Terrorism in all its forms and manifestations is always criminal and unjustifiable. While the principle may find purchase in our collective hearts and minds, it requires solidification and active reaffirmation in our domestic legal system. The ongoing case of *United States v. Najibullah* presents a ripe opportunity for doing so.

Currently, in the Southern District of New York, a Taliban spokesperson and commander in Afghanistan, Haji Najibullah has filed a motion to dismiss the thirteen-count indictment against him related to his alleged orchestration of a 2008 attack on an American military convoy that resulted in the deaths of three American servicemembers.[[1]](#footnote-1) Najibullah argues that, as a member of the Taliban when the alleged conduct occurred, he has legal status as a prisoner of war and is thus immune from prosecution for what he argues was lawful participation in hostilities.[[2]](#footnote-2) In deciding whether or not to grant the motion the defendant’s motion, the civilian district court judge presiding over the case must rule on complex law-of-war issues that have festered at the roots of the United States’ conflict with the Taliban in Afghanistan since its inception.[[3]](#footnote-3) Doing so will require reliance on and application of core principles of International Humanitarian Law (IHL): the doctrines of conflict classification, determination of belligerent status, and customary immunities.

The central issue before the court is whether the defendant is eligible for the Prisoner of War (POW) status required to claim combatant immunity for his alleged orchestration of the 2008 attack and resulting deaths.[[4]](#footnote-4) Given thorough analysis of the evidence submitted by both parties, and the relevant doctrines of international humanitarian law, the answer is decisively clear: the defendant is not eligible for POW status and thus cannot claim combatant immunity. It necessarily follows that the motion fails on the merits and must be denied.

Traditionally, the question of combatant immunity exists within the *Jus in Bello* legal domain and is determined by a two-part inquiry, governed by the Third Geneva Convention Relative to the Treatment of Prisoners of War (GCIII).[[5]](#footnote-5) The first question asks whether the conflict was of sufficient international character to fall within the scope of GCIII. The prosecution correctly argues that the state of the conflict between the United States and the Taliban at the time cannot be classified within the contemplated boundaries of GCTIII art. 2.[[6]](#footnote-6) International consensus reaffirms the validity of this position and further characterized the conflict as a non-international armed conflict (NIAC).[[7]](#footnote-7) Because the rest of GCIII cannot be invoked outside the context of an international armed conflict (IAC), this conflict characterization requirement is a threshold test, and one the defendant’s argument fails to pass. As such, the analysis could and should stop there.[[8]](#footnote-8) However, competing political and procedural forces at play may caution the court from ruling on this issue. Thus, I have included in my evaluation of the motion's viability equal and due attention to the second component of this inquiry.

Assuming that the entirety of GCIII is applicable to the armed conflict, the second issue is whether the 2008 Taliban sufficiently fulfills the requirements of GCIII art. 4 such that the defendant’s membership in the group entitles him to POW status and resulting combatant immunity. The evidential record clearly demonstrates that the 2008 Taliban fails to meet the requirements necessary for Najibullah to properly claim immunity from the current prosecution solely by virtue of his acting under the authority of the Taliban.[[9]](#footnote-9) Taking both inquiries together, proper interpretation and application of IHL necessitate the conclusion that defendant Najibullah was an unprivileged belligerent, acting under the authority of a non-state party to an NIAC and thus may be properly prosecuted for allegedly orchestrating the armed attack on and killing of three privileged American Combatants belligerents.

1. The Washington Post, *Choice facing N.Y. judge: Does Taliban leader get war-related immunity?*, <https://www.washingtonpost.com/national-security/2024/09/01/taliban-najibullah-trial-wartime-immunity/> (Sept. 1, 2024). [↑](#footnote-ref-1)
2. *Id*. [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 75 UNTS 135, 12 August 1949. [↑](#footnote-ref-5)
6. Hearing Transcript, United States v. Najibullah, 14 Cr. 401(KPF) (2024). [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. *Supra* note 5. [↑](#footnote-ref-8)
9. *Supra* note 6. [↑](#footnote-ref-9)