

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

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## 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. 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.

Only prisoners captured in international armed conflicts are entitled to the protections of Article 4 of the Geneva Convention. Shortly after the invasion of Afghanistan, [the United States determined](#) that its conflict with al Qaeda in Afghanistan was not an international armed conflict. Though that determination was controversial at the time, the Supreme Court implicitly endorsed it in [Hamdan v. Rumsfeld](#). 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"), 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. Because the Taliban forces did not meet Article 4's demanding criteria, [the government determined that the Geneva Convention did not apply to detained Taliban fighters](#).

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," then the detaining power must treat the detainees as POWs until a "competent tribunal" determines each detainee's claim of POW status.

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.

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. 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. 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.

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. That directive is thought to be among the first State efforts to implement Article 5. 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 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.

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. 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?

The answer is, as Blocher admits, that "the CSRTs were created to classify enemy combatants" in response to the Supreme Court's decision in [Hamdi v. Rumsfeld](#). 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. 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 criticism, the determinations of the CSRTs are in no way “flawed” by the failure to assess POW status.

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