

Discourse in the Legal Tongue: The Discourse on “Enemy Combatants” as an Illustration of Hegemonic Contestation.

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Abstract

This paper seeks to provide an elucidated understanding of the role of law in international discourse by analyzing legal argumentative practice. The overarching driving question will be whether the legal form of discourse has any merits. It argues that regardless of the inner motives actors might have for engaging in legal discourse, its outward show is the same. The paper pictures discourse in the legal tongue in form of “hegemonic contestation”. Three elements find expression in this picture: the openness of legal argument, its distinct argumentative form, and the hegemonic move in making something particular appear to be universal. This theoretical perspective shall be cast on the discourse on “enemy combatants”. The distinct interpretative claims will be exposed and reconsidered under the perspective of hegemonic contestation. It will be argued that struggles over “right” meaning or interpretation are expressive of productive power within legal discourse. This paves the way to approach the overall merits of the legal argumentative form in a last step. It concludes that the form cannot be an almighty guardian against power but that the road to a point of substantive justice is and should be closed. This insight throws the subject back into the spotlight.

I. Introduction

“Semantic instability, irreducible trouble spots on the borders between concepts, indecision in the very concept of the border: all this must not only be analysed as a speculative disorder, a conceptual chaos or zone of passing turbulence in public or political language. We must also recognize here strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.”¹

The fact that power is also exercised by semantics appears as an uncontroversial observation.² In legal scholarship this idea has been received with reluctance although legal argument appears as the prime example of “semantic fights” in which actors seek to implement meanings and concepts that suit their interests.³ Remnants of the bygone idea, that legal interpretation flows straight from the norm text, have stood in the way. Yet, the idea of indeterminacy has gained current. In international law, this idea is closely linked with Martti Koskenniemi’s work on the structure of international legal argument in “From Apology to Utopia”.⁴ He finds the nature of indeterminacy in the heart of liberalism’s contradictory premises – in the constant oscillation between respect for individual autonomy (on the international plane he translates this into state consent), on the one hand, and some conception of justice, on the other. It is not based on linguistic pragmatism, but rather, extends “beyond semantic ambivalence”.⁵ Regardless of the nature of indeterminacy, the consequence is the same: there appears to be no room for a single rational, intrinsically just, universally right or true interpretation to a legal norm. Interpretation is a political choice. Numerous different attempts have been undertaken to rescue legal practice, science and the law against this apparently existential threat.⁶ However, even superhuman characters such as Roland Dworkin’s Hercules miss the enemy with every mighty punch.⁷ This is not the place to recall these attempts or to refute them in a single superhuman conclusive move.⁸ This paper rather seeks to provide an elucidated

¹ Jacques Derrida, quoted in G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, (Chicago, Ill. 2003), 105.

² See, e.g., E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006).

³ For the concept of “semantic fights” and its history, see Id., at 17ff. For legal argument in particular see R. Christensen and M. Sokolowski, *Recht als Einsatz im Semantischen Kampf*, In E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006), pp. 353-71.

⁴ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, reissue with new epilogue, (Cambridge 2005). First published in Helsinki, 1989.

⁵ Id., at 590-96.

⁶ Note already, however, that the protagonist of a pure theory of law concurs, attributes the application of to the sphere of the politics of law, and agrees that law application is a subjective act which does not lend itself to legal science. H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, (Leipzig 1934), 94-100.

⁷ See R. Dworkin, *Law's empire*, (London 1986).

⁸ See, e.g. the critique by J. Finnis, "On Reason and Authority in *Law's Empire*" (1987) 6 *Law and Philosophy* 357-80, 372-76.

understanding of the role of law in international discourse by analyzing argumentative practice. When the law is itself indeterminate, where does its merit lie? The answer lies near: it must be the form! Koskenniemi adds a normative programme to his descriptive analysis of indeterminacy - a "culture of formalism".⁹ Actors exchange interpretative claims in a certain formal argumentative practice. In doing so, they vest their particular interpretation in a form that immediately asserts universal validity. This last ingredient can be called a hegemonic move and completes the picture of "hegemonic contestation"¹⁰. This picture captures in sum (1) that legal interpretations are continuously contestable and contested, (2) that this contestation follows a certain form and (3) that this process is hegemonic.¹¹ This is expressive of the observation that power is also exercised by semantics and it demands a closer look at this practice of argumentative interchange.

The driving interest of this paper is an elucidated understanding of the role and function of international law in international relations and it asks whether discourse in the legal tongue, that is formal argumentative practice with reference to legal texts, has any merits. In conclusion, does the picture of "hegemonic contestation" indeed leave the international lawyer face to face to an existential threat or is it a good thing after all? It approaches this task with resort to the example of the legal discourse on "enemy combatants". It proceeds in three steps. It first provides a theoretical perspective to be cast on the discourse on "enemy combatants" (Part II). This requires an understanding of the construction of the stage on which "hegemonic contestation" takes place. Law is a social phenomenon and its understanding must be informed by the process which generates it and by the motivation of actors for participating in its construction. It will be argued that regardless of the inner motives, the construction looks more or less the same and that it can be captured in the picture of "hegemonic contestation". Legal discourse carries understandings about what counts as a legal argument as well as how those arguments have to be performed. The actors engage in the interchange of arguments employing the weapon of making interpretative claims about the "right" meaning of a legal term. This theoretical perspective will be cast on the discourse on "enemy combatants" in a second step (Part III). The term "enemy combatants" has been introduced with a particular conception by the U.S. administration whose interpretative claim shall be exposed in its discernible elements. Further participants in the legal discourse include courts and scholars. Their reception, ranging from outright support to complete rejection of the administration's claim, shall be sketched. The argumentative interchange will be reconsidered within the picture of "hegemonic contestation" which paves the way to approach the question whether there is any merit in legal argument and overall, whether it is a good thing in a third step (Part IV). The likely impact of power will be considered. It will be argued that the argumentative form cannot be an almighty guardian against power or, to the extreme, against forms of totalitarianism. But the resort to a substantive point of justice is and should be closed. Highlighting the nature of "hegemonic contestation" throws the individual back into the spotlight.

⁹ M. Koskenniemi, *The Gentle Civilizer of Nations*, (Cambridge 2001), 494ff.

¹⁰ M. Koskenniemi, "International Law and Hegemony: A Reconfiguration" (2004) 17 *Cambridge Review of International Affairs* 197-218, 199.

¹¹ Id.

While “semantic instability” is under scrutiny, this paper must not itself suffer from such instability. To be clear, I refer with “expression” or “text” to one or a combination of words such as “enemy combatants”. Also a legal text, the words one finds in an edition of treaties for instance, is referred to as “text” or “expression”. Those expressions carry “meanings”, “conceptions” or “interpretations” (note the plural). With these terms I refer to what we *mean* when we say “enemy combatants”. These can of course be very different things.¹² Finally, “law” is a system of “legal norms”. A “legal norm” is the interpretation attributed to a legal text at a given time.

II. Discourse in the Legal Tongue: A Theoretical Perspective

In order to analyse and explain legal discourse, this part develops a theoretical perspective to be cast on the object of analysis. The object is discourse in the legal tongue - that is interlinked formal argumentative practices with reference to legal expressions. An understanding of this argumentative form arguably demands an understanding of the social action, its purpose and process, that has generated the object of analysis.¹³ Consequently, the first investigates international relations theory and explores actors’ aims in engaging in legal argumentative practice. The second section paints the theoretically informed picture of “hegemonic contestation” and thereby completes the theoretical perspective on discourse in the legal tongue. It will turn out that regardless of the inner motives for action, the outward show of legal discourse looks more or less the same and in turn, “if we are interested in how norms matter, we must begin with the problem of praxis and draw from there the implications for both political and legal analysis. ... [P]ragmatic criteria play a much greater role in social science explanations than is usually assumed.”¹⁴

1. *Why actors engage in legal discourse*

It is necessary to start from a disillusioning but necessary premise: we cannot know why states engage in legal discourse but instead have to offer plausible explanations why they do so. The intentions and motives will remain known to the actor alone. Thus we draw inferences from context, statements and actions, and have to do so with caution. Furthermore, different actors can argue with distinct motives, some might argue on the basis of their normative conviction and others on a rationalist calculation of their interests in, for instance, the maximisation of (relative) power. They could still reach an agreement and it could not be said that this agreement was the product of strategic bargaining or argumentative persuasion – of either “honest” or “dishonest” arguing of any participant.

¹² In this I follow C. K. Ogden and I. A. Richards, *The meaning of meaning: a study of the influence of language upon thought and of the science of symbolism*, 10th ed., (London 1972), 11, who elaborate on the relation between “symbol”, “thought or reference” and “referent”.

¹³ See R. Keller, *Sprachwandel*, 3rd ed., (Tübingen and Basel 2003), 33ff.

¹⁴ F. V. Kratochwil, How do Norms Matter?, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, New York 2000), pp. 35-68, 36-37.

With those limitations in mind it is nevertheless possible and necessary to provide plausible explanations for actors' behaviour. The plausibility of such explanation can only relate to the context; yet a number of distinct possibilities can be outlined.

a. Realism

Realist accounts of state action have persistently refuted the idea that norms have any impact on action. Law is an epiphenomenon of action and arguably, no explanation why states engage in legal discourse could be offered.¹⁵ In a little more refined approach, several explanations have been put forward even under realist premises. First, states would provide legal justifications for their action no matter how transparently self-interested their actions are because failing to do so would give away the cost-free possibilities that some other parties, national or international audiences might believe the arguments.¹⁶ This is most likely the weakest of all explanations because according to realist premises no participant would believe this. On an external critique, legal justification is not cost-free but locks the actor in a process of argumentative interchange.¹⁷ Secondly, a legal discourse might provide the means for fixing the terms of either coordination or cooperation. Actors must know what counts as cooperative and deviant behaviour. Yet, even if it makes sense that states talk, the fact that such talk might appear as legal does not change the fact that law could never have an independent impact on state action.¹⁸ The distribution of material power is decisive.¹⁹

In contrast to all other accounts, under the premises of realist international relations theory states do not exercise power by trying to mould international law in a way that meets their interests. Power for the purpose of this paper should be understood as “the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate.”²⁰ Since capacities of actors and their choice of action are determined by the structural allocation of relative material power alone, law is not attractive to actors exercising power.

b. Rationalism

The explanation relating to the need to fix terms for cooperation and coordination leads the way to discuss why actors engage in legal discourse according to positions within

¹⁵ See A. T. Gutzman, "A Compliance-Based Theory of International Law" (2002) 90 *California Law Review* 1823, 1836-38.

¹⁶ See J. L. Goldsmith and E. A. Posner, *The limits of international law*, (Oxford 2005), 167-175.

¹⁷ This is what Thomas Risse calls “communicative entrapment”, T. Risse, "Let's Argue!": Communicative Action in World Politics" (2000) 54 *International Organization* 1.

¹⁸ See also H.-J. Cremer, "Völkerrecht - Alles nur Rhetorik?" (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 267-98.

¹⁹ See H. J. Morgenthau, *Politics Among Nations the Struggle for Power and Peace*, (New York 1949), 209-18, 228-242. For a concise account of Kenneth Waltz, see A.-M. Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205 (“For Waltz, norms of any sort, qua norms, lacked independent causal force.”). See also S. D. Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton, NJ 1999).

²⁰ M. Barnett and R. Duvall, *Power in Global Governance*, In M. Barnett and R. Duvall (eds.), *Power in Global Governance*, (Cambridge 2005), pp. 1-32, 3

the regime debate; first under rationalist premises and secondly in a reflective or constructivist understanding. Contributions endorsing a rationalist position have convincingly shown that regimes, part of which would be international law, modify the incentives of states by changing the structure of outcomes of actions.²¹ This is a common position of rationalistic institutionalists. Institutions can be defined as “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations”.²² Furthermore, it has been argued that regimes have reputational effects and that non-compliance causes reputational costs.²³ It is not apparent how arguments hinging on reputation can be integrated into a rationalist position without being reduced to the overall incentive structure. Either reputational loss is costly and should therefore be avoided or it has some other effect connoted with reputation, e.g. actors want to have a good reputation because of their self-understanding as good actors. Then it falls outside the framework of explanation of rationalistic positions. Under rationalist premises actors engage in legal discourse because they claim and defend the outcomes provided by a regime. An illustration of such intervention would be, for instance, an actor’s a claim of a legal right and a certain payoff or the claim proscribed by the regime.

Here, another explanation for engaging in legal discourse lies in the exercise of institutional power by which an actor can possibly exert indirect control over others by designing international institutions in ways that work to his long-term advantage. In the strong variant of hegemonic domination the regime created under the pressure of the hegemon is little more than the expression of his interests. The difference to the exercise of direct compulsory power under realist premises is indeed slim because the reason for weaker states to participate in the established regime stems less from pursuing own interests and benefiting from the incentives of the regime but rather from the lack of alternatives and from the compulsion of the hegemon.²⁴ In another variant, institutions have gained some independence from dominant actors which justifies thinking of institutional power as distinct from direct compulsory power. Even if institutions are not a tool exclusively in the hands of a single actor, they are yet likely to be tilted to the benefit of the more powerful.²⁵

A further explanation for actors’ interest in legal discourse rests on liberal theory of international relations. Neoliberals such as Anne-Marie Slaughter have been among the first to argue for a greater convergence between the disciplines of international relations

²¹ See D. Snidal, "Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes" (1985) 79 *American Political Science Review* 923, K. W. Abbott and D. Snidal, "Why states act through formal international organizations" (1998) 42 *Journal of Conflict Resolution* 3-32, A. Kydd and D. Snidal, Progress in Game-Theoretical Analysis of International Regimes, In V. Rittberger (ed.), *Regime Theory and International Relations*, (Oxford 1993), pp. 112-35.

²² R. O. Keohane, *International Institutions and State Power: Essays in International Relations Theory*, (Boulder 1989), 163.

²³ See, e.g., A. T. Gutzman, "A Compliance-Based Theory of International Law" (2002) 90 *California Law Review* 1823.

²⁴ See M. Barnett and R. Duvall, Power in Global Governance, In M. Barnett and R. Duvall (eds.), *Power in Global Governance*, (Cambridge 2005), pp. 1-32, 15ff.

²⁵ Id.

and international law.²⁶ A clear contrast to the approaches discussed so far is the level of analysis. Key actors in liberal theory are individuals and private groups.²⁷ Liberal theory, in short, holds that whether states observe norms on the international level is due to the domestic constitution of the state, and not due to the incentive structure as argued by institutionalists. Rather compliance, normative propositions and the claim to “right” interpretations are the product of the domestic order. In liberal states people are accustomed to the benefits of rule of law and extend those lessons learned to the international sphere. The prospect and function of international law is, then, to foster domestic governance institutions.²⁸ “The future of international law is domestic”²⁹. It is not made explicit that domestic governance institutions have to be, in fact, liberal (democratic) institutions.³⁰ Yet, this would have to be the case for the proclaimed benefits to set in – democratic peace and a “just world order”.³¹ Individuals, private groups, or state representatives, i.e. representative of aggregated individual preferences, strive for such a just world order which is in their given interests. Law is a means to achieve this goal and this adds another explanation why such actors might engage in legal discourse.

c. Constructivism

In both the realist contentions and in the rationalistic accounts, in their institutionalist and liberal variants, actors engage in legal discourse to pursue their given interests which are fixed on the state level, or as in the case of liberal theory, given on the individual level. International Law does not have an independent impact on state behaviour on realist premises. It can modify the incentive structure in an institutionalist account, or it is seen as conducive to shared liberal preferences. The shared premise that interests and identities are given and exogenous to explanation blends out any sociologically informed understanding of how norms matter. To the contrary, reflective approaches conceive of actors and their preferences as variables and argue that institutions do not only reflect the interests of states or individuals but also shape those interests.³² Constructivism gains a more comprehensive

²⁶ A.-M. Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205, A.-M. Slaughter, A. S. Tulumello and S. Wood, "International law and international relations theory: a new generation of interdisciplinary scholarship" (1998) 92 *The American journal of international law* 367-97, A.-M. Slaughter, "International law and international relations" (2000) 285 *Recueil des Cours* 13 - 249.

²⁷ See the seminal outline of liberal theory for international relations by A. Moravcsik, "Taking preferences seriously a liberal theory of international politics" (1997) 51 *International Organization* 513 - 53.

²⁸ See Id., at 333ff. Also see A.-M. Slaughter, "A liberal theory of international law" (2000) 94 *Proceedings of the American Society of International Law* 240-49, 246ff.

²⁹ A.-M. Slaughter and W. Burke-White, "The future of international law is domestic (or, the European way of law)" (2006) 47 *Harvard International Law Journal* 327-52.

³⁰ See, however, Id., at 348.

³¹ A.-M. Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 *Columbia Law Review* 1907, A.-M. Slaughter, *A new world order*, (Princeton, N.J. 2004), 216ff.

³² For the juxtaposition of rationalistic and reflective approaches to institutions, see R. O. Keohane, *International Institutions and State Power: Essays in International Relations Theory*, (Boulder 1989), 166ff. Also see A. Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, In V. Rittberger (ed.), *Regime Theory and International Relations*, (Oxford 1993), pp. 49-72, J. G. Ruggie,

understanding of endogenous preferences by looking at the formation of actors' identities and interests.³³ Normative and ideational structures are just as important as material structures. This has far-reaching consequences for the understanding of international relations and more pertinently for the reasons why actors engage in legal discourse.³⁴ For instance, an actor might engage in legal argument, because this fits the idea he has of himself. Representatives of a state which upholds the rule of law would have to justify their international action with reference to law. In this sense it adds on to liberal theory of international relations, but it does not follow the premise that preferences are fixed on the individual level. Rather law and discursive interventions are inseparable from the "reasons and self-understandings that agents bring to their actions."³⁵

Furthermore, constructivism opens the door for communicative action theory in addition to rationalism. Those two social theories distinguish between two different logics of action: consequentialism and submitting to the better argument.³⁶ Accordingly, actors might engage in legal discourse with the aim of convincing other participants. A "logic of arguing" might be introduced as a third logic of social action in addition to first, a logic of consequentialism within the realm of rational choice and second, a logic of appropriateness according to which actors try to engage in proper behaviour fitting their self-understanding.³⁷ Note, however, that argumentative practice can stem from both strategic and communicative action. Normative argumentative practice such as a discourse in law always makes claims to what is the appropriate action, more particular, to what is the proper interpretation of legal text. Arguably the logic of appropriateness is dominant to both consequentialist and communicative action.³⁸ This is met by the observation that regardless of whether one or a number of actors follow(s) a consequentialist or communicative mode of action, the outward show of argumentative practice is fairly much the same. Before turning to this outward show, it must not be neglected that the social

"What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 *International Organization* 855-85.

³³ See A. Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics" (1992) 46 *International Organization* 391-425, H. Müller, *The Internalization of Principles, Norms, and Rules by Governments: The Case of Security Regimes*, In V. Rittberger (ed.), *Regime Theory and International Relations*, (Oxford 1993), pp. 371-88, A. Wendt, *Social theory of international politics*, (Cambridge 2000).

³⁴ See J. Brunée and S. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Columbia Journal of Transnational Law* 19-74.

³⁵ A. Wendt, "The Agent-Structure Problem in International Relations Theory" (1989) 41 *International Organization* 335, 359.

³⁶ For an introduction to communicative action in international relations, see H. Müller, "Internationale Beziehungen als kommunikatives Handeln. Zur Kritik der utilitaristischen Handlungstheorien" (1994) 1 *Zeitschrift für Internationale Beziehungen* 15, H. Müller, "Spielen Hilft nicht immer. Die Grenzen des Rational-Choice-Ansatzes und der Platz der Theorie kommunikativen Handelns in der Analyse internationaler Beziehungen" (1995) 2 *Zeitschrift für Internationale Beziehungen* 371.

³⁷ T. Risse, "Let's Argue!': Communicative Action in World Politics" (2000) 54 *International Organization* 1, 3-16.

³⁸ H. Müller, "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations" (2004) 10 *European Journal of International Relations* 395-435, 410ff.

construction of identities and interests can also be an instrument of power, if successful, this might well be the most efficient and penetrating exercise of dominance.

The concept of productive power builds on the insights of constructivism and relates them to power and dominance. Identities and interests are products of systems of knowledge and discursive practices. Dominant meanings impact the perception of reality which informs decision-making. Such perceptions are vital for actors' pursuit of their interests because they can be either conducive or disadvantageous to this aim.³⁹ Thus, efforts to set and fix meanings can be seen as an expression of productive power.⁴⁰ In its most penetrating form, it encompasses all subjectivity and at the same time would no longer lend itself to the power of any particular subject.⁴¹ This approach gives rise to fundamental questions of structure and agency and the philosophical questions of subjectivity, social determination and the possibilities of transformation.⁴² In a less stark variant this exercise of power shall be taken up again in a discussion of the practice of interchange in form of hegemonic contestation in the following part. For now it is sufficient to recall that the implementation of dominant meaning is also an exercise of productive power and adds a significant additional explanation for why actors engage in legal discourse.⁴³

In sum, a number of explanations of actors' interest in legal discourse appear plausible. Actors might want to fix the terms to overcome coordination problems, gain higher outcomes through cooperation, they might want to claim their outcomes in an institutional setting, save their reputation or convince other participants by arguing. Furthermore, legal discourse is the place for the exercise power.

d. Actors

So far, actors have been states or state officials. In liberal theory interests are fixed on the individual level but still aggregated and put into use by domestic political mechanisms. It might seem appropriate to limit the scope of actors under scrutiny in international legal discourse to states because international law, in common understanding but with the notable exception of liberal theory, is made by states. Even if states might be convinced of

³⁹ See already C. K. Ogden and I. A. Richards, *The meaning of meaning: a study of the influence of language upon thought and of the science of symbolism*, 10th ed., (London 1972), See also E. Felder, Semantische Kämpfe in Wissensdomänen. Eine Einführung in Benennungs-, Bedeutungs- und Sachverhaltsfixierungs-Konkurrenzen, In E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006), pp. 13-46.

⁴⁰ See M. C. Williams, "Hobbes and International Relations: A Reconsideration" (1996) 50 *International Organization* 213-36, 222.

⁴¹ See M. Hardt and A. Negri, *Empire*, (Cambridge, Mass. 2002), M. Hardt and A. Negri, *Multitude. War and Democracy in the Age of Empire*, (London 2006).

⁴² See for strategies of transformation, e.g. the argument on Judith Butler in S. Krämer, *Sprache, Sprechakt, Kommunikation*, (Frankfurt am Main 2001), 248ff. Compare M. Hardt and A. Negri, *Multitude. War and Democracy in the Age of Empire*, (London 2006), 224ff, on theories of transformation under post-modern premises.

⁴³ See also I. Johnstone, The power of interpretive communities, In M. Barnett and R. Duvall (eds.), *Power in Global Governance*, (Cambridge 2005), pp. 185-204, 186.

norms which do not meet their interest or may arguably be bound against their will,⁴⁴ treaties and customary law are seen as the most productive sources of international law. Such a limitation of the scope of actors would be wrong and misleading for the simple reason that states do set to the largest extent the norms of international law, but the norm is not readily available in any specific situation. Rather it rests in the dominant interpretation of a legal expression at a given time. Usually, interpretative disputes - disputes about the meaning of a norm - are settled by court. The court makes law by applying a legal expression to circumstances. This interpretation is not in the control of states alone. They could step in and agree on new legal expressions which carry different meanings and thereby reform or reaffirm their political will. In the absence of a global legislative body or assembly, whatsoever its desirability, this reflects a deficient relationship between the judiciary and politics.⁴⁵

And yet, interpretation is not in the control of courts either. Their decisions are discussed by legal scholars suggesting where the court was wrong and where a different meaning should have been applied. Other important discussants include non-governmental organizations (NGOs) and other interest groups. Apart from states and their official representatives, legal advisors and spokes persons, also courts, legal scholars, and other interest groups such as NGOs take part in legal discourse which is even taken into national, regional and municipal newspapers. The internal reasons for engaging in legal discourse differ, they may stem from consequentialist or communicative motivations. Only courts stick out because they are institutionally designed to have an authoritative say in legal discourse, but even here there is no reason to categorically postulate the prevalence of one mode of action over the other.

2. *The Practice of Interchange as Hegemonic Contestation*

Regardless of the “true” inner reasons why actors engage in legal discourse, it universally looks more or less the same. This section subjects the practice of legal discourse to some scrutiny. This will show that actors constantly make claims about the “proper” interpretation of a norm and secondly it will be argued that there are no criteria by which such interpretations could be proven “right” or “wrong” in any objective manner. Thus, the process of argumentation is necessarily open and the claim in communicative action that an actors’ “dishonest” strategic use of arguments can be unmasked is hard to sustain unless it were possible to show internal inconsistency and contradiction in one actor’s way of arguing. Yet, this does not mean that the actors do not engage in communicative action. A look at practice neither helps proponents of consequentialist nor communicative action but it does help to understand legal discourse and it provides the context on which the plausibility of explanations must rest. Legal discourse will be depicted as “hegemonic contestation”; a picture that has been drawn by Martti Koskenniemi who defines hegemonic contestation as “the process of routinely challenging each other by invoking

⁴⁴ See, e.g., C. Tomuschat, "Obligations arising for states without or against their will" (1993) 241 *Recueil des Cours* 199-374, M. Byers, *Custom, power and the power of rules international relations and customary international law*, (Cambridge 1999), 129-165.

⁴⁵ See A. v. Bogdandy, "Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck Yearbook of United Nations Law* 609-73, 618-25, 650-58.

legal rules and principles on which international actors have projected meanings that support their preferences and counteract those of their opponents.”⁴⁶ This definition captures three ideas: (1) that interpretative claims are always contestable and contested, (2) that this contestation follows a routine pattern, a certain argumentative form, and (3) that making an interpretative claim in international law is always a hegemonic move because it makes something particular appear to be universal. Each claim shall be addressed briefly.

a. The Openness of Legal Argument

Like meaning, a norm is not immediately palpable but comes to life only by its contingent dominant interpretation at a given time. This interpretation is never fixed but subject to constant challenge. The possibility of eternal contestability can be based on two unrelated observations. The first observation rests on the structure of international legal discourse according to which the indeterminacy of the law is not about the semantic ambivalence of expressions but rather due to the underlying reasons to which interpretative claims resort. It locates indeterminacy at the heart of liberalism. There is no objective standpoint from which it were possible to determine some adequate balance between autonomy, individual right, and the general good.⁴⁷ Interpretative claims can either resort to the consent of the subject, in this case they are apologetic, the direction of argument is ascending or inductive, or they can resort to an idea of justice, then they are utopian, the direction of argument is descending or deductive. International legal argument inescapably oscillates between these two poles without ever coming to rest.⁴⁸ “The problem is that in case somebody disagrees with our interpretation, we are left with very little means to convince him and, unless we are both ready to enter into open-minded discussion about the justice of adopting particular interpretations (in which case, of course, there is no certainty that we shall agree in the end) the danger of endless conceptual referral can hardly be avoided.”⁴⁹ The main point is not semantic ambivalence; it is arguably stronger: even where there is no such ambivalence, international law remains indeterminate because of the tension between autonomy and the general good.

The second unrelated observation that would independently carry the claim that legal argument remains essentially open rests on the insight that norms do not come with a “true” interpretation just like words do not have a meaning other than that attributed to them by their use.⁵⁰ Thus a legal norm can continuously be challenged by suggesting a different interpretation to a legal expression. No additional structural argument for this is

⁴⁶ M. Koskeniemi, "International Law and Hegemony: A Reconfiguration" (2004) 17 *Cambridge Review of International Affairs* 197-218, 199.

⁴⁷ M. Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 85.

⁴⁸ This is shown at length in Koskeniemi's study, *see*, Id., at 76ff, 309ff, 513ff.

⁴⁹ Id., at 531.

⁵⁰ L. Wittgenstein, *Tractatus Logico-Philosophicus, Tagebücher 1914-1916, Philosophische Untersuchungen*, (Frankfurt 1984), 262, L. Wittgenstein, *Das Blaue Buch*, 9th ed., (Frankfurt 2000), 49ff, (“laßt uns nicht vergessen, daß ein Wort keine Bedeutung hat, die ihm gleichsam von einer unabhängigen Macht gegeben wurde, so daß man eine Art wissenschaftlicher Untersuchung anstellen könnte, um herauszufinden, was das Wort wirklich bedeutet. Ein Wort hat die Bedeutung, die jemand ihm gegeben hat.”).

necessary. Interpretation is never a given but stems from the practical use of the norm. The practical use is also a limitation because not any interpretation is equally accepted by the participants. Interpretations are limited by an interpretative community which takes the ground between the pitfalls of the claim to a purely objective reading of the text and pure subjectivity in the eyes of the reader of a legal expression.⁵¹ This is a form of extra-textual cultural import. It underlies interpretation and in fact makes legal discourse possible. The constraint lies in this extra-textual import such as cultural assumptions. It must be noted, however, that those cultural assumptions are not themselves fixed. Nor are they always shared, easy to find and precise enough to suggest one single interpretation. Furthermore, this constraint of acceptability is not based on some ground of rationality or reasonableness but rather factual. There is no reason to believe that some shared rationality or normative judgement is necessary for sensible argumentative interchange, this might be the case but must not be.⁵²

In sum, the process of argument is open. This is a fact and not a normative proposition. Nor is it by itself a threat to law's normativity or its merits. Because of the openness of argument, the decision of a specific interpretation is political. This is the politics of international law.⁵³ A constraint within the open process of argumentative interchange lies in the acceptability of interpretative claims by other participants in the discourse. This is not a notion of acceptability on some ground of rationality, but rather a factual constraint stemming from the fact that the interpreter is not alone in the world. Some further constraint to interpretative claims may lie in their distinct legal form.

b. The Argumentative Form

The norm derives from dominant interpretation, which, like meaning, stems from the use of the legal expression. It is continuously contestable and contested. Interpretations are only limited in their successfulness by the acceptability of the proposed interpretation by other participants. Furthermore, the acceptability is in a first step premised by a qualification of the argument as a legal interpretative claim. It is this specific argumentative form that shall now be addressed. “[C]riteria now define the conditions for the assertability or justification for using a term, rather than the semantic ‘content’”⁵⁴ Those criteria are formal, they contain prescriptions on how a legal argument has to be performed. More particularly, they prescribe how a claim has to be argumentatively tied to the legal expression. They have to be principled arguments rather than utility or policy

⁵¹ See I. Johnstone, The power of interpretive communities, In M. Barnett and R. Duvall (eds.), *Power in Global Governance*, (Cambridge 2005), pp. 185-204.

⁵² This point is a point of controversy among linguists, see, S. Krämer, *Sprache, Sprechakt, Kommunikation*, (Frankfurt am Main 2001) who structures her discussion of linguistic position of the 20th century around this question. For the controversy in legal theory, see R. Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2. Aufl. ed., (Frankfurt am Main 1991 [1983]), Nachwort (1991): Antwort auf einige Kritiker, 399-425.

⁵³ See C. Reus-Smit, The politics of international law, In C. Reus-Smit (ed.), *The Politics of International Law*, (Cambridge 2004), pp. 14-44, 40.

⁵⁴ F. V. Kratochwil, How do Norms Matter?, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, New York 2000), pp. 35-68, 47.

considerations.⁵⁵ “[W]hile there are likely to be disagreements about the proper use of a term or the interpretation of a rule, purely idiosyncratic uses are excluded even if the use of the concepts remains contestable and contested.”⁵⁶ In legal discourse formally prescribed rules of interpretation bear the burden of compelling participants in the discourse to tie their claims to legal expressions and relevant practice. In doing so, their arguments are also contestable in their consistency and in their argumentative connections. Certainly, these rules of interpretation are themselves nothing but rules and subject to the same fate of indeterminacy. Yet, at the core there again is a political decision that those rules should make legal argument a distinct enterprise.⁵⁷

Thus the second claim in the picture of “hegemonic contestation” can be supplemented by a “culture of formalism”⁵⁸ which emphasises the need for institutional contestability. “Whatever historical baggage, including bad faith, such culture entails, its ideals include those of accountability, equality, reciprocity and transparency, and it comes to us with an embedded vocabulary of (formal) rights.”⁵⁹ The building blocks are Kantian and Kelsian without sharp edges to fit with post-modern premises.⁶⁰ Arguments need to be general, abstract and formally equal.⁶¹ The necessity to tie argumentative claims in a formal way to general norms expresses law’s intrinsic aspiration to formal equality.⁶² Koskenniemi conceives of the “culture of “formalism” as a normative programme - a progressive choice.⁶³ The merits of the argumentative form will be resumed in Part IV.

c. The Partial, Universal and Productive Power

The third contention put forward by the notion of “hegemonic contestation” is that an interpretative claim in international law is always a hegemonic move because it makes something particular appear to be universal. Here, another supplementary picture is helpful, that of “semantic fights”.⁶⁴ It posits that “authority and power is also exercised by

⁵⁵ Compare R. Dworkin, *A matter of principle*, (Cambridge, Mass. 1986), 33-71.

⁵⁶ F. V. Kratochwil, How do Norms Matter?, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, New York 2000), pp. 35-68, 52.

⁵⁷ See J. N. Shklar, *Legalism*, (Cambridge, Mass. 1964).

⁵⁸ M. Koskenniemi, *The Gentle Civilizer of Nations*, (Cambridge 2001), 494ff.

⁵⁹ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 616. Also see M. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2007) 8 *Theoretical Inquiries in Law* 9-36.

⁶⁰ See M. Koskenniemi, *The Gentle Civilizer of Nations*, (Cambridge 2001), 500f.

⁶¹ For a Neo-Kantian approach to this effect see, e.g., O. Höffe, *Demokratie im Zeitalter der Globalisierung*, (München 1999), 47f.

⁶² J. v. Bernstorff, "Sisyphus was an international lawyer. On Martti Koskenniemi's 'From Apology to Utopia' and the place of law in international politics." (2006) 7 *German Law Journal* 1015-35, 1029.

⁶³ See M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 616.

⁶⁴ See E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006), 17f.

semantics”⁶⁵ and thereby gives credit to the fact that semantic expressions and connected concepts also convey patterns of thinking, highlight particular aspects of a situation and are therefore highly contested. The picture of “semantic fights” denotes the practice by which actors try to implement the use of a particular expression and the use of a particular connected conception in relation to specific patterns of fact. This can be considered as productive power in sociologically informed approaches to international relations theory. Concepts transported in meanings of a term “define the (im)possible, the (im)probable, the natural, the normal, what counts as a problem”,⁶⁶ and they define the legality of an action or culpability of a person. Particularly, legal discourse makes this point overtly clear: whether an individual fits the express legal category of “enemy combatant” may decide, for instance, the legality of his detention. Taking the linguistic picture of “semantic fights” three different levels can be distinguished: first, that of a struggle over the expression which is employed to refer to a pattern of fact; secondly, the level of fighting over the meaning of an expression, and in order to make sense of the distinct claims, thirdly, the level of distinct reconstructions of patterns of fact.⁶⁷ Dependent on the prevalent conception, patterns of fact of course appear differently. This offers more depth in understanding how productive power is exercised in semantic fights.⁶⁸

The suggestion that *every* interpretative claim in international law is a hegemonic move rests on the premise that there could never be “true” universal agreement. Or, one could argue, that there are facts that make interpretations morally correct. Then this could hardly be called hegemonic. This is certainly a point of controversy. Yet, even if one were to believe in the objectivity of moral values and the possibility of true agreement, this would change nothing of what has been said so far. As Jeremy Waldron concludes:

“the existence of a right answer, if there is one, is so far a mere matter of ontology. ... Making true and making false are semantic relations, and ... they have nothing whatsoever to do with the social, psychological, political, or institutional determinants of judicial decision-making.”⁶⁹

Legal interpretations remain insurmountably contestable; should they in fact not be contested at a certain time this might stem from agreement. But in such situations one should wonder. “Why is it that concepts and structures that are themselves indeterminate

⁶⁵ Id., at 13 (“Herrschaft und Macht werden auch über Semantik ausgeübt.”).

⁶⁶ C. Hayward, *De-Facting Power*, (New York 2000), 35.

⁶⁷ See E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006), 28f.

⁶⁸ This has also entered international relations theory. For discourses as systems of signification and the productivity of discourse, see, e.g., J. Milliken, “The Study of Discourse in International Relations: A Critique of Research and Methods” (1999) 5 *European Journal of International Relations* 225-54, A. Wiener, “Contested Compliance: Interventions on the Normative Structure of World Politics” (2004) 10 *European Journal of International Relations* 189-234.

⁶⁹ J. Waldron, *Law and disagreement*, (Oxford 1999), 186f. See also A. v. Bogdandy, “Constitutionalism in International Law: Comment on a Proposal from Germany” (2006) 47 *Harvard International Law Journal* 223-42, 227 (“social theory and political philosophy ... have never proved to lead the debate on ‘right or wrong’ more efficiently than the established paths of legal reasoning.”).

nonetheless always end up on the side of the status quo?”⁷⁰ Wondering leads to healthy criticism and is likely to direct attention to productive power.

In sum, every interpretative claim is subject to continuous contestation. The gap between legal texts and interpretation is filled by a political decision. Every claim, in order to qualify as legal argument and to thereby be (formally) acceptable in legal discourse, has to be tied to the legal text in a general form fitting norms for legal discourse. This claim is hegemonic because it makes something particular seem to be universal.

III. The Discourse on “Enemy Combatants”

Regardless of the inner reasons actors might have for engaging in legal discourse, the outward practice can be pictured as one of “hegemonic contestation”. This practice shall now be illustrated with regard to the discourse on “enemy combatants”. The first step sets the scene and the second describes the legal discourse. The last section reconsiders this argumentative interchange under the theoretical perspective developed above.

1. Context and Problem

The so-called “war on terror” has put rather well established interpretations of legal expressions in the systematic context of the laws of war under stress.⁷¹ A part of this is the categorization of people who fight or aid the fight against the United States. Before President Bush declared a “war on terror”, there appears to have been a largely shared understanding that “combatants” are immunized for their lawful military actions under the laws of war and that in contrast “civilians” must not take direct part in hostilities; should they nevertheless do so, they lose their protection as civilians and they could be tried for their action.⁷² The question whether the means and methods civilians use when engaging in hostilities are lawful does not even arise in deciding their criminal culpability because they are, as a category of persons, in principle not authorized to use force.⁷³ The laws of war divide the subjects or authors of the use of force into those whose combatancy may be lawful (“combatants”) and into those whose fighting would be illegal in any event (“civilians”). Further attempts to specify those two categories of persons already hit entrenched controversies. The contending interpretations are situated in the contemporary context which shall be briefly displayed in a general overview.

⁷⁰ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 606, referring to D. Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism*, (Princeton, N.J. 2004).

⁷¹ See generally, A. Cassese, "Terrorism is also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 *European Journal of International Law* 993-1001.

⁷² See N. Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War" (2004) 43 *Columbia Journal of Transnational Law* 1.

⁷³ One exception might apply but appears to have fallen outside the centre of attention in legal discourse; that is the concept of *levée en masse*. See Geneva Convention Relative to the Treatment of Prisoners of War ["GC III"], art. 4 (A) 6, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Upon the attacks of September 11, 2001, on U.S. soil, President Bush stated in his address on terrorism before a joint meeting of Congress on September 20, 2001:

“Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”⁷⁴

The U.S. has been engaged in what it calls the “war on terror” ever since and has taken military actions on a global scale. The largest part of its military efforts is framed within the “Operation Enduring Freedom” whose first target was Afghanistan less than one month after September 11. The day after initial attacks, Bush declared that

“on my orders the United States military has begun strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. ... This military action is a part of our campaign against terrorism”⁷⁵.

Also, the war against Iraq was put under this heading, although the stated reasons for intervention have been diverse.⁷⁶ The day after President Bush declared major combat operations to have ended in Iraq he explained that this was “one victory in a war on terror that began on Sept. 11th, 2001, and still goes on.”⁷⁷ Certainly, there have been many further incidences in this “war on terror” which is still on going and likely to stay for some time to come.

It is important to note the range of contexts subsumed under the expression “war on terror”. The problem legal discourse has to face is to apply legal expressions to this variety of contexts. Such legal expressions, like “combatant” and “civilian”, but also “war”, stem from a system of law building to a large extent on the distinction between international and non-international armed conflict and between civilians and combatants. In legal discourse the Geneva Conventions of 1949 figure prominently. Following their common Art. 2, they

“shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁷⁸

Art. 3 common to the Geneva Conventions in contrast applies “in the case of armed conflict not of an international character”⁷⁹. Thus a first controversial issue of interpretation is how to qualify the “war on terror”.

⁷⁴ A Nation Challenged, President Bush's Address on Terrorism Before a Joint Meeting of Congress, N.Y. TIMES, 21 Sept. 2001, p. 4.

⁷⁵ A Nation Challenged, Bush's Remarks on U.S. Military Strikes in Afghanistan, N.Y. TIMES, 8 Oct. 2001, p. 6.

⁷⁶ Threats and Responses. Transcript: Confronting Iraq Threat 'Is Crucial to Winning War on Terror', N.Y. TIMES, 8 Oct. 2002, p. 12. As is well known, the link between Saddam Hussein and Al Qaeda did not exist, *see, e.g.*, The Terrorism Link That Wasn't, N.Y. TIMES, 19 Sep. 2003, p. 26.

⁷⁷ Aftereffects: The President; Bush Declares 'One Victory in a War on Terror', N. Y. TIMES, 2 May, 2003, p. 1.

⁷⁸ Geneva Convention Relative to the Treatment of Prisoners of War [“GC III”], art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷⁹ *Id.*, art. 3.

Another expression which the U.S. has used in this context and which shall be put under scrutiny in this paper is that of “enemy combatant”. The conception the U.S. conveys with this expression holds that persons under this category are combatants, and not civilians. The Geneva Conventions of 1949 do not explicitly define either category but rather specify the category of prisoners of war in Art. 4 GC III and of protected persons under the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.⁸⁰ The categories are explicit in the First Additional Protocol of 1977 (“AP I”)⁸¹, Art. 43(2), which the U.S. has not ratified and whose customary law status cannot be taken for granted in its entirety. Art. 43(2) reads:

“Members of the armed forces of a Party to a conflict ... are combatants, that is to say, they have the right to participate directly in hostilities.”

And Art. 50(1) provides:

“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

Further, note Art. 51(3):

“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”

Thus, apart from the qualification of the “war on terror”, a second point of controversy in the discourse on “enemy combatants” is the claim to apply the term generally to individuals fighting against the U.S. in the “war on terror”. Furthermore, the consequences arising from the categorization as “enemy combatants” are discussed. They extend to the question of protection, treatment and justification of detention under the law of war. For illustrative purposes the claims focussing on the latter consequence shall be highlighted. Art. 118 GC III states that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” The controversy over the justification and duration of detention ties the questions together: Are “enemy combatants” generally combatants? And if so, is their detention legally sanctioned until the cessation of the “war on terror”?

2. *The Legal Discourse: Contending Interpretations of “Enemy Combatants”*

“If the Government accurately describes al-Marri's conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.”⁸²

The expression “enemy combatant” has been introduced into the present legal discourse by the administration of the United States. This expression conveys conceptions which the U.S. pursues to implement. Also, case law stems from the U.S. However, the use of the term is under international scrutiny because of the universalistic claim the

⁸⁰ Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁸¹ Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [“AP I”], June 8, 1977, 1125 U.N.T.S. 3.

⁸² *Al Marri v. Wright*, 2007 WL 1663712 (4th Cir. June 11, 2007), at *1.

interpretation conveyed by “enemy combatants” makes to the international laws of war. If successfully implemented, it would have universal effect. The exposition of the legal discourse with reference to “enemy combatants” shall start with the interpretative claim of the U.S. administration, then depicts its reception and treatment in case law and finally by other participants, notably scholars and the International Committee of the Red Cross (ICRC).

a. The interpretative claim of the U.S. Administration

The U.S. administration has itself never officially proposed anything that could serve as a legal definition of the concept of “enemy combatant” despite of, or in tandem with, its inflationary use of the term. Yet, the Combatant Status Review Tribunals (CSRTs) set up under the Detainee Treatment Act (DTA) of 2005⁸³ serve the declared purpose “of determining whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base are properly classified as enemy combatants”.⁸⁴ This certainly requires some definition; it is given in an order of the Deputy Secretary of Defense of July 7, 2004, as follows:

“An ‘enemy combatant’ ... shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”⁸⁵

This corresponds with the government’s submission in *Hamdi v. Rumsfeld*,⁸⁶ where it had argued that Hamdi was properly detained as “enemy combatant” because he was “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States”⁸⁷ The claim first makes an assertion about who qualifies as a combatant. Following Legal Advisor to the U.S. Department of State, John B. Bellinger,

“[I]t’s very clear, and an accepted [sic] in international law, that individuals who take up arms illegally ... are combatants because they are fighting, but they are ‘unlawful combatants’ because they are doing it in an illegal way.”⁸⁸

The U.S. administration pushes the claim that combatants are, apart from members of armed forces and irregular groups fulfilling certain criteria, also those individuals who fight. Further clarification can be gained by looking at the individuals and their actions to which the government applies the expression “enemy combatant”. In the case already referred to,

⁸³ 10 U.S.C. § 10005(e)(2)(A)

⁸⁴ The Deputy Secretary of Defense’s “Memorandum for Secretaries of the Military Departments,” dated July 14, 2006, “Enclosure 1,” p. 1, available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (last visited July 26, 2007).

⁸⁵ Id.

⁸⁶ 542 U.S. 507 (2004).

⁸⁷ Id., at 526. Citing the Brief for Respondents, at 3.

⁸⁸ Opening Statement by John B. Bellinger III, in a digital video conference with German journalists in Berlin, Cologne and Hamburg, on March 13, 2006. Available at http://www.usembassy.de/germany/bellinger_dvc.html (last visited Aug. 10, 2007).

the government rests its claim that Yaser Esam Hamdi is an “enemy combatant” on the facts that he has been “affiliated with a Taliban military unit and received weapons training”, that he “remained with his Taliban unit following the attacks of September 11”, and that, during the time when Northern Alliance forces were “engaged in battle with the Taliban, ... Hamdi's Taliban unit surrendered” to those forces, after which he “surrender[ed] his Kalishnikov assault rifle” to them.⁸⁹ The government further bases its claim on the fact that because Al Qaeda and the Taliban “were and are hostile forces engaged in armed conflict with the armed forces of the United States,” “individuals associated with [those groups] were and continue to be enemy combatants.”

It also applies this term to persons like Ali Saleh Kahlah Al-Marri, who, upon the account of the government, was “closely associated with al Qaeda, an international terrorist organization with which the United States is at war”. Notably, and as the court dealing with his appeal in a habeas corpus petition points out, the government did “not assert that (1) al-Marri is a citizen, or affiliate of the armed forces, of any nation at war with the United States; (2) was seized on or near a battlefield on which the armed forces of the United States or its allies were engaged in combat; (3) was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or (4) directly participated in any hostilities against United States or allied armed forces.”⁹⁰ This use of the expression corroborates the statement by Jon Bellinger⁹¹ that the US claims a combatant to be anyone who fights, and in this context, anyone who fights the U.S.

Apart from the personal scope to which the government applies the term “enemy combatant” it makes claims about the consequences attached to this categorization. These extend to the protection by the Geneva Conventions, the legally proscribed and permissible treatment, and the justification for holding individuals in custody without formal charges or proceedings “until the Government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.”⁹² The justification of detention rests on a combination of the claim to the personal scope of “combatant” and to the qualification of the “war on terror”. First, combatants can be held until the cessation of hostilities.⁹³ The U.S. maintains that this holds for all persons it qualifies as “enemy combatants”. Second, it ties the “cessation of hostilities” to the end of the “war on terror”. It maintains it is at war with al Qaeda in a legal sense. This is manifest in the Authorization to Use Military Force (AUMF)⁹⁴ which is directed not only at the Taliban but generally at “nations, organizations, or persons’ associated with the September 11, 2001, terrorist attacks.”⁹⁵

⁸⁹ 542 U.S. 507 (2004), Brief of the Applicants, at 148-149.

⁹⁰ *Al Marri v. Wright*, 2007 WL 1663712 (4th Cir. June 11, 2007), at *8-9.

⁹¹ See *supra* note 88.

⁹² 542 U.S. at 540. Citing the Brief for Respondents, at 9, 39-46.

⁹³ Art. 118 GC III.

⁹⁴ Pub.L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001).

⁹⁵ 542 U.S. at 518. See also A. Walen and I. Venzke, “Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in Hamdi v. Rumsfeld” (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1-43, 8ff (volume forthcoming).

The conception conveyed by the U.S. in their use of the term “enemy combatant” can be summed up as a claim to qualify as “enemy combatant” every person who fights with one of the consequences attached to this being the detention until the cessation of hostilities. The legally relevant conflict is the “war on terror”.⁹⁶

b. Reception and Treatment in Case Law

The U.S. government’s claims have been received in distinct and oftentimes ambiguous ways by the courts. Some questions are still pending.⁹⁷ The focus shall be on two cases the government relies on for support of its claim, these are *Hamdi v. Rumsfeld*⁹⁸ and *Padilla v. Hanft*⁹⁹, and on the latest rejection of its interpretative claim in *al-Marri v. Wright*.¹⁰⁰ The assertions of the government, that an “enemy combatant” is anyone who fights the U.S. and that it is at war with al Qaeda justifying detention until the end of the “war on terror”, will be addressed simultaneously.

The court in *Hamdi* did not explicitly address the question of personal scope of the category of “enemy combatants”. Yet, its view is implicit in the discussion of the consequences attached to this qualification. It posits its claim within the context of the “war on terror” but ties its argumentation to Art. 118 GC III. It finds that “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”¹⁰¹ Yet, “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”¹⁰² But the court was dealing with Hamdi who was fighting on behalf of the Taliban, an unrecognized *de facto* regime and caught during the international armed conflict against the U.S. It could therefore make the narrow but sufficient statement that

“[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’”¹⁰³

The Supreme Court claimed to only answer the narrow question of the detention and due process of Hamdi in particular who was a Taliban combatant. This is how the majority

⁹⁶ All three claims are included in the joint statement of Daniel J. Dell’Orto, Principal Deputy General Counsel Department of Defense; Major General Thomas J. Romig, Judge Advocate General of the Army; Major General Jack L. Rives, Acting Judge Advocate General of the Air Force; Rear Admiral James E. McPherson, Judge Advocate General of the Navy; Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the United States Marine Corps, before the Senate Armed Services Committee, Subcommittee on Personnel Military Justice and Detention Policy, July 14, 2005, available at: http://armed-services.senate.gov/testimony.cfm?wit_id=3387&id=1559 (last visited Aug. 2, 2007).

⁹⁷ See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 2007 WL 1854132 (U.S. Jun. 29, 2007) (NO. 06-1195).

⁹⁸ *Id.*

⁹⁹ 423 F.3d 386 (4th Cir. Sept. 9, 2005).

¹⁰⁰ 487 F.3d 160 (4th Cir. Jun. 11, 2007).

¹⁰¹ 542 U.S. at 520.

¹⁰² *Id.*, at 521.

¹⁰³ *Id.*

reads the case in *al Marri*.¹⁰⁴ The court explicitly neither endorsed nor rejected the label of “enemy combatants” but noted generally:

“The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”¹⁰⁵

Yet, the context the court dealt with is broader than the international armed conflict between the U.S. and the Taliban. It concerns the “war on terror” and the Authorization to Use Military Force (AUMF) which is directed not at the Taliban but at “‘nations, organizations, or persons’ associated with the September 11, 2001, terrorist attacks.”¹⁰⁶ This gives some credit to the government’s claim that the “war on terror” is the relevant conflict for assessing combatancy and legality of detention.¹⁰⁷ Certainly, the interpretation of the Court’s judgment is itself again up for “hegemonic contestation”.

That *Hamdi* lends itself to a reading supportive of the government’s claim glossing over distinctions between civilians and combatants becomes apparent in *Padilla*. Here the Court of Appeals of the 4th Circuit decided on the petition of Jose Padilla who was taken to be a close associate of al Qaeda.¹⁰⁸ It was also found that Padilla was “armed and present in a combat zone” in Afghanistan as part of Taliban Forces during the international armed conflict with the U.S.¹⁰⁹ The Court held that Padilla

“unquestionably qualifies as an ‘enemy combatant’ as that term was defined for purposes of the controlling opinion in *Hamdi*. Indeed, under the definition of ‘enemy combatant’ employed in *Hamdi*, we can discern no difference in principle between *Hamdi* and *Padilla*. Like *Hamdi*, *Padilla* associated with forces hostile to the United States in Afghanistan.”¹¹⁰

Thus, the distinction between civilians and combatants that *Hamdi* did not make explicit and which the government glosses over in its interpretative claim finds resonance in *Padilla* where the label “enemy combatant” is found to be fitting for a person who was associated with al Qaeda and not the Taliban. Notably, this decision is tied explicitly to the law of war:

“We understand the plurality’s reasoning in *Hamdi* to be that the AUMF authorizes the President to detain all those who qualify as ‘enemy combatants’ within the meaning of the laws of war, such power being universally accepted under the laws of war as necessary in order to prevent the return of combatants to the battlefield during conflict.”

In a footnote the court added more tellingly on the length of detention:

“Under *Hamdi*, the power to detain that is authorized under the AUMF is not a power to detain indefinitely. Detention is limited to the duration of the hostilities as to which the detention is authorized. 124 S.Ct. at 2641-42. Because the United States remains engaged in the conflict with al

¹⁰⁴ See *infra* note 112-16 and accompanying text.

¹⁰⁵ 542 U.S. 507 (2004), at 522.

¹⁰⁶ *Supra* note 94. [Pub.L. No. 107-40, § 2(a), 115 Stat. 224 (September 18, 2001)].

¹⁰⁷ See also Walen/Venzke, *supra* note 95.

¹⁰⁸ 423 F.3d at 389-90.

¹⁰⁹ *Id.* at 390-91.

¹¹⁰ *Id.* at 391.

Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.”

In sum, *Padilla* follows the government’s interpretative claim regarding the personal scope of the category of “enemy combatants” and to the attached consequences.

Pieces of this holding were put together in the most recent rejection of the government’s claim by the same Court, yet by a different constellation of judges, in *al-Marri*. Here the court rejected the government’s categorization of al-Marri as “enemy combatant” despite the fact that it did not contest the facts concerning the person of al-Marri and despite the fact that his actions are quite similar to those of Padilla with the sole difference, as the court itself highlights, that al-Marri was never proven to be armed and present in a combat zone during the conflict between the Taliban and the United States.¹¹¹ The court rejected the classification of al-Marri as “enemy combatant” even assuming the government’s accusations to be correct. It resorts to the laws of war and finds that

“clear rules for determining an individual's status during an international armed conflict, distinguishing between ‘combatants’ (members of a nation's military, militia, or other armed forces, and those who fight alongside them) and ‘civilians’ (all other persons).”¹¹²

“If the Government accurately describes al-Marri’s conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.”¹¹³

The Court also distinguishes between international and non-international armed conflicts and holds that the conflict with Al-Qaeda is not one between nations and therefore of not of an international character - “the legal status of ‘enemy combatant’ does not exist in non-international armed conflicts.”¹¹⁴ Moreover, it addresses the government’s claim that a civilian loses his civilian status and becomes an “enemy combatant” if he engages in criminal conduct on behalf of an organization seeking to harm the United States.¹¹⁵ It finds, that “merely engaging in unlawful behavior does not make one an enemy combatant.”¹¹⁶ The Justice Department immediately replied that it would ask the full Fourth Circuit to rehear the case.¹¹⁷

In sum, the conception the government seeks to convey with the expression “enemy combatant” has received ambiguous reception in case law which is itself subject to divergent interpretations and used in support and rejection of opposing contentions. *Padilla* appears to uphold the government’s use of the term just as clearly as *al Marri* rejects it. The weight of authority of the Supreme Court in *Hamdi* could not contribute to clarification, rather, as the court said, “[t]he permissible bounds of the category will be defined by the

¹¹¹ See also the reading of *Padilla* in *al Marri* 487 F.3d at 180.

¹¹² *Al Marri v. Wright*, 2007 WL 1663712 (4th Cir. June 11, 2007), at *15. Citing arts. 2,4,5 GC III and art. 4 GC IV.

¹¹³ *Al Marri v. Wright*, 2007 WL 1663712 (4th Cir. June 11, 2007), at *1.

¹¹⁴ *Id.*, at *20.

¹¹⁵ *Id.*

¹¹⁶ *Id.*, at *21.

¹¹⁷ Adam Liptak, Judges Say U.S. can’t Hold Man as ‘Combatant’, N.Y. TIMES, Jun. 12, 2007, p. 1.

lower courts as subsequent cases are presented to them.”¹¹⁸ It should be clear by now that the law bounding this category is the stage of controversy rather than its solution.

c. Scholarly Contributions and the ICRC.

The relationship between case law and scholarly contributions is reciprocal. The court has cited, appropriately or not, scholarly contributions and scholars engage in a discussion of case law and take court opinions in support or as point of criticism in their arguments. The number of such studies is tremendous. The following depicts examples of scholarly contributions on a scale leading from acceptance to rejection of the government’s interpretative claim.

The position of John C. Yoo is closely linked to that of the government and vice versa.¹¹⁹ He was working in the United States Justice Department's Office of Legal Counsel from 2001 to 2003 and is regarded as one of the architects of the administration’s policy upon the attacks of 11 September.¹²⁰ In his contributions, Yoo gives vigorous support to the executive by endorsing the idea of the unitary executive in foreign affairs. He explains: "What the idea had lacked was an intellectual justification and defense."¹²¹ This is what he purports to provide.¹²² In support of the government’s interpretative claims, he resorts to the Supreme Court’s decision in *Hamdi* and maintains that it recognizes the fact that the U.S. is at war with al Qaeda and other supporting organizations in the “war on terror”, that Hamdi is an “enemy combatant” and that his detention is justified until the cessation of hostilities. This is the end of the “war on terror”.¹²³ Following the warning that “the Court has unwisely injected itself into military matters”,¹²⁴ Yoo reiterates that it is for the executive to decide about the existence of a state of war.¹²⁵

This is a concern shared by Curtis A. Bradley and Jack L. Goldsmith: “there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war.”¹²⁶ Yet, they take concerns about detention until the cessation of hostilities in the context of the “war on terror” more seriously and suggest an individualized approach which determines for each detained individual whether a balance between security and liberty justifies continuous detention.¹²⁷ However, they do neither distinguish between civilians and combatants nor between international and non-

¹¹⁸ 542 U.S. 507 (2004), at 522.

¹¹⁹ See, Jeffrey Rosen, *The Yoo Presidency*, N.Y. TIMES, 11 Dec., 2005, p. 106.

¹²⁰ On his role in the administration, see Tim Golden, *A Junior Aide Had a Big Role In Terror Policy*, N.Y. TIMES, 23 Dec., 2005, National Desk, p. 1.

¹²¹ *Supra* note 119. [Rosen, *Yoo Presidency*]

¹²² See J. C. Yoo, *War by Other Means: An Insider's Account of the War on Terror*, (New York 2006), J. C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, (Chicago 2006).

¹²³ J. Yoo, "Courts at War" (2006) 91 *Cornell Law Review* 573; See also J. C. Yoo and J. C. Ho, "The Status of Terrorists" (2003) 44 *Virginia Journal of International Law* 207.

¹²⁴ J. Yoo, "Courts at War" (2006) 91 *Cornell Law Review* 573, 574.

¹²⁵ See, e.g., *Id.* at 584.

¹²⁶ C. A. Bradley and J. L. Goldsmith, "Congressional Authorization and the War on Terrorism" (2005) 118 *Harvard Law Review* 2047, 2070.

¹²⁷ *Id.* at 2123-27.

international armed conflicts in this respect. Implicitly therefore, a civilian can turn himself into a combatant.

Jordan J. Paust rigorously examines the government's claims on the basis of these distinctions and highlights its "fallacies".¹²⁸ In a first step in his line of reasoning he rejects the claim that the "war on terror" constitutes a war in the legal sense and that the U.S. is at war with al Qaeda. Al Qaeda does not qualify as a state, nation, belligerent or insurgent group. The attacks of 9/11 could trigger the right to self-defence but not the application of the laws of war.¹²⁹ Secondly, outside the context to which the laws of war apply, namely the international armed conflicts against the regimes in Afghanistan and Iraq, there cannot be combatants. Combatant status is closely linked to the right to engage in armed conflict which is not and should not be given to members of al Qaeda.¹³⁰ The latter point, that combatancy is linked to the possibility of legitimately participating in hostilities and based on a link to a legitimate party to the conflict, is also prominently stressed by Kenneth Watkin.¹³¹ In sum, Paust argues that the category of combatants only exists in international armed conflicts and that the conflict with al Qaeda is not an international war. Members of Al Qaeda could therefore not be "enemy combatants".

A further group of scholars and participants in legal discourse also dismantles the expression of "war of terror" and breaks it down into international and non-international armed conflicts and the categories of combatants and civilians. Marco Sassòli and Knut Dörmann, for instance, largely follow the interpretation of the International Committee of the Red Cross (ICRC) which traditionally enjoys a more authoritative say in the interpretation of the laws of war. Both scholars have worked for the ICRC's legal division. In its exhaustive study on Customary International Humanitarian Law¹³² the ICRC finds that civilians and combatants must be distinguished and that "civilians are persons who are not members of the armed forces."¹³³ In its official statement "The relevance of IHL in the context of terrorism"¹³⁴ the ICRC soberly states:

"In its generic sense, an 'enemy combatant' is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict. The term is currently used - by those who view the 'global war against terror' as an armed conflict in the legal sense - to denote persons believed to belong to, or believed to be associated with terrorist groups, regardless of the circumstances of their capture."

¹²⁸ J. J. Paust, "Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions" (2004) 79 *Notre Dame Law Review* 1335.

¹²⁹ *Id.* at 1341-42.

¹³⁰ *Id.* at 1342-43. On "combatant immunity", see J. J. Paust, "War and Enemy Status After 9/11: Attacks on the Laws of War" (2003) 28 *Yale Journal of International Law* 325, 330-32.

¹³¹ K. Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy*, HPCR Occasional Paper Series, (2005).

¹³² J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law. Volume I: Rules*, (Cambridge and New York 2005) Volume II documents practice in two separate parts.

¹³³ *Id.*, Rules 6 and 7, at 19-24.

¹³⁴ Dated Jul. 21, 2005, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (last visited: Aug. 2, 2007).

In its interpretation such use of the term is unfounded. Rather, combatants are members of a party to an international armed conflict. This corresponds with Dörmann's clarification on "terminology". He maintains with reference to Art. 43 (1) AP I¹³⁵ that "the term 'combatants' denotes the right to participate directly in hostilities."¹³⁶ A civilian is everyone who is not a combatant. Should civilians directly participate in hostilities, "they remain civilians but become lawful targets of attacks for as long as they do so."¹³⁷ They can be called "unlawful/unprivileged combatant/belligerent".¹³⁸ This is also the view of Sassòli who highlights with regard to the U.S. government's claim to the justification of detention that it only holds true for "combatants" and that this category of persons only exists in international armed conflict.¹³⁹

d. Summary of Contending Conceptions

The U.S. claims that it is engaged in a "war on terror" which includes the wars against Afghanistan, Iraq, and al Qaeda as well as other sponsors or supporters of terrorism. Individuals captured in this "war on terror" are "enemy combatants" regardless of whether they had been fighting on behalf of a state, a terrorist organization, or whether they have fought at all. Planning to fight or supporting hostilities would be sufficient. "Enemy combatants" can be detained until the end of the "war on terror". The courts have taken ambiguous positions on these claims. *Hamdi* has in fact successfully lent itself to diametrically opposed claims – *Padilla* coming closest to a full endorsement of the government's claims and *al-Marri* closest to a rejection. A similar picture arises from an illustrative depiction of scholarly contributions and the ICRC. Each participant in the discourse resorts to the laws of war and authoritative opinions, such as the decisions by the courts, to form and support its argumentative claims.

Some commentators see the law to burst under such pressure and argue for change in the laws of war to adapt to new circumstances.¹⁴⁰ This might be more honest. It should be clear however, that the law in fact changes when the dominant interpretation changes. Should the U.S. succeed in implementing its claims conveyed in the term "enemy combatant" and should their distinct and particular use of the term come to be established, or is at least a not a totally absurd proposition, then any resort to the black letter of the law will be largely in vain – a melancholic journey to a peaceful resort outside the theatre of battle, safe but out of sight.

¹³⁵ *Supra* note, 80.

¹³⁶ K. Dörmann, "The legal situation of "unlawful/unprivileged combatants"" (2003) 85 *International Review of the Red Cross* 45-74, 45.

¹³⁷ *Id.* at 46.

¹³⁸ *Id.*

¹³⁹ M. Sassòli, "The Status of Persons Held in Guantánamo under International Humanitarian Law" (2004) *Journal of International Criminal Justice* 96, 102-3.

¹⁴⁰ *See, e.g.*, M. Reisman, "Assessing Claims to Revise the Laws of War" (2003) 97 *American Journal of International Law* 82, B. J. Falk, "The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III" (2007) 3 *Journal of International Law and International Relations* 31-60, E. T. Jensen, "Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance" (2005) 46 *Virginia Journal of International Law* 209.

3. *The Discourse of “enemy combatants” as “hegemonic contestation”*

The picture of “hegemonic contestation” captures the observations that interpretative claims are contestable and continually contested, that they follow a certain argumentative form, and that the act of vesting a particular conception into interpretative claims to international law is hegemonic. Each element shall be briefly reconsidered with reference to the discourse on “enemy combatants”.

The openness of the legal form is uncontroversial in theory and practice. Actors can and do make divergent claims with reference to legal texts. Even bodies institutionally authorized to decide on divergent interpretations, U.S. federal courts in this example, have not been able to settle the issue. Not only have their decisions naturally been scrutinized by legal scholars, but also, the decisions covered the full range of outright approval of government’s claim to utter rejection. *Hamdi* has taken an ambiguous middle way on which both the approval in *Padilla* as well as the rejection *al-Marri* have been based. Also scholars have succeeded in tying their divergent claim to the law and jurisprudence.

Furthermore, they have done so in a legal argumentative form. Yet, not all actors have ascribed to the same rigour in tying their argumentative claims to legal expressions. The U.S. administration bases its argument on interpretations with reference to legal expressions. But it also suggests the term “enemy combatant” which is not contained in any document of the law of war to express a conception which is highly controversial and rejected by those who tie their arguments closest to legal expressions. This stirs the thought that the U.S. cannot convincingly fit its interpretation within the framework of prevailing interpretations of legal texts. Thus, the demand inherent in the legal tongue, that arguments be tied to legal texts or relevant practice and that this connection itself follows a certain form, appears to have some constraining impact on the likely success of vesting claims in the mantle of legality.

The claim to legality in international law is a universal claim. To the extent that the claim is not shared, it is a hegemonic move. Dominant interpretations are certainly not static but in constant shift. Should they shift to accompany the U.S. conception conveyed by the expression “enemy combatants”, the U.S. succeeds in fostering its hegemony by legalizing its actions. In this sense, fighting the war extends to “communicating the war”¹⁴¹ in the form of law. “Defining the battlefield is not only a matter of deployed force, or privileging killing; it is also a rhetorical claim.”¹⁴²

The ICRC maintains that

“[t]o the extent that persons designated ‘enemy combatants’ have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called.”¹⁴³

¹⁴¹ See D. Kennedy, *Of War and Law*, (Princeton 2006), 122.

¹⁴² *Id.*

¹⁴³ ICRC, “The relevance of IHL in the context of terrorism”, official statement, dated Jul. 21, 2005, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (last visited: Aug. 2, 2007).

Following its interpretation of the laws of war, “combatants” only exist in international armed conflict, the term would be misapplied in non-international armed conflict and to each qualification, different consequences attach. This should not be cast aside as “mere semantics”. Certainly, conceptions can have different expressions and an expression is not by itself inherently linked to one particular conception. Yet, the expression “enemy combatant” carries a conception that the U.S. has consistently connected to it. It is not fix - like no meaning is fixed to a word. But it should be noted that the prevalence of one expression over another shifts the balance in “hegemonic contestation”. The U.S. conception of “enemy combatant” has been newly introduced and has to confront the conceptions expressed by “civilian” and “combatant”. It has to, so to speak, fight uphill. If the term “enemy combatant” were to become dominant, those critical of the U.S. claims would have suffered a severe loss. They would then themselves have to seek to again replace this expression with different ones. Or they would have to seek to implement an interpretation of “enemy combatant” which is unlike the U.S. interpretation. In any event, it should be abundantly clear that semantics have consequences, that they are at the essence of argumentative interchange and that they are expressive of productive power.

This paves the way to approach the overarching question: if the above contentions on the nature of indeterminacy and legal argument are plausible, what is the role and function of international law in international relations. Is there any merit in legal argument and is it a good thing?

IV. Conclusions: Merits of Discourse in the Legal Tongue

It has been suggested that the merit of the law cannot lie in providing a substantive reference point of justice but that it is the process in which justice lies. This point shall be resumed and elaborated briefly in order to assess whether the observation of indeterminacy is an existential threat to laws normativity and whether the form has any merits. This touches upon the question of the relation between law and politics in international relations. Conclusively, should the above observations leave us in a state of despair or is it a good thing after all?

1. Substantive Justice and the Merits of the Form Under the Impact of Power

There are no substantive criteria to judge interpretative claims. Conceptions of justice offer no stable ground simply because they are conceptions in the plural. The single idea of substantive justice that would reduce all conceptions to one encompassing idea of justice and truth is unavailable. If it were possible to decide between interpretations on the basis of one idea of substantive justice there might be no reason to have law in the first place. If it were deducible from one idea of substantive justice what the interpretation should be, then it would have to be equally possible to know what the law has to be - recognizable to everyone capable of logical deduction. Those incapable would only have to ask the knowing. This would be the worst of all worlds. In the last chapter of her treatise “The Origins of Totalitarianism”, Hanna Arendt makes clear: “the self-coercive force of

logicality is mobilized lest anybody ever starts thinking – which as the freest and purest of all human activities is the very opposite of the compulsory process of deduction.”¹⁴⁴ It is the contingency of interpretations that safeguards against totalitarian dominance on the basis of some kind of transcendent justice.¹⁴⁵ “The argument will remain indeterminate and political. And yet, only its remaining so will prevent it from being just another totalitarian apology.”¹⁴⁶ Thus, one encompassing idea of justice and truth is not only unavailable but also unwelcome. When the law does not lend itself to substantive judgement, where does its merit lie? The answer lies near: it must be the form! This is the legal argumentative form in which individual interpretations are exchanged. The gap between legal text and interpretation is filled by a political decision.

It might be rejected that such approach to legal reasoning results in chaos and uncertainty. This is wrong on two accounts. First, it is wrong because it resorts to an ideal which then tells how the practice must be. When the above account of legal reasoning is plausible, then an argument about how it rather should be does not yet change the facts. This does not deny that ideas can guide action and that a normative predisposition might guide analysis; but if one were to make the argument that “hegemonic contestation” leads to chaos and uncertainty, then it would be necessary to first offer a more plausible explanation for legal discourse. Secondly, it is wrong because even its normative contention appears questionable. It appears to be based on the implicit assumption of the availability of one concrete and correct conception of substantive justice. This has to be disguised as “just another totalitarian apology”.

However, the form constrains the range of possible arguments. How is this possible, when it is essentially open? Openness does not mean that any argument goes. Theoretically yes, practically no. The constraint lies in the acceptability by other participants in the discourse. Notably this is no acceptability on “rational” or “reasonable” grounds but it is, in fact, factual acceptance. This raises problems of normativity because not any factual acceptance must be good. In particular the impact of power is oftentimes decisive and conspicuously absent in theoretical inquiry and normative propositions.¹⁴⁷ Distinct ways in how power influences the argumentative interchange inside its outward form are discernable. Most straightforwardly, actors would simply not make an argument because of the repercussions they might have to suffer from (coercive power). Secondly, even if the law is itself indeterminate, implemented meanings tilt the balance of argument. Power is likely to be embedded in the dominant interpretations of a norm which then makes it harder to find acceptance for contravening interpretative claims (institutional power). Thirdly, acceptance can be induced by moralization and appealing juxtapositions of good

¹⁴⁴ H. Arendt, *The Origins of Totalitarianism*, new ed., (San Diego 1976 [1966]), 473.

¹⁴⁵ See also R. Christensen and M. Sokolowski, *Recht als Einsatz im Semantischen Kampf*, In E. Felder (ed.), *Semantische Kämpfe. Macht und Sprache in den Wissenschaften*, (Berlin and New York 2006), pp. 353-71, 367.

¹⁴⁶ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 559.

¹⁴⁷ A. Hurrell, *Conclusion. International Law and the Changing Constitution of International Society*, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, New York 2000), pp. 327-47, 330.

and evil which in turn shape the identities of actors pursuing to do the good thing (productive power). The latter, then gives full credit to the picture of “hegemonic contestation” for it captures precisely the hegemonic element of finding acceptance of a particularistic claim due to the belief, that this claim is “right”.

The U.S. conception of “enemy combatants” is novel and would have consequences which many, including the author, would not share.¹⁴⁸ The government’s claim becomes more acceptable because of the daemonification of the enemy.¹⁴⁹ This is a common technique of justification through shaping identities.¹⁵⁰ This amounts to a threat to formal argumentative practice because it undermines precisely its formal attributes outlined above. It drives at exclusion and unequal application to the detriment of the “outlaw”. In other words, substantive convictions undermine the outward formal argumentative practice.

Is it necessary to fall silent in despair? Two arguments brighten this bleak picture of the form. First, the need for, even simply factual, acceptance is a constraint. It stands and functions independent of a substantive ground. The legal form demands interpretative claims to be general and abstract.¹⁵¹ It requires “that our claims satisfy certain criteria, and that means that they cannot be based purely on idiosyncratic grounds.”¹⁵² In fact, the legal form ensures that arguments are reproachable in their distinct claims, this is a prerequisite for communicative action. But it is just a prerequisite. In order to amount to a sound discourse theoretical foundation of international law, further ingredients would have to be included.¹⁵³ The immediate merit of the argumentative form lies in the fact that it compels justification in legal form which meets the acceptance of other participants.¹⁵⁴ Second, the legal tongue gives a voice to everyone and it makes individual suffering heard in a

¹⁴⁸ See for a sketch of the consequences the affidavit of Stephen Abraham, lieutenant colonel in the United States Army Reserve, Brief in Reply to Opposition to Rehearing, Appendix, June 22, 2007, *Al Odah v. U.S.*, cert. granted, 2007 WL 1854132 (U.S. Jun. 29, 2007) (No. 06-1196). See also A. Walen and I. Venzke, *Detention and the "War on Terror": Constitutional Interpretation Informed by the Law of War*, (2007), Unpublished manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979644, (last visited Aug. 15, 2007).

¹⁴⁹ See V.-J. Proulx, "If the hat fits, wear it, if the turban fits, run for life: reflections on the indefinite Detention and targeted killing of suspected terrorists" (2005) 65 *Hastings Law Journal* 801, 864ff.

¹⁵⁰ See T. A. van Dijk, "Discourse and manipulation" (2006) 17 *Discourse & Society* 359-83. For the rhetoric on the “war on terror” see P. Graham, T. Keenan and A.-M. Dowd, "A call to arms at the end of history: a discourse-historical analysis of George W. Bush's declaration of war on terror" (2004) 15 *Discourse & Society* 199-221.

¹⁵¹ See I. Maus, *Das Verhältnis der Politikwissenschaft zur Rechtswissenschaft: Bemerkungen zu den Folgen politologischer Autarkie.*, In M. Becker and R. Zimmerling (eds.), *Politik und Recht*, vol. 36, (Wiesbaden 2006), pp. 76-120, XXX, for an insightful argument on Hobbes to this effect. Also see M. C. Williams, "Hobbes and International Relations: A Reconsideration" (1996) 50 *International Organization* 213-36.

¹⁵² F. V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (Cambridge 1989), 12.

¹⁵³ H.-J. Cremer, "Völkerrecht - Alles nur Rhetorik?" (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 267-98, 288ff, picks up this idea.

¹⁵⁴ See also M. Koskenniemi, "The Place of Law in Collective Security" (1996) 17 *Michigan Journal of International Law* 455, 478.

universalistic claim.¹⁵⁵ This reflects the normative programme of legal argumentative practice.

The process can certainly never be the whole story.¹⁵⁶ Again, interpretative claims rest on a political choice. And this brings back substantive convictions. But it does so on the individual level. Highlighting the nature of “hegemonic contestation” throws the individual participant in legal discourse back into the spotlight.

“[T]he abandonment of aspiration to ‘absolute’ knowledge has exhilarating effects: on the one hand, human beings can recognize themselves as the true creators and no longer as the passive recipients of a predetermined structure; on the other hand, as all social agents have to recognize their concrete finitude, nobody can aspire to be the true consciousness of the world. This opens the way to an endless interaction between various perspectives and makes ever more distant the possibility of any totalitarian dream.”¹⁵⁷

2. Is “hegemonic contestation” a good thing? - Justice and Responsibility

The form does not safeguard against injustice. It is neither an almighty guardian against power nor, to the extreme, against forms of totalitarianism. A last resort could only be made to justice. But as a universal claim this road is and should be closed. Nevertheless, if one is convinced that a certain interpretative claim ought to be rejected, then one should do so - fighting in the same form for individual convictions. The legal argumentative form sets the stage on which actors pursue different interests, normative convictions and possibly distinct philosophical commitments. The gap between the legal text and interpretative claim leaves room for a political choice. In fact, “it is a precondition for there to be something like a realm of politics in which issues of right, good and just can be meaningfully debated and reproached. There is no closure.”¹⁵⁸

This adds to the understanding of law and politics in international relations. Most of the time law and politics stand in a symbiotic relationship. A political decision is at the heart of legal argumentative practice and comes into play in interpretation. Law is at the same time an instrument for the exercise of power. The exercise of power works through and by discourse in the legal tongue. The required form that makes arguments recognizable as legal arguments and the need for some degree of acceptance in order to receive the benefits of law, however, are constraints. If law were to vest a totalitarian dream it would be apologetic. On the other hand, the resort to any substantive ground of justice in order to compel an interpretation and to qualify a certain behaviour as “illegal” is utopian. It claims for itself a conception of justice and exerts it to the actor engaged in deviant

¹⁵⁵ See, e.g., M. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2007) 8 *Theoretical Inquiries in Law* 9-36, 35. But also see C. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century" (1999) 281 *Recueil des Cours* 13-438, 26.

¹⁵⁶ See also A. Hurrell, Conclusion. International Law and the Changing Constitution of International Society, In M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, New York 2000), pp. 327-47, 346f.

¹⁵⁷ E. Laclau, *Emancipation(s)*, (New York 1996) 16-17.

¹⁵⁸ M. Koskenniemi, "Book Review - Giovanna Borradori (ed.) *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago and London, University of Chicago Press, 2003)" (2003) 4 *German Law Journal* 1087-94, 1089.

behaviour.¹⁵⁹ But this is not to say that law itself is always either. Rather it oscillates between apology and utopia and it does so in a certain distinct legal form.¹⁶⁰ A claim might be called apologetic. When it does not find any acceptance it is without effect or benefit – an empty claim whose mask of universality can be easily lifted.

However, it might well be argued, that the argumentative form disguises what is at issue: namely, responsible political decisions. The claim to legality precludes awareness of responsibility.¹⁶¹ In other words, actors might hide behind the mask of legality. If they can do so successfully, then this might also well be legitimate. If not, then, again, the response would have to be to tear down this mask, to reveal the mistaken decision and to qualify it as illegal.

In conclusion, the descriptive exposition of the openness of legal argument leads to the normative proposition to raise critical awareness of the political decisions and judgments inside the outward show.¹⁶² This proposition does not derive from this observation for this would certainly be wrong. But rather it takes this observation and, in an almost educative voice, highlights responsibility and possibilities. Justice and injustice are not out there. They are human-made.

¹⁵⁹ M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, (Cambridge 2005), 303-85.

¹⁶⁰ See also N. Krisch, "International law in times of hegemony unequal power and the shaping of the international legal order" (2005) 16 *European Journal of International Law* 369-408.

¹⁶¹ This is the critique by J. A. Beckett, "Rebel Without a Cause? Koskenniemi and the Critical Legal Project" (2006) 7 *German Law Journal* 1045-88, 1078, by D. Kennedy, "The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's 'From Apology to Utopia')" (2006) 7 *German Law Journal* 982-92, 990, and it is the central thesis in D. Kennedy, *Of War and Law*, (Princeton 2006).

¹⁶² "One of the problems with modern international law has been its routinization, the absence of reflection by the profession of its embedded preferences." M. Koskenniemi, "A Response" (2006) 7 *German Law Journal* 1103-08, 1107.