doesn't tell us when a state disintegrates. But
25 we can look at Article 4 of the Third Geneva Convention to tell

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1 us who the drafters had in mind for states. I just wanted to
2 highlight that.

3 But, Article 4(A)(2) specifically provides for
4 prisoner of war status to the -- to the resistance fighters, to
5 insurgents actually, to militias that never had a claim to
6 state authority. So this is pretty huge by the states' parties
7 acceding to the Geneva Conventions.

8 Q. Why is it so significant?

9 A. It is significant because the drafters were reacting again
10 to the World War II experience as well as experience in earlier
11 wars of resistance fighters that were originally someone the
12 partisans Francs-Tireurs, especially in World War II, we had
13 young French men that did not want -- that really abhorred the
14 forced labor requirements being put upon them by the Vichy
15 government so they fled to the hills. And they did the same
16 thing in Belgium and in parts of Italy. They fled to the
17 hills, they organized themselves. They had never been part of
18 a military, unlike Charles de Gaulle forces, unlike the Taliban
19 who were prior state military. These were partisans,
20 resistance fighters that organized themselves and then claimed
21 to be fighting on behalf of one of the allied power whether
22 France, Belgium, etc. Charles de Gaulle wound up trying to
23 work with them and so did the allied powers, trying to send in,
24 through their -- at that time very embryonic special forces
25 tried to work with these resistance forces. But states were

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1 willing to give them POW status if they followed four very
2 strict requirements that made them look like a state military
3 and those are the four criteria under 4(A)(2).

4 Q. I want to talk to you, very shortly, about those four
5 criteria but just to be clear, was it ever the intention of the
6 drafters of the Geneva Convention, of the third Geneva
7 Convention, for the protections under 4(A)(2) to apply to any
8 entity that had a claim to state authority?

9 A. No. And the travaux preparatoires, which are -- pardon my
10 French and I do not know how to spell that, Google usually
11 helps me -- the prefatory documents are considered the official
12 negotiating records of the Geneva Conventions and under
13 international law, specifically the Vienna Convention on the
14 law of treaties. It says that after the text of the treaty,
15 the travaux preparatoires are to be instructed and influential
16 on informing us on how to interpret the treaties. Here the
17 convection, the travaux repertoires, Volume II, Volume II(A),
18 specifically the official record of the drafting negotiations,
19 comes out and shows that Russia, the Soviet Union
20 representative at the time, stood up and said, wait a second.
21 I want to ensure that none of these 4(A)(2) requirements are
22 going to have to be adhered to by 4(A)(1) by a state force.
23 And so that was -- that is actually recorded in the negotiating
24 record and it was clear that that via the very text of 4(A)(1)
25 and 4(A)(3), that those requirements do not apply. They only

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1 apply to these irregular bands of fighters that agree to be
2 bound by the Law of War and that agree that they're fighting,
3 right, they can show the link that they are fighting on behalf
4 of a great party.

5 And I'm sorry.

6 THE COURT: For the court reporter, T-R-A-V-A-U-X,
7 P-R-E-P-A-R-A-T-O-I-R-E-S.

8 MR. DALACK: Thank you, Judge. Despite my Lebanese
9 roots, I have no French skills whatsoever so I appreciate that.

10 THE WITNESS: And my German doesn't help her at all.

11 THE COURT: I am going to ask you again for bite-sized
12 questions and bite-sized answers.

13 MR. DALACK: Thanks, Judge.

14 BY MR. DALACK:

15 Q. We jump the gun a little bit here. Before getting into the
16 factors set forth under 4(A)(2), in your opinion is there any
17 argument to be made that those factors are incorporated into
18 the POW protections afforded to people under 4(A)(1) or
19 4(A)(3)?

20 A. There is arguments but they're not persuasive arguments.

21 Q. Why are they not persuasive arguments?

22 A. First of all, you look at the text of 4(A)(1) and 4(A)(3)
23 and they do not include those four requirements.

24 Q. What about the historical tradition and the roots of
25 4(A)(1) and 4(A)(3)?

1 A. The most recent predecessor, the clearest articulation of
2 those four criteria you can find in the Hague Regulations of
3 1907, Article 1, and they expressly state that armies are
4 warranted protection as prisoners of war. Then it says: And
5 militias and volunteers that adhere to the following four
6 criteria. Throughout the articulation and the history and
7 development of the codification of the Laws of War they have
8 never applied to actual militaries.

9 Q. So is it fair to say that the drafters of the Third Geneva
10 Convention sought to provide broad protections to armed forces
11 that had a claim to state authority?

12 A. Yes.

13 Q. And that the protections that are afforded to fighters who
14 do not have a claim to state authority are very limited if they
15 can adhere to a strict set of criteria under 4(A)(2)?

16 A. Yes, and they still have to be fighting on behalf of one of
17 the parties.

18 Q. Let's get into the subcategories of 4(A)(2) briefly and
19 let's assume for the sake of argument for a moment that the
20 4(A)(2) criteria are incorporated into 4(A)(1) or 4(A)(3). OK?
21 In your opinion -- well, first let's start with what are the
22 four factors under 4(A)(2)?

23 A. The four factors are being an organizer in force under
24 responsible command, bearing your arms openly, wearing
25 distinctive insignia that is recognizable at a distance, and

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1 number four, I apologize, number four is obeying the laws and
2 customs of war.

3 Q. In your opinion, throughout the period of the American war
4 in Afghanistan from October of 2001 up until about August of
5 2021, are the Taliban able to satisfy those four criteria under
6 4(A)(2)?

7 A. Under the very unsettled area of law of how much adherence
8 there needs to be under all four, yes.

9 Q. Let's just start with 4(A)(2)(a), being commanded by a
10 person responsible for his subordinates. Why does the Taliban
11 satisfy that criteria?

12 A. As we heard their expert earlier today, Mr. Barclay, the
13 Taliban organized itself with a hierarchy or commanders
14 responsible for members that they were responsible for that
15 were underneath them.

16 Q. That seems like a pretty low bar. Is it really that low?

17 A. The law doesn't specify how organized a military-type
18 organization needs to be under 4(A)(1). What it was supposed
19 to be getting at it is a factor was the ability to impose
20 discipline on one's forces.

21 Q. And, in your opinion, was the Taliban able to impose
22 discipline on its own forces?

23 A. In general, yes.

24 Q. Now, with respect to the second factor, 4(A)(2)(b), having
25 a fixed distinctive sign, recognizable at a distance; what is

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1 the purpose behind this criteria?

2 A. The purpose of this criterion is to provide for distinction
3 between fighters and civilian population so that opposing
4 parties can recognize each other and know who to kill and keep
5 civilians safe.

6 Q. As a general matter, throughout the entirety of the
7 American war in Afghanistan from October of 2001 to August of
8 2021, in your experience and expertise, were the American
9 soldiers able to distinguish Taliban fighters, generally, from
10 civilians?

11 A. In general, over 20 years of fighting, American forces knew
12 when they were being fired upon and they would fire back and
13 they knew who was Taliban.

14 THE COURT: That's not quite responsive to the
15 question.

16 MR. DALACK: Maybe you can rephrase it.

17 THE COURT: I am just saying that answer doesn't help
18 at all because the whole point is distinctive insignia. She is
19 telling me if they know they're being shot at, they know it is
20 Taliban. That is not responsive.

21 MR. DALACK: Let's unpack that a little bit.

22 Q. With respect to distinctive insignia, why is the
23 requirement for distinctive insignia important here?

24 A. It is important so that armed forces can distinguish
25 civilians from fighters.

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1 Q. And in the context of the Taliban, did they have
2 distinctive insignia or distinctive garb that helped U.S.
3 soldiers distinguish them from civilians?

4 A. It's been reported they did wear black turbans.

5 Q. Besides black turbans, are you familiar or aware of any
6 other insignia?

7 A. No, I'm not.

8 Q. Notwithstanding that, though, given the benefit of history,
9 can you, are you able to say whether or not the United States
10 struggled to distinguish Taliban fighters from civilians?

11 THE COURT: Again, that's not the criteria. Nice try,
12 though. No. I mean, that's her answer but that's not
13 satisfying the criteria. You are left with your black turban.

14 MR. DALACK: OK. I appreciate that, your Honor.

15 BY MR. DALACK:

16 Q. But am I right to characterize at least this criterion as
17 being primarily concerned with this overarching principle of
18 discontinue?

19 A. It, and carrying arms openly, act together to provide for
20 adherence to distinction.

21 Q. And, generally speaking, did the Taliban carry their arms
22 openly?

23 A. Yes.

24 Q. And then with respect to conducting operations in
25 accordance with the laws and customs of war, how is this

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1 criterion satisfied by the Taliban?

2 A. So, the law is unclear on how much adherence there needs to
3 be, whether or not it is 51 percent of the conduct of the
4 operations or adherence to the law of customs of war, the law
5 doesn't say. So, I think one with a straight face can look
6 back at 20 years of military engagement with the Taliban and
7 say that a large bulk of that was consistent with the law and
8 customs of war, particularly when we are dealing with
9 legitimate military objectives, who their ambush operations
10 were conducted against and they were conducted against members
11 of the opposing force which is lawful act of war.

12 Q. With respect to conducting operations in accordance with
13 the Laws of War we heard some testimony earlier today about the
14 various means that the Taliban employed against U.S. armed
15 forces. Do you recall that testimony?

16 A. Yes, I do.

17 Q. Do you recall testimony about suicide bombings?

18 A. Yes, I do.

19 Q. And use of things known as IEDs or improvised explosive
20 devices?

21 A. Yes.

22 Q. Are those particular means of engaging with an enemy on the
23 battlefield violative of the Laws of War?

24 A. Not in and of themselves.

25 Q. What would make them violative?

1 A. The wrong target, if they were used to specifically target
2 civilians or if civilians were harmed to a degree that was
3 excessive to legitimate military objective that was pursued by
4 those destructive means. And, there is a third way.

5 Q. Please.

6 THE COURT: Actually, no. I have a question a few
7 steps back, please, and thank you for indulging me.

8 Why are we using a 20-year framework for the
9 consideration of the content of the Taliban when I thought I
10 was supposed to be considering the world as it was in or about
11 the time of the events at issue here? I mean, for example, if
12 we are saying the Taliban was absolutely in derogation of the
13 Law of War in 2008, 2009 and 2010, the fact that they got their
14 stuff together and ended up acting completely in accordance
15 with the Laws of War for the next couple of years, does that
16 change the inquiry? I guess I am just trying to figure out how
17 and why I should be focusing on the 20-year period.

18 MR. DALACK: At the risk of engaging in argument in
19 the middle of -- I think our position is what I understand
20 Professor VanLandingham testimony's to be is that the conflict
21 in Afghanistan, unquestionably, started as an international
22 armed conflict in October of 2001 and it never changed or
23 shifted to a non-international armed conflict throughout its
24 entirety up until the withdrawal in August of 2021.

25 THE COURT: Yes.

1 MR. DALACK: It is for that reason that I am talking
2 about things in the bulk, in the broader historical context.

3 THE COURT: I see. So if, counter-factually, your
4 witness had suggested that it was a 10-year or a 15-year or a
5 2-year period of international armed conflict, that would,
6 again, be focus of the satisfaction of the criteria in 4(A)?

7 MR. DALACK: Again, I think I'm engaging in a
8 hypothetical on 4(A)(2) and said even assuming that 4(A)(2)
9 could apply to the Taliban, I think Professor VanLandingham's
10 testimony is that the Taliban fits neatly into either 4(A)(1)
11 or especially 4(A)(3), akin to the Free French under Charles
12 de Gaulle. But even assuming that they were considered an
13 irregular armed force that had to meet the requirements of
14 4(A)(2), I am simply exploring why Professor VanLandingham,
15 nevertheless, believes that that they would be entitled to the
16 prisoner of war protections under 4(A)(2).

17 THE COURT: Yes. All right.

18 MR. DALACK: Thank you, Judge.

19 Can I just take a moment, your Honor?

20 THE COURT: Yes.

21 (Counsel confer; continued on next page)
22
23
24
25

1 MR. DALACK: Thank you, your Honor.

2 BY MR. DALACK:

3 Q. Just to close the discussion on the 4(A)(2) factors,
4 Professor VanLandingham. The requirements of 4(A)(2), are they
5 designed, are they meant to be construed narrowly or broadly?

6 A. They are meant to be construed broadly.

7 Q. Why is that?

8 A. Because of the humanitarian object of being a prisoner of
9 war, that convention.

10 Q. Is there anything cut and dry about the analysis here such
11 that reasonable scholars couldn't debate this issue?

12 A. It's not cut and dry. It's not black and white. Just like
13 when a representative of a state claims that it has state
14 representation, at what point do they lose enough to not be
15 able to represent the state. There is quite a bit of gray in
16 that.

17 Q. Wrapping up, are you aware of an international, or is there
18 an international historical tradition of criminally prosecuting
19 soldiers in civilian court for actions taken on the battlefield
20 in an armed conflict?

21 A. The tradition is the opposite, which is not prosecuting
22 soldiers for their lawful acts of belligerency.

23 Q. Are you aware of any United States prosecutions in civilian
24 court of North Vietnamese fighters, for example?

25 A. No.

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1 Q. What about soldiers fighting on behalf of Iraq in the first
2 Gulf War?

3 A. No.

4 Q. What about from the second Gulf War, the Iraq War?

5 A. No.

6 Q. Other than my client, Mr. Najibullah, are you familiar or
7 aware of any other native Pashto-speaking Afghan being charged
8 in a United States civilian court for acts against United
9 States soldiers on the battlefield in Afghanistan?

10 A. No.

11 MR. DALACK: With that, your Honor, I have no further
12 questions.

13 THE COURT: Thank you.

14 Cross-examination.

15 I am ready to go forward. Once again, I will ask
16 everyone, including our witness, does anyone need a break? No.
17 Great answer.

18 Let's go.

19 CROSS-EXAMINATION

20 BY MR. ADELSBERG:

21 Q. Good afternoon, Professor.

22 A. Good afternoon.

23 Q. You testified today that between 2001 and 2021, the U.S.
24 and the Taliban were in an international armed conflict. Do
25 you recall that?

1 A. I sure do.

2 MR. ADELSBERG: Mr. Hanchet, can you please pull up
3 Government Exhibit 201, at page 6.

4 Q. Professor, do you recognize this document?

5 A. Yes.

6 Q. These are your remarks from the annual meeting of the
7 American Society of International Law in 2014?

8 A. Yes.

9 Q. And in those remarks, you argued that the U.S. would be
10 violating Common Article 3 of the Geneva Conventions if it did
11 not force-feed Guantanamo Bay detainees?

12 A. Yes.

13 Q. And you wrote, it's the first highlighted piece there, "A
14 detaining authority in a non-international armed conflict which
15 all three branches of our government have found to exist has a
16 legal duty to preserve the life and the health of detainees in
17 its care," right?

18 A. Yes.

19 Q. As an expert of law of war issues relating to Afghanistan,
20 you knew that there were Taliban fighters detained at
21 Guantanamo Bay at this time, right?

22 A. Yes.

23 Q. So you would agree that as of 2014, when you made this
24 statement, all three branches of our government have concluded
25 that a non-international armed conflict existed between the

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1 U.S. and the Taliban?

2 A. No. That's not what I said there. I was not specific. I
3 did not distinguish between the Taliban or al Qaeda in that
4 small article.

5 Q. Nowhere in your remarks did you say that the conflict
6 between the U.S. and the Taliban is an international conflict,
7 right?

8 A. No, because I was focused on the non-renunciation principle
9 found in the Geneva Conventions.

10 Q. Nowhere in your remarks did you say that these detainees
11 should receive prisoner of war protections and not just Common
12 Article 3 protections, right?

13 A. No. Common Article 3 also applies in an international
14 armed conflict.

15 Q. But you never in any way stated that there is a different
16 principle or set of provisions that should apply to the Taliban
17 detainees, correct?

18 A. No, I did not.

19 Q. And that would have been relevant since Article 26 of the
20 Geneva Convention explicitly covers issues surrounding food for
21 prisoners of war, doesn't it?

22 A. Yes, it does.

23 Q. So, if you were actually considering any of these
24 individuals as prisoners of war, that would have been a
25 relevant thing to mention, right?

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1 A. Maybe in a longer law review article besides just remarks
2 given in a presentation, sure.

3 Q. You were given multiple times to speak in this
4 presentation, right, not just this one?

5 A. I am sorry?

6 Q. You were given multiple opportunities at this presentation
7 to speak?

8 A. Yes. Specifically about the non-renunciation principle.

9 Q. And you never clarified in any way anything related to the
10 Taliban and this being an international armed conflict; is that
11 right?

12 A. Right, because that wasn't the topic of the panel. It was
13 about force-feeding.

14 Q. So, can you testify to your view that it was an
15 international armed conflict from 2001 to 2020?

16 A. Yes.

17 Q. You're aware that this view is in contravention with
18 various executive branch pronouncements, right?

19 A. Sure am.

20 Q. It's in contravention of various FCIC pronouncements,
21 right?

22 A. Yes.

23 Q. The UN report we reviewed earlier?

24 A. Yes.

25 Q. The only federal court case to decide this issue?

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1 A. Yes.

2 Q. And the overwhelming majority of scholars in your field who
3 opined on this issue?

4 A. I wouldn't use the term overwhelmingly.

5 Q. You would say at least majority?

6 A. Probably.

7 Q. You would say that there is a fulsome minority that agrees
8 with your view?

9 A. Absolutely, especially as more facts come out.

10 Q. Professor VanLandingham, are you aware of a single member
11 of the Taliban who has been provided combatant immunity
12 protections under Article 4 of the GPW?

13 A. No.

14 Q. And you're aware that Taliban fighters have been
15 successfully prosecuted in the U.S. for conduct in Afghanistan,
16 right?

17 A. Not exactly.

18 Q. You're not aware of the *Hamidullin* case?

19 A. Yes, I am aware of that case.

20 Q. Are you aware of the *Lindh* case?

21 A. The American that joined an extreme faction of Afghanistan,
22 yes.

23 Q. These are mostly yes or no answers. Are you aware of the
24 case?

25 A. I am aware of the *Lindh* case, yes. I teach it.

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1 Q. And you're aware Taliban fighters have been successfully
2 prosecuted in Germany for conduct in Afghanistan, right?

3 A. I am unaware of that.

4 Q. And you're aware that Taliban fighters have successfully
5 prosecuted in the UK for conduct in Afghanistan, right?

6 A. I am unaware that they were successfully prosecuted for
7 lawful acts of belligerency.

8 Q. Now, you're aware that the U.S. Department of State
9 designated Taliban as a specially designated global terrorist
10 in 2002, right?

11 A. Yes.

12 Q. And between 2002 and 2009, the international community did
13 not recognize the Taliban as a legitimate government of
14 Afghanistan, right?

15 A. Correct.

16 Q. And you're aware that there were 42 countries who
17 contributed to personnel to the International Security
18 Assistance Force, right?

19 A. Yes.

20 Q. Do you know of a single country in the ISAF that classified
21 the conflict in 2008 as an international armed conflict?

22 A. No.

23 Q. Let's talk a little bit about Article 4(A)(2).

24 A. Sure.

25 Q. Professor VanLandingham, I am going to read a list of

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1 scholars and just ask if you're generally familiar with their
2 scholarship. Okay?

3 A. Yes.

4 Q. Jeffrey Corn?

5 A. Yes.

6 Q. You have written a couple of articles and books with him,
7 right?

8 A. Yes.

9 Q. Ken Watkin?

10 A. Yes.

11 Q. Jamie Williamson?

12 A. Yes.

13 Q. Michael Schmitt?

14 A. Yes.

15 Q. Jens David Ohlin?

16 A. Yes.

17 Q. Yoram Dinstein?

18 A. Yes.

19 Q. Howard Levie?

20 A. Yes.

21 Q. Ruth Wedgewood?

22 A. Yes.

23 Q. Would you agree that these are all highly respected
24 scholars in the field of law of war?

25 A. To varying degrees, yes.

1 Q. Are you aware that each of these scholars has written that
2 satisfying the Article 4(A)(2) criterion is implicit in being
3 an armed force under Section 4(A)(1) and 4(A)(3)?

4 A. As implicit, yes.

5 Q. In fact, you yourself wrote an article stating that these
6 four criteria were carried into Article 4 of the Third Geneva
7 Convention which stipulates the criteria for PoW status, right?

8 A. I don't know exactly the context of that.

9 THE COURT: May I hear the question again, please.

10 Q. In fact, you yourself wrote an article stating that these
11 four criteria were "carried into Article 4 of the Third Geneva
12 Convention which stipulates the criteria for PoW status"?

13 A. For Article 4(A)(2). I didn't specify 4(A)(1) or 4(A)(3).

14 Q. You didn't specify that it was just for 4(A)(2), right?

15 A. Not in that context, no.

16 Q. You said that the Hague Convention criterion were carried
17 into Article 4, right?

18 A. Yes, in 4(A)(2).

19 Q. But you didn't say 4(A)(2), did you?

20 A. No.

21 Q. And you didn't limit your analysis in that article to
22 Article 4(A)(2), right?

23 A. No. The article is much broader.

24 Q. Let's direct your attention back to approximately 2008.

25 A. Sure.

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1 Q. You're aware that during this period the Taliban were
2 carrying out suicide bombings?

3 A. Yes.

4 Q. Kidnapings?

5 A. Yes.

6 Q. Beheadings?

7 A. Yes.

8 Q. The Taliban were executing captured Afghan soldiers?

9 A. Not to my express knowledge, no.

10 Q. I am not asking whether you saw it with your own eyes. Are
11 you aware of reports?

12 A. I am aware of reports of allegations, yes.

13 Q. In fact, you heard Mr. Adams today testify about 190
14 suicide attacks in 2008 alone. Do you recall that?

15 A. Yes.

16 Q. And you're aware that in many of these cases, the Taliban
17 were murdering civilians, right?

18 A. I don't know how many of those incidents of suicide bombers
19 involved civilians versus lawful acts to others.

20 Q. But many of the attacks did include civilian deaths?

21 A. Yes.

22 Q. And you're aware that in many of these cases, the Taliban
23 was claiming credit for these attacks, right?

24 A. Absolutely.

25 Q. But your testimony is that these were the exception to the

1 rule, is that right, rogue instances of violence?

2 A. I didn't say they were exception to the rule. I said it's
3 unclear whether they represented the majority of the
4 hostilities engaged in by the Taliban.

5 Q. I want to pick up on that, because that just depends on the
6 denominator, right?

7 So, if they were attacking a lot of U.S. military
8 installations or Afghan military installations, then that
9 impacts the analysis, right?

10 A. Sure. Because it shows they are engaging in lawful acts of
11 war against military objectives.

12 Q. But if they are also engaging in hundreds of attacks
13 resulting in civilian deaths, attacks clearly against the laws
14 of war, your argument is that because it has a smaller
15 percentage of that denominator, therefore they are in
16 compliance with the law of war?

17 A. The law isn't clear on how much an armed force, a military,
18 has to adhere to the law of war in order to maintain its status
19 under Article 4.

20 Q. You testified, I think the quote was, a large book of the
21 Taliban's activities were in accordance with the laws and
22 customs of war, right?

23 A. It seems so, yes.

24 Q. And would that include targeting civilians?

25 A. No.

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1 Q. Attacking civilian infrastructure?

2 A. Of course not.

3 Q. Requiring fighters to wear civilian clothes?

4 A. No.

5 Q. Kidnaping, beheading?

6 A. No.

7 Q. Now, you testified today that the Taliban wore distinctive
8 clothing. Do you recall that?

9 A. I said they were reported to have worn black turbans.

10 Q. Did you coauthor an op ed in 2018 in USA Today entitled,
11 Let the Military Justice System Decide if Matthew Golsteyn was
12 a victim of murder?

13 A. Yes, I did.

14 Q. In that op ed, did you write, "In complicated operating
15 environments like Afghanistan, enemy fighters don't wear
16 uniforms"?

17 A. Yes, such as al Qaeda. There are a lot of enemy fighters
18 in Afghanistan.

19 Q. In that case, that actually involved, as I recall, a
20 Taliban member, the Golsteyn case, didn't it?

21 A. Allegedly.

22 Q. This was a case involving the alleged murder of an alleged
23 Taliban member. In your analysis, you didn't in any way limit
24 it to al Qaeda, you just said, "In complicating operating
25 environments like Afghanistan enemy fighters don't wear

1 uniforms," correct?

2 A. Yes, because I had a 700-word limit.

3 Q. But your testimony today is that the Taliban wore
4 distinctive clothing and black turbans?

5 A. I didn't testify that they wore distinctive clothing. I
6 testified that they wore black turbans that seemed to
7 distinguish themselves from the civilian population in many of
8 their operations.

9 Q. How do you square that with your writing earlier? Is it
10 that you were referring to al Qaeda then?

11 A. I don't know what you're referring to.

12 THE COURT: Move on, counselor.

13 Mr. Dalack already lost that point so move on.

14 MR. ADELSBERG: Mr. Hanchet, can you pull up
15 Government Exhibit 208.

16 Q. Is the individual in this photo wearing a black turban?

17 A. He seems to be wearing a checkered turban.

18 MR. DALACK: Objection, your Honor. Lack of
19 foundation for this line of questioning.

20 THE COURT: No. He's allowed.

21 MR. ADELSBERG: Mr. Hanchet, please pull up Government
22 Exhibit 209.

23 Q. Are the individuals in these photographs wearing black
24 turbans, to your knowledge?

25 A. Not to what my eyes show me.

1 MR. ADELSBERG: Please pull up Government Exhibit 210.

2 Q. How about the individual here?

3 A. They are wearing their arms openly, but I don't see a black
4 turban.

5 Q. Now, regarding Article 4(A)(2), would you agree with me
6 that if the Taliban were in large scale or systematic
7 nonfulfillment of any one of the criteria, that they would not
8 qualify for PoW status?

9 A. Absolutely not. 4(A)(2) criteria do not apply to the
10 Taliban because they fall under 4(A)(3) as the part of the
11 armed forces of the state of Afghanistan.

12 Q. My question here is about 4(A)(2).

13 A. Sure. I agree with you.

14 Q. Now, John Pictet, he is a pretty important figure in the
15 development of laws of war, right?

16 A. Yes.

17 Q. You regularly cite him in your writings?

18 A. Yes.

19 Q. In your view, his commentary should be given considerable
20 weight, right?

21 A. Yes, along with the years' state practice over the 60 years
22 since he wrote those.

23 Q. I want to talk about the Red Cross.

24 You have written extensively about the Red Cross,
25 right?

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VanLandingham - Cross

1 A. I'm sorry?

2 Q. You have written extensively about the Red Cross, right?

3 A. I worked with them, yes, and I have written about them.

4 Q. As I understood your testimony on direct, the Red Cross
5 essentially caved in 2002 in finding that the conflict in
6 Afghanistan turned into a NIAC because they wanted access to
7 detainees, is that fair?

8 A. I don't think it's fair. I didn't mean to implicate
9 caving. I think they had to make a very complicated decision
10 based on limited facts within their purview.

11 Q. As I understood it, did you also imply that they had
12 institutional interests?

13 A. They have legal interests. They are bound to pursue the
14 greatest humanitarian protections for those caught up in
15 conflict. It's in their charter.

16 Q. Now, you describe the ICRC as the -- you describe had a
17 preeminent role regarding the Geneva Conventions, is that fair?

18 A. Yes, absolutely.

19 Q. And you have discussed their, quote, long-standing
20 modalities of independence, neutrality, and impartiality?

21 A. Yes. Those are their stated modus operandi principles they
22 adhere to within their own governing documents.

23 Q. And you talked about that independence and impartiality in
24 2016, right?

25 A. I am not sure what you mean.

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VanLandingham - Cross

1 Q. You wrote an article in 2016 that discussed the Red Cross's
2 independence, did you not?

3 A. I have written a lot of articles. I don't remember what
4 was in 2016.

5 Q. But you have written many articles on the Red Cross, and in
6 those articles, have you ever maintained that they did not have
7 independence?

8 A. No, not to my knowledge.

9 Q. And those articles far postdated 2002?

10 A. Yes.

11 Q. 2007?

12 A. Yes.

13 Q. 2011?

14 A. Yes. I never said they weren't independent. I said they
15 had to make a complicated decision.

16 Q. Just a few more questions and then I will wrap up.

17 You testified before that one of the reasons the
18 conflict was an international armed conflict was because of
19 Pakistani support for the Taliban?

20 A. Under legal terms, their overall control of the Taliban has
21 come to light in public reports and public scholarship since
22 that time frame.

23 Q. Is your position that the United States, it was an
24 international armed conflict against the Taliban and Pakistan
25 during this period?

1 A. Yes. I think that's a very reasonable argument and
2 interpretation to make based on the facts that have come to
3 light.

4 Q. So your view was that we were in that armed conflict for
5 the last 20 years even though neither side recognized the
6 conflict?

7 A. The Geneva Conventions are adamant that it doesn't matter
8 what the parties call the conflict. It's a de facto analysis
9 based on objective indicia on the ground.

10 Q. And you're aware the U.S. provided \$32 billion in aid to
11 Pakistan during that period?

12 A. Yeah. They're a nuclear power playing a dangerous game.

13 THE COURT: Counsel, I do want to understand and
14 counsel has raised an issue that I thought was going to be
15 explored on direct, and since it wasn't, I am going to ask it
16 here.

17 I think what I am understanding as your argument is
18 that in the first instance, there is an international armed
19 conflict involving the Taliban in Afghanistan because the
20 Taliban never surrendered, never quite gave up, and always
21 professed to be the government in Afghanistan. Am I
22 understanding that correctly?

23 THE WITNESS: Yes. That's the strongest basis for
24 there to be an international armed conflict.

25 THE COURT: As a secondary argument, what you're

1 arguing is that there is an international armed conflict
2 involving the Taliban, it's the United States versus Pakistan?

3 THE WITNESS: Yes.

4 THE COURT: So we can have all the discussion we want
5 to have about the Taliban in Afghanistan and what they are
6 doing and what they are not doing. But what you're suggesting
7 is forget all of that. The Taliban was taken in by Pakistan,
8 conducted their operations from Pakistan, Pakistan gave them
9 the logistical, financial, and operational support they needed,
10 and that is in and of itself an armed international conflict.

11 THE WITNESS: Yes, Judge Failla. And that's based on
12 the International Court of Justice's opinion in the Bosnia case
13 back in 2007.

14 THE COURT: *Tadic*?

15 THE WITNESS: No. That was actually earlier. This
16 was actually ICJ dealing -- and I have got the name of the
17 entire case, but they said it's not effective control. They
18 were looking at, when does state support of a group make it so
19 that that state, that group that is fighting, that that state
20 is now a party to the conflict? And it's when they exercise
21 not effective control over that group, but what they call an
22 overall control of that group. Were they providing enough
23 military guidance, not day-to-day operational or tactical
24 decisions, but enough overall guidance, coupled with vast
25 amounts of resources, support, military advice, that, in fact,

1 the Taliban was an organ acting on behalf of Pakistan, a state
2 which is a party to the conflict? It's a way to
3 internationalize an armed conflict.

4 THE COURT: I don't think the defense has ever argued
5 that to me before, but I understand the argument that you're
6 making today.

7 Counsel, please continue. Excuse me for derailing
8 your questioning.

9 BY MR. ADELSBERG:

10 Q. During this 20-year period, did the U.S. embassy in
11 Pakistan ever close down?

12 A. No.

13 Q. Did the Pakistan embassy in U.S. ever close down?

14 A. No.

15 Q. And this is just a yes-or-no question. Are you aware of
16 any executive, congressional, or judicial statement indicating
17 that we were at war with Pakistan?

18 A. Kind of. The Chairman of the Joint Chiefs of Staff,
19 Admiral Mike Mullen, in 2011 stated that the Haqqani network,
20 which at the time claimed to be part of the Taliban, was a,
21 quote-unquote, veritable arm of Pakistan. And we were
22 fighting --

23 THE COURT: I don't know that that was responsive to
24 his question.

25 A. It seems like that was an executive branch statement made

1 to Congress.

2 THE COURT: We are at the end of this. I did really
3 need you to be responsive to the questions.

4 MR. ADELSBERG: I move to strike the answer.

5 THE COURT: There is no jury here, sir.

6 MR. ADELSBERG: As nonresponsive.

7 THE COURT: It's not being accepted by me so don't
8 worry about.

9 Yes, you're done.

10 Mr. Dalack, the briefest of redirects.

11 MR. DALACK: Yes. Thank you.

12 REDIRECT EXAMINATION

13 BY MR. DALACK:

14 Q. Professor VanLandingham, did the transitional government
15 under Hamid Karzai ever exercise effective control over
16 Afghanistan?

17 A. No.

18 Q. What about the government under Ashraf Ghani?

19 A. No.

20 Q. In fact, are you aware of what happened to that government
21 after the United States fully withdrew from Afghanistan in
22 August of 2021?

23 A. It immediately fell.

24 MR. DALACK: Can we please pull up Government Exhibit
25 208.

1 Mr. Hanchet, thank you.

2 Q. Do you know who that is? Have you ever seen this picture
3 before?

4 A. No.

5 Q. What about Government Exhibit 209, have you ever seen this
6 picture before?

7 A. No.

8 Q. Do you know anything about the men in this picture?

9 A. I don't even know where that is.

10 Q. What about Government Exhibit 210, have you ever seen this
11 picture before?

12 A. No.

13 Q. Just as a broad point, are the protections afforded under
14 Article 4 individual or categorical?

15 A. They are categorical.

16 Q. So, even if individuals who are aligned with a particular
17 group, would otherwise be covered under Article 4, they deviate
18 from the requirements of Article 4, it doesn't mean that the
19 whole group is no longer able to enjoy protections under
20 Article 4?

21 A. Correct. That individual may lose PoW status depending on
22 what they did, but the group won't based on that individual's
23 activities.

24 Q. If an individual is accused of engaging in hostilities on
25 the battlefield against an enemy troop, would that be covered

1 by the Article 4 protections?

2 A. Yes. That's what they would be given combatant immunity
3 from.

4 Q. You were asked on cross-examination about a number of
5 different scholars. Do you remember that?

6 A. Yes.

7 Q. Presumably, some of them took positions that were different
8 than yours on the characterization of the conflict in
9 Afghanistan between 2001 and 2021, right?

10 A. Yes. Although I think the question was more about whether
11 4(A)(2) criteria applied to 4(A)(1) and 4(A)(3) specifically.
12 Yes, I am aware.

13 Q. Notwithstanding those positions, is it your expert opinion
14 that the requirements of 4(A)(2) are incorporated into 4(A)(1)
15 or 4(A)(3)?

16 A. No, they are not.

17 Q. Are you familiar with the 2020 commentary to the GPW?

18 A. Yes, I very much am.

19 Q. Does the 2020 commentary to the GPW support or undermine
20 your determination as to the Taliban's entitlement to combatant
21 immunity or prisoner of war status under 4(A)(3)?

22 A. It supports it. It specifically says that criteria of
23 4(A)(2) apply to 4(A)(2) and do not expressly apply to 4(A)(1).
24 The only difference between 4(A)(1) and 4(A)(3) is the lack of
25 recognition of the power that the forces are fighting for.

1 Q. Does the 2020 commentary say anything about recognition by
2 other countries as being a prerequisite for enjoying protection
3 under 4(A)(3)?

4 A. It is not a prerequisite.

5 MR. DALACK: Ms. Reid, can you please pull up the 2020
6 commentary to Article 2, please.

7 Can we go to paragraph 266.

8 Q. Professor VanLandingham, do you see what is on the screen
9 there?

10 A. Yes.

11 Q. Do you recognize it?

12 A. Yes, I do.

13 Q. What is it?

14 A. It's the ICRC's statement that just because a government
15 has been defeated on the battlefield does not divest the armed
16 forces fighting for it, their claim to state authority and
17 therefore prisoner of war status. Divest which is linked to
18 international armed conflict. It's basically stating that just
19 because a separate government has been established by the
20 invading power doesn't mean that suddenly an international
21 armed conflict is no longer international.

22 Q. Does this support or detract from the position you have
23 taken today with respect to the characterization of the armed
24 conflict in Afghanistan?

25 A. It strongly supports that position.

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1 MR. DALACK: Then, also, could you please blow up 267?

2 THE COURT: Mr. Jacobson, stop.

3 We are done. I can read.

4 MR. DALACK: Understood, your Honor. I just have one
5 last question on paragraph 267.

6 THE COURT: Because your co-counsel shouted it across
7 the room to you? Not appreciated.

8 Go ahead. Ask your one question.

9 MR. DALACK: You know what, your Honor, I will rest
10 here. Thank you.

11 THE COURT: Thank you very much. You may step down.

12 (Witness excused)

13 THE COURT: All right. Thank you, all of you, for
14 staying and for getting this done in one day, as intense as it
15 was.

16 I am fine. I can leave now. There was a reference in
17 the defense submission to post-hearing briefing. I don't know
18 that I need it. I don't know that you want to do it. I don't
19 know if at 5:22 on the evening of the hearing you want to make
20 that decision. So tell me what you want. What I really would
21 like to do, though, at some point very soon, is let our
22 interpreters and our marshals and our court reporters go. So
23 if you want to talk to me tonight, great. If you want to talk
24 to me another night, also great. Tell me what you want to do.

25 MR. DALACK: We would welcome the opportunity to

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1 confer with government counsel and see their position on the
2 need or appropriateness of post-hearing briefing and follow up
3 with the Court by letter forthwith.

4 THE COURT: That's fine by me.

5 What would you like to do?

6 MR. ADELSBERG: Your Honor, we are prepared to argue
7 it now. We don't think additional briefing is required.

8 THE COURT: I would love to have engaged in oral
9 argument. I am capable of going deep into the evening, but I
10 am going to get a mutiny from everybody else in the room.

11 You don't want additional briefing?

12 MR. ADELSBERG: If the Court has particular questions.
13 As the Court intimated before, it sounds like the Court doesn't
14 need additional briefing. Our position would be we are not
15 going to ask for it if the Court doesn't need it.

16 THE COURT: I myself am not requesting it. Talk with
17 your adversary, and if you decide it's something you both want
18 to do, talk to me and I will listen.

19 All right. On that happy note, I thank you all very
20 much. We are adjourned.

21 (Adjourned)

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