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Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher

In a brief but pointed critique recently published in this *Journal*,¹ Joseph Blocher claims that the Combatant Status Review Tribunals (CSRTs), established to determine whether Guantánamo detainees were “enemy combatants,” were inadequate because they were not authorized to determine whether detainees qualified as prisoners of war (POWs). Blocher asserts that the Third Geneva Convention obligated the United States to vest the CSRTs with such authority. While we concur that the CSRTs did not have authority to make POW classifications, we maintain that under the circumstances, the United States’ decision to deny individual consideration of POW status is appropriate and consistent with the Geneva Convention Relative to the Treatment of Prisoners of War.² In our view, because predicate analysis identified no qualifying POW groups to which detainees could claim membership, the CSRTs were appropriately precluded from determining POW status. Accordingly, the CSRTs served the distinct function of determining whether continued detention was justified.

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1. Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 *YALE L.J.* 667 (2006).
 2. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

I. WHO QUALIFIES AS A POW: A THREE STEP PROCESS

The Third Geneva Convention furnishes a three-step process to identify POWs. Stringent conflict classification is the essential first step of this process.³ This step is necessary because the character of a conflict dictates the scope of Convention applicability. Not all provisions of the Geneva Conventions are applicable *ipso facto* to all armed conflicts.⁴

Only prisoners captured in international armed conflicts are entitled to the protections of Article 4 of the Geneva Convention.⁵ Shortly after the invasion of Afghanistan, the United States determined that its conflict with al Qaeda in Afghanistan was not an international armed conflict.⁶ Though that

3. Geneva Convention, *supra* note 2, art. 2.

4. Governmental sources acknowledge the importance of conflict classification. See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, THE LAW OF WAR DESKBOOK, at ch. 3 (Brian J. Bill ed., 2000) (on file with authors); UK MINISTRY OF DEFENCE, THE MANUAL FOR THE LAW OF ARMED CONFLICT ¶ 3.1 (2004).

The International Committee of the Red Cross also acknowledges that conflict classification is essential to determining which provisions of the Conventions apply, a determination that turns on whether a conflict is or is not "inter-state." See Advisory Service on Int'l Humanitarian Law, Int'l Comm. of the Red Cross, *What Is International Humanitarian Law?*, (Jul. 2004), [http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). On the one hand, "[i]nternational armed conflicts" are "subject to a wide range of rules, including those set out in the four Geneva Conventions"; on the other hand, "non-international armed conflicts" are subject only to the "more limited range of rules" that are "laid down in Article 3 common to the four Geneva Conventions." *Id.*

5. Geneva Convention, *supra* note 2, art. 2 (establishing the situations to which the full corpus of the Geneva Conventions apply, namely, disputes between states resulting in the intervention of armed forces or in the total or partial belligerent occupations by one state of the territory of another state). Accordingly, the POW determination criteria of Article 4 are reached only through the conduit of an "Article 2" armed conflict, necessarily excluding from Article 4 armed conflicts that are not inter-state, such as the armed conflict with al Qaeda. (Although Article 2 refers to "High Contracting Parties," the universal nature of the Geneva Conventions renders this term synonymous with "states.")

6. From the outset of the combat operations initiated by the United States in Afghanistan in response to the attacks of September 11, 2001, the Bush Administration characterized the conflict with al Qaeda as distinct from the conflict with the Taliban. The rationale for this theory was summarized in a memo prepared by Jay Bybee. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Dep't of Defense (Jan. 22, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>. Because "the Taliban regime represented the *de facto* government of Afghanistan," Bybee's memo acknowledged that "an international armed conflict within the meaning of Common Article 2 existed" between the military forces of the United States and Afghanistan. *Id.* "Therefore, with regard to operations against the Taliban, the full body of the law of war became applicable." *Id.* But because al Qaeda "did not then, nor arguably ever will, satisfy the criteria of 'Statehood' for purposes of analyzing

determination was controversial at the time, the Supreme Court implicitly endorsed it in *Hamdan v. Rumsfeld*.⁷ Because al Qaeda detainees were not captured in the course of an international armed conflict, they cannot benefit from the provisions of Article 4 and Article 5. By contrast, the portion of the fight in Afghanistan against the Taliban *was* determined to qualify as an international armed conflict. That determination triggered the second step of the Third Convention POW qualification regime.

In the second step of the POW qualification process, Article 4 requires Detaining Powers to evaluate the character of opposing forces. If those forces fall within one of Article 4's protected groups (which include the "armed forces of a Party to the conflict" and associated "militias," "volunteer corps," and "organized resistance movements"),⁸ then captured personnel may be POWs. Article 4's criteria are demanding; to qualify, armed groups must be organized, must display a "fixed distinctive sign" (e.g., a uniform), must "carry[] arms openly," and must obey "the laws and customs of war." The inquiry at step two is directed at the *forces* as a whole, and not at the particular characteristics of the detained members of those forces.⁹ Because the Taliban forces did not meet

applicability of the law of war, the US determined that the conflict against al Qaeda was not an international armed conflict." *Id.*

7. 126 S. Ct. 2749 (2006). No part of the decision suggested that Hamdan, by virtue of being captured in Afghanistan, was subject to the full corpus of the Geneva Conventions. Instead, the Court restricted its decision to the baseline humane treatment protections of Common Article 3.

8. Article 4 states in relevant part:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

Geneva Convention, *supra* note 2, art. 4(A)(2).

9. The phraseology of Article 4(A)(2) reveals that the proper focus at step two is on the characteristics of the opposing forces, and not on the characteristics of the detainees. Though the opening phrases of 4(A)(2) speak in terms of "members" of units, the now

Article 4's demanding criteria, the government determined that the Geneva Convention did not apply to detained Taliban fighters.¹⁰

Finally, and only if opposing units meet the Article 4 criteria, must a detaining power take the third step of the POW identification process, which is set out in Article 5. Article 5 provides that if any "doubt" should "arise" about whether detainees "belong to any of the categories enumerated in Article 4,"

familiar enumerated criteria for POW status are more clearly associated with unit designations such as "militias," "corps," and "movements." *Id.* art. 4(A)(2).

This reading of Article 4(A)(2) is supported by Professor Dinstein's analysis. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 37-41 (2004). Interestingly, Dinstein identifies seven, as opposed to the traditional four, cumulative criteria. *Id.* His additional criteria include organization in the form of embedded discipline, belonging to a party to the conflict, and non-allegiance to the detaining power. *See id.* at 39-41. Considering their application, Professor Dinstein ponders whether his seven criteria are intended to be applied against individuals or instead against groups of which such individuals are members. *See id.* at 43. He concludes that criteria related to organization (such as the first of the Article 4(A)(2) criteria and his own criteria of embedded discipline and belonging to a party to the conflict) are inquiries that may only be directed against a group. That is, individuals cannot of their own accord develop organization or the international legal status of "party." *See id.* Dinstein explains, however, that the requirement of non-allegiance to the captor can only operate under an individualized inquiry. *See id.* He concludes that the remaining criteria—insignia, carrying arms openly, and adherence to the law of war—are hybrids: though these criteria may be tested on an individual basis, group behavior may be substituted for specific information of the individual. *See id.*

10. This determination surprised many law-of-war practitioners by applying the criteria of Article 4(A)(2) to the regular armed forces of the Taliban government. Previously, military and international lawyers had assumed that the criteria of Article 4(A)(2) did not apply to regular armed forces because those forces were covered by Article 4(A)(1), which appears to provide that the "armed forces of a Party" to a conflict are eligible for the protections of the Convention with no further conditions required. Geneva Convention, *supra* note 2, art. 4(A)(2). Evidence that Afghanistan had composed, organized, and given its imprimatur to a force might appear to be sufficient to grant that force POW status upon capture.

Citing the consistent use of the Article 4(A)(2) criteria to describe attributes of all lawful belligerent groups, however, the Bush Administration argued that the four conditions of Article 4(A)(2) were effectively incorporated into Article 4(A)(1). The Administration thus rejected characterizations of the Taliban as the "armed forces" of Afghanistan because that group failed to comply with the four conditions set out in Article 4(A)(2). Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Dep't of Defense 9-10 (Jan. 22, 2002), *available at* <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>.

Ultimately, these determinations required somewhat controversial adjustments to the course of instruction on POW classification at the U.S. Army Judge Advocate General's School. Instructors regularly encounter resistance to this reading of 4(A)(1) from students steeped in traditions of literal interpretation of treaty and statutory language.

then the detaining power must treat the detainees as POWs until a “competent tribunal” determines each detainee’s claim of POW status.¹¹

Blocher misinterprets the Convention’s requirements by omitting the first two steps of the process and focusing only on the third part of the process, the Article 5 tribunal.

II. UNRAVELING ARTICLE 5

Blocher’s argument that individual detainees’ POW status should be evaluated by competent Article 5 tribunals falls prey to a troubling ambiguity in Article 5. The term “belong to any of the categories enumerated in Article 4” could have either of two meanings. The phrase could mean that the “competent tribunal” must decide whether *a particular detainee* met the criteria of Article 4. Alternatively, the phrase could mean merely that the tribunal should determine whether the detainee is a member of a group covered by Article 4. The former reading is the foundation of Blocher’s criticism of CSRTs, yet the latter reading is the more textually sound and historically practiced interpretation.¹²

As precedent for his claim that Article 5 tribunals, rather than the President, should determine whether opposing forces meet the Article 4 criteria, Blocher cites the United States’ treatment of Viet Cong detainees.¹³ Carefully reviewed, however, the Vietnam precedent actually undermines Blocher’s position.

It is true that the United States and the Government of Vietnam, in an effort to alleviate crowding in Vietnamese civilian jails and in recognition of the Vietnamese criminal justice system’s lack of capacity to try Viet Cong fighters as traitors, adopted an expanded reading of Article 4 to accord POW status to Viet Cong members.¹⁴ But far from supporting Blocher’s argument that individual tribunals should apply Article 4’s criteria, the Viet Cong experience instead shows that a central command should determine whether opposing units are covered by Article 4.

11. The relevant part of Article 5 states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

12. See DINSTEIN, *supra* note 9, at 37-41.

13. Blocher, *supra* note 1, at 669.

14. GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973*, at 66 (1975) (recounting the U.S. military and Vietnam government’s decision to “broadly constru[e] article 4”).

In late 1967, the U.S. Military Assistance Command, Vietnam (MACV), instructed the military's Article 5 tribunals that only individuals identified as members of enumerated groups, previously vetted under Article 4, would be entitled to POW status.¹⁵ That directive is thought to be among the first State efforts to implement Article 5.¹⁶ Properly understood, the Directive represents a national-level, policy-based determination that specific forces and units participating in hostilities, as groups, satisfied the POW criteria of Article 4. With analysis of Article 4 completed by MACV, no doubt could remain concerning satisfaction of the Article 4 criteria. MACV Article 5 tribunals had no mandate to interpret Article 4 independently, apply its criteria to captives, or to second-guess the classifications under which they categorized detainees. The tribunals' task was simply to resolve doubt as to membership in pre-approved units and forces. In other words, the role of the Article 5 tribunal was to determine if the specific individual was a *member of an organization* that had already been determined to qualify under Article 4, not to determine if he *individually* qualified under Article 4.

Blocher's argument for individual adjudications of the Article 4 criteria also presents practical concerns surely anticipated by the drafters of Article 5. Permitting Article 5 tribunals to adjudicate Article 4 criteria for each detainee might lead to highly disparate and inconsistent results for captives even from the same fighting organizations. Difficulties collecting and preserving evidence from the battlefield would doubtless compound the potential for inequity and uneven results.

III. A DOUBTFUL READING OF DOUBT

A second ambiguity exists in Article 5's use of the word "doubt." Does "doubt" refer to the subjective perceptions of the detaining power, or may an individual detainee raise such "doubt" simply by claiming that he is a POW? Applying the Vietnam practice, once a detaining power has taken the second

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15. U.S. Military Assistance Command, Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees (Dec. 27, 1967), *reprinted in* Howard Levie, *Documents on Prisoners of War*, 60 INT'L L. STUD. 748 (1979) [hereinafter MACV Dir. 381-46]. The directive identified the following groups' members as qualifying for POW status: Viet Cong Main Forces; Viet Cong Local Forces; North Vietnamese Army Units; and Organized Forces of Irregular Guerillas and Self-Defense Forces who had not engaged in terrorism, sabotage or spying. *Id.* Annex A.
 16. Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUD. 1, 57 (1977). Professor Levie notes that parties to the Convention later confronted with Article 5 interpretive issues were apparently unaware of MACV Directive 381-46 and U.S. Article 5 tribunals conducted in Vietnam. *Id.* (citing *Military Prosecutor v. Kassem* (Israeli Military Court, Ramallah Apr. 13, 1969), *reprinted in* 42 I.L.R. 470, 472 (1971)).

step of the POW identification process, and determined that an opposing force qualifies for POW treatment under Article 4, Article 5 of the Convention requires the detaining power to take the third step of that process. Article 5 provides that if any “doubt” should “arise” about whether the detainees “belong to any of the categories enumerated in Article 4,” then the detaining power must treat the detainees as POWs until a “competent tribunal” determines each detainee’s claim of membership in a group qualifying for POW status.¹⁷

Unlike the situation in Vietnam, where certain groups had been determined to meet the Article 4 criteria, in Afghanistan President Bush determined that the conflict against al Qaeda was not an international armed conflict and that the Taliban forces did not meet the criteria set forth in Article 4.¹⁸ This meant that there was no “doubt” to resolve. While these centralized and unitary mass appraisals might initially appear at odds with the individual adjudications prescribed by Article 5, they are in fact in keeping with the Third Convention’s three-step POW classification regime under which the first step (of conflict classification) and the second step (of applying the Article 4 criteria to opposing forces) are to be taken by a central command.

IV. WHY, THEN, CSRTS?

If the United States has determined that none of the individuals detained at Guantánamo Bay were members of an organization that met the Article 4 criteria and that therefore no “doubt” could exist about the detainees’ lack of POW status, why did the United States initiate CSRTs?¹⁹

17. *But see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 44, June 8, 1977, 1125 U.N.T.S. 3, 25 [hereinafter Protocol I]. Protocol I appears to resolve this question for State parties to these 1977 updates to the 1949 Geneva Conventions. Article 45 of Protocol I states: “A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, *if he claims* the status of prisoner of war” *Id.* (emphasis added). The United States, however, is not a party to Protocol I.

18. Memorandum from George W. Bush, President of the United States, to the Vice President, et al. (Feb. 7, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

19. We agree in part with Blocher on this issue as he asserts, “This Comment argues that the CSRTs were not competent to deny POW status because they were charged only with identifying enemy combatants.” Blocher, *supra* note 1, at 668. This is true because, as argued above, there was no doubt as to the detainees’ status after the President’s determination. While there is academic debate as to whether the President can rightfully make that

The answer is, as Blocher admits, that “the CSRTs were created to classify enemy combatants”²⁰ in response to the Supreme Court’s decision in *Hamdi v. Rumsfeld*.²¹ Where Blocher misses the value of the CSRTs is in the independent need to determine whether each detainee was an enemy combatant, not for purposes of determining the detainee’s POW status, but rather to subject the detainee to continuing U.S. detention in order to prevent his return to the battlefield.²² The Court’s decision clearly illustrates why CSRTs are necessary: detainees who are enemy combatants may be detained for the duration of the hostilities whereas those who are not enemy combatants must be released.

Thus, detainees at Guantanamo do not merit tribunals under Article 5 because their status as POWs under Article 4 is not in doubt. The President resolved that question when he determined that the armed conflict against al Qaeda was non-international and that the Taliban as a group could never qualify for POW status pursuant to Article 4. Although controversial, these determinations eliminated doubt within the meaning of Article 5 as to potential POW status for detainees captured in Afghanistan. Nonetheless, these determinations left unresolved the justification for continued detention based on evidence that a detainee joined or supported hostile forces and engaged in armed conflict. The CSRTs perform the distinct function of making this subsequent and critical determination. Accordingly, while the predicate determinations that produced the need for the CSRTs remain the subject of

determination under international law, Blocher does not rely on this as the basis for his objections to the CSRTs.

20. Blocher, *supra* note 1, at 670. The author continues, “The CSRTs did not—and were never asked to—determine detainees’ POW status.” *Id.*

21. 542 U.S. 507 (2004). *Cf.* Blocher, *supra* note 1, at 670 n.15.

22. In *Hamdi v. Rumsfeld*, the Court treated the term “enemy combatant” as different from the requirements of Article 4 when it accepted the government’s proffered definition:

[The government] has made clear . . . [that] the “enemy combatant” that it is seeking to detain is an individual who, it alleges, was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States.” We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

542 U.S. at 516. The Court further stated that

[u]nder the definition of enemy combatant that we accept today as falling within the scope of Congress’ authorization, Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in armed conflict against the United States” to justify his detention.

Id. at 526.

UNDERSTANDING THE DISTINCT FUNCTION OF THE COMBATANT STATUS
REVIEW TRIBUNALS: A RESPONSE TO BLOCHER

criticism, the determinations of the CSRTs are in no way “flawed” by the failure to assess POW status.

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