Legal Contestation about 'Enemy Combatants'
On the Exercise of Power in Legal Interpretation

INGO VENZKE*

* LL.M. (London), Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, ivenzke@mpil.de. I thank Armin von Bogdandy, Eyal Benvenisti, Ziv Bohrer, Andreas Fischer-Lescano, Niels Petersen, Alec Walen, Antje Wiener, my colleagues at the institute, and the journal's anonymous referees for their thoughtful comments on earlier versions of this article.

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I. Introduction

Among the many battlegrounds in the 'war on terror' is one of semantics. In legal discourse, immediate consequences attach to the use of specific expressions, including those employed in relation to individuals captured and detained under the auspices of war. In the context of the laws of international armed conflict the understanding prevails that those persons in the category of 'combatants' can be detained for the duration of hostilities on the simple basis of being 'combatants' and that 'civilians' can be interned if they take part in hostilities and/or pose an individual threat justifying their internment. The default position on 'civilians' is that they must be spared from the consequences of hostilities and that internment is an exception requiring justification. Who is a 'civilian' and which legal arguments can justify his detention is of course the subject of entrenched controversy. Many individuals, like Ali Saleh Kahlah al-Marri, have petitioned for a writ of *habeas corpus* to have the lawfulness of their detention reviewed. The individuals' classification is decisive. The US 4th Circuit of Appeals held in 2007:

> 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.[1]

The legal qualification of al-Marri and other individuals taken into custody in the 'war on terror' takes place in a semantic fight that lies at the core of legal argument.[2] It shows the concrete contestedness of one of the foundational norms of the laws of war, namely the distinction between combatants and civilians. The laws of war pertaining to the treatment of al-Marri have become increasingly contested for multiple reasons. One reason is precisely the process of 'cultural validation' of the norms under scrutiny

[1] *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) at 165 [*al-Marri*]. Legal contestation with regard to al-Marri has of course continued to occupy US courts.

[2] For the concept of 'semantic fights' in legal contestation see Ralph Christensen & Michael Sokolowski, 'Recht Als Einsatz Im Semantischen Kampf' in Ekkehard Felder, ed., *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (Berlin and New York: de Gruyter, 2006) at 353. Also note that the Oxford English Dictionary finds one meaning of contestation to be the '[d]isputation or controversy, as between parties at law', *The Oxford English Dictionary*, 2d ed., s.v. 'contestation', online: OED <http://www.oed.com>.

that accounts for divergences in interpretation.[3] Different experiences and different concerns dominate distinct local discourses that shape actors' divergent interpretations of international norms.[4] Also, by vesting their actions in terms of legality, actors seek to tap law's symbolic power.[5] Interpretations are claims to lawfulness;[6] as such, they are expressions of power exercised by implementing meanings that are aligned with a particular actor's preferences.[7]

This article expands on an understanding of interpretation in law as an exercise of power. Remnants and variants of the bygone idea that the correct interpretation could be found in an exegetic or hermeneutic approach to legal texts have impeded efforts to find legal expressions' meaning in their use and of understanding contestation of meanings as manifestations in the exercise of power. Sure enough, legal reasoning, methods, and positive rules of interpretation serve a normative function. This is not the decisive issue here. The aim is to spell out and apply an alternative perspective and to provide a firm grasp on practice. Nonetheless, normative repercussions flare up.

Since it is legal practice that is under scrutiny a look at legal theory puts the understanding of interpretation as exercise of power into context. This informs research on norms in international relations in a number of ways. It

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[3] Antje Wiener and Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. & Int'l Rel. 1. [Wiener & Puetter 2009]; Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel. 189.

[4] Andrea Liese, 'Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism' (2009) 5 J. Int'l L. & Int'l Rel. 17.

[5] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings L.J. 814 at 838 [Bourdieu]: 'Law is the quintessential form of the symbolic power of naming that creates the things named … It confers upon the reality which arises from its classificatory operations the maximum permanence.'

[6] See the conception of law by Rudolf von Jhering, *Der Kampf ums Recht*, 18th ed. (Wien: Manzsche, 1913) [Jhering] and compare Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum. L. Rev. 809.

[7] Ekkehard Felder, 'Semantische Kämpfe in Wissensdomänen. Eine Einführung in Benennungs-, Bedeutungs- und Sachverhaltsfixierungs-Konkurrenzen' in Ekkehard Felder, ed., *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (Berlin and New York: de Gruyter, 2006) 13; Jacques Derrida, quoted in Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, Ill.: Univ. of Chicago Press, 2003) at 105: '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.'

is argued that legal discourse takes a particular legal argumentative form that preconditions acceptance of claims to legality and that, within this form, interpretations can be understood as expressions of power (Part II). This argument in a theoretical perspective is then illustrated in legal practice that relates to the expression 'enemy combatants' and to the treatment of al-Marri. The application of the theoretical perspective buttresses the argument that norms pertaining to his treatment have become increasingly contested because powerful actors stretch prevalent meanings in order to portray their actions as lawful. It is argued that the constraints of legal argument are such that the US administration has sought to implement the expression of 'enemy combatants' into the discourse and to thereby create a greater distance from treaty law (Part III). This paves the way for discussing the possible merits of applying critical constructivist research on norms.[8] Here the article ends on a normative note. It suggests that the contestability of legal norms does not necessarily shatter law's aspiration to justice. To the contrary, contestability may prevent the reification of justice and shift the focus to the responsibility of individual interpreters. Elucidating the contestedness of norms draws attention to the exercise of power in legal contestation and casts the spotlight on the individual actor and her interpretative choice (Part IV).

II. Legal Contestation: Contestability, Legal Argument and the Exercise of Power

This section develops a theoretical perspective of legal contestation. It thereby takes up central tenets of critical constructivist research on norms and combines them with conceptions of law that build on semantic pragmatism and structural indeterminacy. It seeks to inform international relations research on norms by first expanding on the particularities of *legal* contestation. While contestability is always a possibility the legal argumentative form constrains actors in the ways in which they can contest meanings of legal expressions. Finally, it develops an understanding of legal interpretations as expressions of power.

1. Contestability in Legal Scholarship

Approaches that build on semantic pragmatism suggest that a norm is not immediately palpable but hinges on its interpretation as a constitutive act in its creation. This interpretation is never fixed; it can be relatively stable but is oftentimes subject to challenges. In particular two prominent and related

[8] For the notion of critical constructivism see Wiener & Puetter 2009, *supra* note 3.

arguments have been offered in legal scholarship to explain continuous contestability.

The first argument rests on the understanding that norms do not come with a true meaning just as words do not have a meaning other than that attributed to them by their use.[9] Suggesting a different interpretation to a legal expression can continuously challenge a legal norm. H.L.A. Hart acknowledges that meanings of norms stem from the practical use of the norm.[10] Furthermore, he suggests distinguishing a core of settled meanings from disputed meanings.[11] The fact that some norms might be uncontested is not, however, ontologically anchored. It is rather the simple result of the absence of dispute. Contestation is always a possibility. Such possibility is practically limited because not every interpretation has a chance of being accepted by other participants in the relevant community. Limitations set by interpretative communities take the ground between the pitfalls of objectivity, the plain meaning of the text, and pure subjectivity, the unconstrained reading of the text.[12]

The second explanation for contestability rests on the structure of international legal discourse. The contestability of legal expressions is not only about their semantic ambiguity. Arguably it is stronger due to the underlying reasons to which interpreters can resort. Martti Koskenniemi suggests that international law is by common agreement premised on the will of sovereign states and that this basis brings with it the problem of binding sovereigns. How can sovereigns be the source of all law and at the same time be bound by it?[13] Interpretations either rely on the consent of the

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[9] This approach is embroiled in a complex philosophical debate. I suggest, however, that a semantic pragmatism in the wake of Wittgenstein can find considerable common ground. See, *e.g*. Dennis M. Patterson, 'Dworkin on the Semantics of Legal and Political Concepts' (2006) 26 Oxford J. L. Stud. 545; Ludwig Wittgenstein, *Tractatus Logico-Philosophicus, Tagebücher 1914-1916, Philosophische Untersuchungen* (Frankfurt: Suhrkamp, 1984) at 262; Ludwig Wittgenstein, *Das Blaue Buch*, 9th ed. (Frankfurt: Suhrkamp, 2000) at 49. On the prospects of semantic pragmatism in legal interpretation also see Damiano Canale & Giovanni Tuzet, 'On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation?' (2007) 20 Ratio Juris 32.

[10] See also Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997 [1961]) at 138 [Hart].

[11] *Ibid.* at 120-8.

[12] Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (Durham: Duke University Press, 1989) at 141-160 [Fish].

[13] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) at 224-240 [Koskenniemi]. This question has dominated legal scholarship ever since a liberal conception of international law has come to see the individual sovereign's consent as the basis of all law binding upon him. For the German

sovereign state or they rely on an idea of substantive justice that is not premised on their consent. In the first case, they are apologetic: the direction of argument is ascending or inductive. In the latter case they are utopian: the direction of argument is descending or deductive. International legal argument inescapably oscillates between these two poles rarely coming to rest.[14]

> 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.[15]

2. The Form of Legal Argument

Contestability is always a possibility on the basis of semantic pragmatism and structural indeterminacy. However, acceptance is always a constraint in interpretation. This constraint need not be based on grounds of rationality or reasonableness. It can be understood as factual acceptance that can be the result of a combination of various motives. Acceptance here is a sociological concept different from acceptability or reasonableness in logic and moral philosophy. Certainly moral appeal and the perception of rational deduction are factors in inducing acceptance, but so are other mechanisms of persuasion.[16] Contestability implies that there is no internal or external yardstick that could decide the dispute.[17] *Legal* contestation also implies that interpretative claims take a particular argumentative form.

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context see Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden: Nomos, 2001) at 28-38.

[14] David Kennedy, 'Theses About International Law Discourse' (1980) 23 German Y.B. Int'l L. 353 at 378-9. This is shown at length in Koskenniemi, *ibid*.

[15] Koskenniemi, *supra* note 13 at 531.

[16] Lyndel V. Prott, 'Argumentation in International Law' (1991) Argumentation 299, finds that the rhetoric used by international lawyers 'depend[s] greatly on the techniques of reasoned persuasion, and that the forms of strict logic play a minor part in their justifications of decisions', at 309; Fish, *supra* note 12 at 471-502. See *infra* section II.3.

[17] *Cf*. Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167. This leaves issues of moral realism aside; the claim is less far reaching and can be solely based on the absence of 'uncontroversial and well-developed methods for thinking about morality', Thomas Nagel, *The Last Word* (Oxford: Oxford University Press, 1997) at 102.

The possibility of acceptance of interpretative claims in legal discourse is premised on an argument's qualification as a legal interpretative claim. Rules of interpretation[18] and standards upheld by the legal profession prescribe how a legal argument has to be crafted.[19] More particularly, they prescribe how claims have to be argumentatively tied to legal expressions.[20] The legal argumentative form finds loose contours in a 'culture of formalism', which emphasizes the need for formal contestability.[21] The rules for legal reasoning render arguments criticizable in their distinct elements. This is a prerequisite for communicative action. But it is just a prerequisite. In order to amount to a sound Habermasian basis for international law other ingredients would have to be added.[22] Certainly, the rules of interpretation are themselves nothing but rules and subject to the same fate of interpretation.[23] Yet, legal

[18] In particular those laid down in the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331; 8 ILM 679 (1969). Case law and scholarly contributions abound on the issue of interpretation.

[19] Jochen von 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 L.J. 1015 at 1029, arguing that the necessity to tie argumentative claims in a formal way to general legal expressions conveys law's intrinsic aspiration to formal equality. *Cf.* Friedrich V. Kratochwil, 'How Do Norms Matter?' in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 35 at 47.

[20] See Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Y.B. Int'l L. 48: 'as a rule they [the rules of interpretation] are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means. It is elegant – and it inspires confidence – to give the garb of an established rule of interpretation to a conclusion reached as to the meaning … of a treaty', at 53. *Cf* Hersch Lauterpacht, 'De l'interpretation des Traités: Rapport' (1950) 43 Ann. inst. dr. int. 366.

[21] Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001) at 494.

[22] For the argument that the legal argumentative form provides prerequisites for Habermasian discourse, see Robert Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2nd ed. (Frankfurt am Main: Suhrkamp, 1991) at 37-9 and Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992) at 272 *et seq.*: 'Die *in der Profession bewährten Standards* sollen die intersubjektive Nachprüfbarkeit und Objektivität des Urteils garantieren', at 275. For international law in particular, see Jürgen Habermas, 'Hat Die Konstitutionalisierung des Völkerrechts noch eine Chance?' in Jürgen Habermas ed., *Der gespaltene Westen* (Frankfurt: Suhrkamp, 2004) 113 at 184. Hans-Joachim Cremer, 'Völkerrecht - Alles Nur Rhetorik?' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 267 at 288, picks up this idea. Andrew Hurrell makes out three preconditions for a normative discourse theory to work: moral accessibility, institutional authority, and effective political agency; Andrew Hurrell, *On Global Order. Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007) at 298-319 [Hurrell 2007].

[23] *Cf.* Hart, *supra* note 10 at 126.

contestation is a distinct enterprise. Its particularity is upheld by a combination of moral choice, beliefs, ethos, and habit.[24]

In sum, contestation is always a possibility. This is a theoretically reasoned contention on the basis of semantic pragmatism and structural indeterminacy and not a normative proposition. Nor is it by itself a threat to law's normativity or its merits. It does not deny that law can and does shape social action and expectations. Awareness of the possibility of contestation neither creates, increases, nor reduces such possibility. Nor does it change the constraints of interpretations that lie in the need for acceptance by other participants in legal discourse. Furthermore, such acceptance is premised on an argument's qualification as a legal interpretative claim.

3. Power and Rhetoric

When a norm is contested, actors have a choice between alternatives. The motives for an actor's choice can be manifold. This section expands on this article's interest in highlighting the exercise of power in interpretations. Exposing the contestability of norms and the particular legal argumentative form draws attention to actors' attempts to vest actions in the mantle of legality. Statements about what the law says are also interpretations that seek acceptance of meanings that are aligned with preferences and interests. Power can 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.'[25] Successful interpretations, that is, interpretations that find acceptance, can thus be conceived as expressions of power.[26]

Analyzing interpretations as acts of naming and as implementations of particular meanings has a long tradition. John Austin encapsulated what is at stake in legal interpretation: 'there can hardly be any longer a possibility of not seeing that stating is performing an act.'[27] Precursors to the study of

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[24] *Cf.* Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard Univ. Press, 1964); Bourdieu, *supra* note 5; Ernest J. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale L.J. 949; Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 Theor. Inq. L. 9.

[25] Michael Barnett & Raymond Duvall, 'Power in Global Governance' in Michael Barnett & Raymond Duvall, eds., *Power in Global Governance* (Cambridge: Cambridge University Press, 2005) 1 at 3, slightly amending John Scott, *Power* (Cambridge: Polity Press, 2001), 1-2.

[26] *See* Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Rev. Int'l Affairs 197 at 199; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14 at 40.

[27] John Langshaw Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1979 [1962]) at 139 [Austin].

performative speech are equally insightful. The Roman rhetorician Quintilianus acknowledges his debt to Cicero and Aristotle's *Art of Rhetoric* and develops a technique of description that aligns the image arising from the description with the interest of the speaker or writer.[28] This thought has gained renewed appreciation in international relations scholarship that stresses the power of persuasion[29] and a strategic element in constructions of social reality.[30] The metaphor of semantic fights denotes the practice by which actors try to implement the use of a particular expression and conception in relation to specific facts to suit their interests or normative convictions. Legal contestation makes this point overtly clear: the qualification of an individual as 'combatant' establishes a framework for the argument that the individual has to rely upon in order to contest the legality of his detention. New expressions are particularly influential.[31] Legal interpretative claims form the weapon in legal contestation; the recognition of the legality or illegality of certain behaviour is what actors strive for. Law can then be understood as a battleground.[32] This conception of law offers greater depth in understanding how power is exercised in semantic fights with reference to legal expressions.

III. The Contested Meaning of 'Enemy Combatants'

The qualification of al-Marri and the contested meanings of the terms 'combatant', 'civilian', and 'enemy combatant' serve to show the increasingly contested distinction between combatants and civilians – a distinction foundational to the laws of war. Critical analysis of this discourse elucidates the particularities of *legal* contestation and illustrates the way power is exercised in interpretation. This section demonstrates the theoretical perspective's view on legal practice. It provides a contextual overview and analyzes distinct actors' interpretative claims. It then reconsiders the

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[28] Quentin Skinner, 'Rhetoric and Conceptual Change' (1999) 3 Finnish Y.B. Pol. Thought 60. On the so-called New Rhetoric see Chaïm Perelman, *Logique Juridique. Nouvelle Rhétorique*, 2nd ed. (Paris: Dalloz, 2001); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York: Palgrave Macmillan, 1987) at ch. 5.

[29] Rodger A. Payne, 'Persuasion, Frames and Norm Construction' (2001) 7 Eur. J. Int'l Rel. 37; Ronald R. Krebs & Patrick Thaddeus Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric' (2007) 13 Eur. J. Int'l Rel. 35.

[30] Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887, speak of 'coercive constructivism'.

[31] Richard Koebner, 'Semantics and Historiography' (1953) 7 The Cambridge Journal 131 [Koebner]; 'situations and actions sometimes lead to the creation of new expressions, which in turn not only instigate a particular course of action but may also exert an enduring influence upon social attitudes', at 131.

[32] *Cf.* Jhering, *supra* note 6.

argumentative interchange under the theoretical perspective developed in the previous section.

1. Context and Problem

The so-called 'war on terror' has challenged established interpretations of legal expressions of the law of war.[33] This includes the categorization of people who fight or aid the fight against, in particular, the United States. Before President Bush declared a 'war on terror', there had been an almost unanimously 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 could be tried for their action.[34] The question of 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.[35] The laws of international armed conflict divide the subjects of the use of force into those whose combatancy may be lawful ('combatants') and those whose fighting would be illegal in any event ('civilians'). This understanding might still be prevalent but has been severely contested. Further attempts to specify those two categories of persons already go to the heart of legal contestation about 'enemy combatants'. In brief, the legal framework and context are as follows.

In his address on terrorism before a joint meeting of Congress on 20 September 2001, President Bush announced that '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.'[36] The US has

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[33] See generally Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 Eur. J. Int'l L. 993.

[34] See Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 Colum. J. Transnat'l L. 1 [Berman]; Kenneth Watkin, 'Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy,' (2005) 2 HPCR Occasional Paper Series. Yoram Dinstein, however, has consistently argued that there exists a third category of 'unlawful combatants' that encompasses anyone who fights unlawfully; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 29-50 [Dinstein].

[35] One exception might apply but appears to have fallen outside the centre of attention in legal discourse and will not be considered; namely, the concept of *levée en masse. Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 at art.4(A) [GC III].

[36] 'A Nation Challenged; President Bush's Address on Terrorism Before a Joint Meeting of Congress' *New York Times* (21 September 2001), online: New York Times

been engaged in what it calls the 'war on terror' ever since and has taken military action on a global scale. Its first target was Afghanistan less than one month after 11 September. 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.'[37] The military action against Iraq was also conducted under the auspices of the 'war on terror', although the stated reasons for intervention in that country have been diverse.[38] The day after President Bush declared major combat operations to have ended in Iraq he framed the 'success' as 'one victory in a war on terror that began on 11 September 2001, and still goes on.'[39]

It is important to note the range of contexts subsumed under the expression 'war on terror'. The problem legal interpretation faces is how to apply legal expressions to such a broad variety of contexts. Legal expressions such as 'combatant' and 'civilian', but also 'war', stem from treaties that build to a large extent on the distinction between international and non-international armed conflicts. In legal contestation, 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.[40]

<http://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html>.

[37] 'A Nation Challenged; Bush's Remarks on U.S. Military Strikes in Afghanistan' *New York Times* (8 October 2001), online: New York Times <http://www.nytimes.com/2001/10/08/us/a-nation-challenged-bush-s-remarks-on-us-military-strikes-in-afghanistan.html>.

[38] 'Threats and Responses; Transcript: Confronting Iraq Threat "Is Crucial to Winning War on Terror"' *New York Times* (8 October 2002), online: New York Times <http://www.nytimes.com/2002/10/08/us/threats-responses-transcript-confronting-iraq-threat-crucial-winning-war-terror.html?n=Top/News/World/Countries%20and%20Territories/Iraq&pagewanted=1>. As is well known, the link between Saddam Hussein and Al Qaeda did not exist, see *e.g.* 'The Terrorism Link That Wasn't' *New York Times* (19 September 2003), online: <http://www.nytimes.com/2003/09/19/opinion/19FRI1.html?th>. It is a different question to ask who believed that it did exist.

[39] David E. Sanger, 'Aftereffects: The President; Bush Declares "One Victory in a War on Terror"' *New York Times* (2 May 2003), online: New York Times <http://www.nytimes.com/2003/05/02/world/aftereffects-the-president-bush-declares-one-victory-in-a-war-on-terror.html?n=Top/Reference/Times%20Topics/Subjects/U/United%20States%20Armament%20and%20Defense>.

[40] GC III, *supra* note 35 at art. 2.

Art. 3 common to the *Geneva Conventions* in contrast applies 'in the case of armed conflict not of an international character.'[41] Thus a controversial issue of interpretation is how to qualify the 'war on terror' – is it an international or non-international armed conflict?

The expression the US has used in this context and which this article scrutinizes is that of 'enemy combatant'. The laws of armed conflict distinguish 'combatants' and 'civilians'. The *Geneva Conventions* of 1949 do not explicitly define either category but rather specify the category of prisoners of war[42] and the category of 'protected persons'.[43] The categories are expressly defined in the First Additional Protocol of 1977 ('AP I'),[44] which the US has not ratified and whose customary law status it disputes. Art. 43(2) AP I 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) AP I 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) AP I: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.'

Apart from the qualification of the 'war on terror' as either international or non-international armed conflict, a second point of controversy in legal contestation about 'enemy combatants' is whether this expression can be applied generally to individuals fighting against the US in the 'war on terror' without regard to the individuals' membership in armed forces. Furthermore, the consequences arising from the categorization as 'enemy combatants' are disputed. They extend to questions of rights of the individuals, their protection, treatment, and to the justification for their detention under the laws of armed conflict. The focus of this article centres on the justification for detention. Art. 118 GC III states that 'Prisoners of war

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[41] *Ibid.* at art. 3.

[42] *Ibid.* at art. 4

[43] *Geneva Convention Relative to Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 at art.4 [GC IV].

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

shall be released and repatriated without delay after the cessation of active hostilities.' The controversy over the justification and duration of detention ties the following questions together: Are 'enemy combatants' generally combatants? If so, is their detention legally sanctioned until the cessation of the 'war on terror'?

2. Competing Interpretations of 'Enemy Combatants'

The expression 'enemy combatant' has been introduced into present legal discourse by the US administration.[45] It conveys conceptions which the administration intends to implement, but has been received in US case law with varying results. The use of the term is under international scrutiny because if it should come to be accepted it would have universal effect and consequences that many would reject. Scholars and the International Committee of the Red Cross (ICRC) have used the expression in divergent ways. Every actor has been able to successfully tie its claims to legal expressions.

a. The Interpretation by the US Administration

The Combatant Status Review Tribunals (CSRTs) set up under the *Detainee Treatment Act* (DTA) of 2005[46] serve the declared purpose of determining 'whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant.'[47] The closest resemblance to a legal definition of the expression 'enemy combatant' that the US has offered was given in an order from the Deputy Secretary of Defense on 7 July 2004, which states:

> 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 Unites 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.[48]

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[45] The expression as such is not entirely new. However, it is new to the present discursive context and it is employed with a new meaning. *Cf.* Joanna Woolman, 'The Legal Origins of the Term "Enemy Combatants" Do Not Support Its Present Day Use' (2005) 7 J.L. & Soc. Challenges 145 [Woolman].

[46] 10 U.S.C. § 10005(e)(2)(A).

[47] Deputy Secretary of Defense, 'Memorandum for Secretaries of the Military Departments' (14 July 2006) at Enclosure 1, online: U.S. Department of Defense <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

[48] *Ibid.*

This corresponds with the government's submission in *Hamdi v. Rumsfeld*,[49] where it argued that Yaser Esam Hamdi was properly detained as an '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.'[50] Who qualifies as a combatant? Following Legal Advisor to the US 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.[51]

The US administration pushes the claim that combatants are, apart from members of armed forces and irregular groups fulfilling certain criteria, also simply those individuals who fight. Further clarification can be gained by looking at the individuals to whom the government applies the expression 'enemy combatant'. In the aforementioned case the government rests its claim that Hamdi is an 'enemy combatant' on the assertions 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.[52] The government further bases its claim on the fact that al Qaeda and the Taliban 'were and are hostile forces engaged in armed conflict with the armed forces of the United States,' and that 'individuals associated with [those groups] were and continue to be enemy combatants.'[53]

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

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[49] 542 U.S. 507 (2004) [*Hamdi*].

[50] *Ibid*. at 526, citing the Brief for Respondents, at 3.

[51] 'Digital Video Press Conference with John B. Bellinger III, Legal Adviser to the Secretary of State: Opening Statement' (13 March 2006), online: United States Diplomatic Mission to Germany <http://www.usembassy.de/germany/bellinger_dvc.html>; also see John B. Bellinger, 'Legal Issues in the War on Terrorism – a Reply to Silja N. U. Vöneky' (2007) 8 German L.J. 871.

[52] *Hamdi, supra* note 49, brief of the Applicants, at 148-149.

[53] *Ibid*.

war.'[54] Notably, and as the court dealing with al-Marri's 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.[55]

This use of the expression corroborates the statement by John Bellinger[56] that the US takes a combatant to be anyone who fights.

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 also extend to 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 11 September 2001.'[57] The justification for 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.[58] The US maintains that this holds true 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 that it is at war with al Qaeda in a legal sense. This is manifest in the *Authorization to Use Military Force* (AUMF), which is directed not only at the Taliban but generally at '"nations, organizations, or persons" associated with the 11 September 2001, terrorist attacks.'[59]

The conception conveyed by the US in its use of the term 'enemy combatant' can be summed up as a claim to qualify as 'enemy combatant' every person who fights, with the consequences that such individual can be

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[54] *al-Marri, supra* note 1 at 166, citing the Declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism offered by the government in support of its claim.

[55] *Ibid*.

[56] See *supra* note 51.

[57] *Hamdi, supra* note 49 at 540.

[58] GC III, *supra* note 35 at art. 118.

[59] Pub.L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [AUMF].

detained until the cessation of hostilities. The legally relevant hostilities are those of the 'war on terror'.[60]

b. Reception and Treatment in Case Law

The US government's claims have received varied responses by the courts. The focus of this subsection shall be on two cases the government relies on in support of its claim (*Hamdi v. Rumsfeld*[61] and *Padilla v. Hanft*[62]) as well as on the rejection of its interpretative claim in *al-Marri v. Wright*.[63]

The court in *Hamdi* did not explicitly address the question of the personal scope of the category of 'enemy combatants'. The court posits its argument within the context of the 'war on terror' but ties its reasoning to Art. 118 GC III applicable in *international* armed conflict. It finds that '[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.'[64] 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.'[65] But the court was dealing with Hamdi, who was fighting on behalf of the Taliban, an unrecognized *de facto* regime, and who was caught during the international armed between Afghanistan and the US. 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."'[66]

The Supreme Court claimed to only answer the narrow question of the detention and due process of Hamdi, who was a Taliban combatant for the duration of the international armed conflict with the Taliban. This is how the majority reads the case in *al-Marri*.[67] The court explicitly neither endorsed

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[60] 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, 14 July 2005', online: United States Senate Armed Services Committee <http://armed-services.senate.gov/testimony.cfm?wit_id=3387&id=1559>.

[61] *Supra*, note 49.

[62] 423 F.3d 386 (4th Cir. 2005) [*Padilla*].

[63] *Supra* note 1.

[64] *Hamdi, supra* note 49 at 520.

[65] *Ibid.* at 521.

[66] *Ibid.*

[67] See *infra* note 75-79 and accompanying text.

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.'[68]

Yet, the context the court dealt with in *Hamdi* is broader than the international armed conflict between the US and the Taliban. It concerns the 'war on terror' and the AUMF, which is directed not at the Taliban but at '"nations, organizations, or persons" associated with the 11 September 2001, terrorist attacks.'[69] 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. Certainly, the interpretation of the Court's judgment is itself again up for contestation.

That *Hamdi* lends itself to a reading supportive of the government's claim becomes apparent in *Padilla*. Here the court decided on the petition of Jose Padilla, who was taken to be a close associate of al Qaeda.[70] It was found that Padilla was also 'armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.'[71] 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.[72]

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

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[68] *Hamdi, supra* note 49 at 522.
[69] AUMF, *supra* note 59.
[70] *Padilla, supra* note 62 at 389-90.
[71] *Ibid.* at 391.
[72] *Ibid.*

> necessary in order to prevent the return of combatants to the battlefield during conflict.[73]

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 Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.[74]

In sum, *Padilla* follows the government's interpretative claim regarding the personal scope of the category of 'enemy combatants' and its justification of detention.

Pieces of this holding were put together by the same Court, yet in 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 question the facts concerning the person of al-Marri and also despite the fact that al-Marri's 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.[75] 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).[76]

> 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.[77]

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[73] *Ibid.* at 393.
[74] *Ibid.*
[75] *Supra* note 1.
[76] *Ibid.* at 179, citing GC III, *supra* note 35 at arts. 2,4, and 5; and GC IV, *supra* note 43 at art.4.
[77] *Ibid.* at 165.

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 not of an international character–'the legal status of "enemy combatant" does not exist in non-international conflicts.'[78] 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 and finds that 'merely engaging in unlawful behavior does not make one an enemy combatant.'[79]

In sum, the conception the government seeks to convey with the expression 'enemy combatant' has received an ambiguous reception in case law which is itself subject to divergent interpretations. It is used in support or 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 lower courts as subsequent cases are presented to them.'[80] It should be clear by now that the law defining this category provides the stage for controversy and is certainly not the end point in contestation.

c. Scholarly Contributions and the ICRC

The relationship between case law and scholarly contributions is reciprocal. The courts (including the Supreme Court) have cited, plausibly or not, scholarly contributions and scholars engage in a discussion of case law. 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. It cannot reflect the whole diversity of international legal scholarship.

The position of John C. Yoo is closely linked to that of the government and vice versa.[81] Yoo worked in the United States Justice Department's Office of Legal Counsel from 2001 to 2003 and can be seen as one of the architects of

[78] *Ibid.* at 187.
[79] *Ibid.*
[80] *Hamdi*, *supra* note 49 at 522.
[81] See Jeffrey Rosen, 'The Yoo Presidency' *New York Times* (11 December 2005), online: New York Times <http://www.nytimes.com/2005/12/11/magazine/11ideas_section4-19.html>.

the administration's policy upon the attacks of 11 September.[82] 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.'[83] This is what he purports to provide.[84] 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 US 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 – that is the end of the 'war on terror'.[85] Following the warning that 'the Court has unwisely injected itself into military matters,'[86] Yoo reiterates that it is for the executive to decide about the existence of a state of war.[87]

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.'[88] 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.[89] However, they neither distinguish between civilians and combatants nor between international and non-international armed conflicts in this respect. Implicitly, therefore, a civilian can turn himself into a combatant. This view is explicitly endorsed by Yoram Dinstein. He argues that combatants are members of the armed forces and anyone who fights.[90] Detention of combatants can last as long as the conflict is ongoing – with regard to the detention of fighters of al Qaeda this is precisely the conflict with al Qaeda.[91]

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[82] On his role in the administration, see Tim Golden, 'A Junior Aide Had a Big Role In Terror Policy' *New York Times* (23 December 2005), online: New York Times <http://www.nytimes.com/2005/12/23/politics/23yoo.html>.

[83] *Ibid.*

[84] See John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006); John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2006).

[85] John Yoo, 'Courts at War' (2006) 91 Cornell L. Rev. 573 [Yoo 2006a]; see also John C. Yoo & James C. Ho, 'The Status of Terrorists' (2003) 44 Virginia J. Int'l L. 207.

[86] Yoo 2006a, *ibid.* at 574.

[87] *Ibid.* at 584.

[88] Curtis A. Bradley & Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harv. L. Rev. 2047 at 2070.

[89] *Ibid.* at 2123-7.

[90] Dinstein, *supra* note 34 at 27.

[91] *Ibid.* at 50.

Jordan J. Paust rigorously examines the government's claims on the basis of these distinctions and highlights its 'fallacies'.[92] 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. The US is not 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.[93] 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. Members of al Qaeda do not enjoy this status, nor should they.[94] 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 stressed by Kenneth Watkin and Nathanial Berman.[95] 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 into the categories of combatants and civilians. Marco Sassòli and Knut Dörmann, for instance, largely follow the interpretation of the ICRC, which traditionally enjoys an 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 Law the ICRC finds that civilians and combatants must be distinguished and that 'civilians are persons who are not members of the armed forces.'[96] In its official statement, entitled 'The relevance of IHL in the context of terrorism', the ICRC 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

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[92] Jordan 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 L. Rev. 1335.

[93] *Ibid.* at 1341-2.

[94] *Ibid.* at 1342-3. On 'combatant immunity', see Jordan J. Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 Yale J. Int'l L. 325 at 330-2.

[95] Watkin, *supra* note 34, Berman, *supra* note 34.

[96] Jean-Marie Henckaerts & Louise Doswald-Beck, eds., *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005) at 19-24.

> 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.[97]

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 I that 'the term "combatants" denotes the right to participate directly in hostilities.'[98] A civilian is anyone 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.'[99] They can be called 'unlawful/unprivileged combatant/belligerent.'[100] This is also the view of Sassòli, who highlights with regard to the US 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.[101]

d. Summary of Competing Conceptions

The US administration 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'. US 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 of the ICRC's position. 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.

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[97] International Committee of the Red Cross, 'Official Statement: The relevance of IHL in the context of terrorism' (21 July 2005) [ICRC], online: ICRC <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

[98] Knut Dörmann, 'The Legal Situation Of "Unlawful/Unprivileged Combatants"' (2003) 85 Int'l Rev. Red Cross 45 at 45.

[99] *Ibid.* at 46.

[100] *Ibid.*

[101] Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) J. Int'l Crim. Just. 96 at 102-3.

Some commentators see the law to be next to unworkable under such pressure and argue for change in the laws of war to adapt to new circumstances.[102] This might be more honest. It should be clear, however, that the law in fact changes when interpretations of legal expressions change.

3. Legal Contestation about 'Enemy Combatants'

The perspective of legal contestation grasps that interpretations are contestable, that they follow a certain legal argumentative form, and that the act of interpretation can well be understood as an exercise of power because it cloaks a particular conception in a statement about what the law actually says.[103]

The possibility of contestation 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, US federal courts in this case, have not been able to settle the issue. Not only have legal scholars scrutinized their decisions but their judgments have covered the full range from outright approval of the government's claim to its utter rejection. Scholars as well as courts have succeeded in tying their divergent interpretations to legal expressions and jurisprudence.

Actors have conveyed their interpretations according to the rules and standards of legal argument. Yet, not all actors have employed the same rigour in connecting their argumentative claims to legal expressions. The US administration bases its argument on interpretations conveyed by its conception of 'enemy combatants'. Notably, this is an expression that cannot be found in any treaty–only in very few Court precedents, and then only in a usage distinct from the one the US administration now attempts to employ.[104] This suggests that the US cannot convincingly fit its interests in the framework of prevailing interpretations of legal texts. At least two observations may be made.

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[102] See Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 Am. J. Int'l L. 82; Barbara J. Falk, 'The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III' (2007) 3 J. Int'l L. & Int'l Rel. 31; Eric Talbot Jensen, 'Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance' (2005) 46 Virginia J. Int'l L. 209.

[103] Note that Austin lets the distinction between performative and constative utterance ultimately collapse to suggest instead that all constative acts are also performative, Austin, *supra* note 27. This is easily understandable on the basis that it is impossible not to interpret.

[104] *Cf.* Woolman, *supra* note 45.

First, the demand inherent in legal interpretation, that arguments be tied to legal texts and that this connection follows a distinct argumentative form, appears to have some constraining impact on the success of cloaking actions in the mantle of legality. Legal texts are open for interpretation. However, some meanings are prevalent and whoever wants to endorse a different meaning has to fight an uphill battle. Contestability in law carries a potential for change but also compels justification for such change or, at least, such change is limited by the acceptance by other participants in the discourse. The qualification of such arguments for change as legal argument is always a necessary precondition. Marco Sassòli points out:

> As with all laws, the laws of war can and must adapt to new developments. However, no law can be adapted in every new case of application to fit with the results desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution of the Westphalian system, the law must, in addition, be the same for all States. To see it only as a means, to be immediately adapted to new claims, or to apply it selectively undermines the predictability and therefore the normative force that defines legal rules.[105]

A second observation is that, where meanings of certain expressions are rather well-established, it might be more promising for an actor pushing for change to endorse a different expression altogether. The US seeks to circumvent prevalent interpretations of legal texts by suggesting the expression 'enemy combatants' and thereby attempts to construct a new discourse which is more aloof from legal texts. Interpretations are certainly not static; should they shift to accommodate the US conception conveyed by the expression 'enemy combatants', the US will succeed in legalizing its actions. In this sense, fighting the war extends to 'communicating the war'[106] 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.'[107] Thus changes in definitions, changes in the law by way of interpretation, can well be understood as expressions of power.

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[105] Marco Sassòli, 'Use and Abuse of the Laws of War in The "War on Terrorism"' (2004) Law & Inequality 195 at 221 (internal footnotes omitted).

[106] David Kennedy, *Of War and Law*, (Princeton: Princeton University Press, 2006), 122 [Kennedy 2006a].

[107] *Ibid.*

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.[108]

Following the ICRC's interpretation of the laws of war, 'combatants' only exist in international armed conflict. The term would be misapplied in non-international armed conflict and different consequences attach to each qualification. The expression 'enemy combatant' conveys a conception that the US has consistently connected to it, at least over the past five years. It is not fixed. It should be noted, however, that the prevalence of one expression over another shifts the balance in contestation. Were the term 'enemy combatant' to become the prevalent point of reference in legal discourse, rather than 'combatant' and 'civilian' as expressed in the treaties on the law of war, those critical of the US 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 US interpretation. It should be abundantly clear that semantics are at the heart of legal contestation, that they have consequences, and that seeking to find acceptance for meanings aligned with an actor's interest is an exercise of power. This paves the way for revisiting the possible merits of critical constructivist research on norms.

IV. Potential Merits of Critical Constructivist Research on Norms

It has been argued in theory and shown in practice that legal expressions find their meaning in their use, that contestation with reference to legal norms takes a particular legal argumentative form, and that acts of interpretation can well be understood as exercises of power. This section contends in conclusion that the understanding of legal practice developed in this article in line with central tenets of critical constructivism in international relations does not necessarily shatter international law's aspiration towards justice but rather helps to discard and counter its instrumentalization for a particular project. Contestability prevents the reification of justice. The contestability of international law then highlights the responsibility of individual interpreters fighting for individual substantive convictions in the same form of legal argument.

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[108] ICRC, *supra* note 97.

1. Contestability

The suggestion of contestability based on semantic pragmatism raises challenges to the concept of law. H.L.A. Hart observed that '[l]egal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules.'[109] On a note that is directed against an exaggeration of such indeterminacy, it might be argued that chaos and uncertainty are its consequences. Such reproach would be mistaken for two reasons. First, it is wrong because it usually resorts to an ideal conception which would then dictate what the practice in fact looks like. When the above account of legal practice is plausible, then an argument about how it should be does not yet change the facts.

Second, contestability does not mean that anything goes. The constraint lies in the necessary qualification of arguments as legal interpretations and their acceptance by other participants in legal contestation. The fact that such requirements ensure that interpretations are contestable in their distinct elements supports the thought that actors are locked in a 'communicative entrapment' of continuous contestation from which they can only exit with some costs and missed gains.[110] Contestation at the international level frequently has particular features which are cause for some reluctance to project Habermasian discourse theory from a democratic institutional context to contestation in international law.[111] Deliberation that might increase the normative value of argumentative outcomes would have to take place in a setting that displays at least minimal institutional prerequisites.[112] The normative quality of legal contestation ultimately rests on the quality of acceptance.

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[109] Hart, *supra* note 10 at 130.

[110] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1 at 3-16.

[111] For an overview of empirical studies that have focused on the settings of diplomatic negotiations see Cornelia Ulbert & Thomas Risse, 'Deliberately Changing the Discourse: What Does Make Arguing Effective?' (2005) 40 Acta Politica 351-67. Note, however, the cautionary outlook by Jürgen Habermas, 'Concluding Comments on Empirical Approaches to Deliberative Politics' (2005) 40 Acta Politica 384-92; Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: Eine Replik' in Peter Niesen & B. Herborth eds., *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der Internationalen Politik* (Frankfurt am Main: Suhrkamp, 2007) 406. For a historical contextualization of this line of thinking, its use for international law and its prospect see also Armin von Bogdandy & Sergio Dellavalle, 'Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms' (2009) 10 German L.J. 5.

[112] Wiener & Puetter 2009, *supra* note 3 at 8; Hurrell 2007, *supra* note 22.

Relying on merely factual acceptance of course raises problems of normativity because factual acceptance can result from a variety of reasons that may not add anything to the interpretations' likeliness to be normatively legitimate. In particular the impact of power is often decisive and conspicuously absent in theoretical inquiry and normative propositions.[113] Distinct ways in which power influences the argumentative interchange inside its outward form of legal contestation are discernable. Most straightforwardly, actors would simply not make an argument because of the repercussions they might have to suffer. In relation to at least some actors, the US government possesses tremendous leverage that makes strong opposition less likely. Even if the law is itself semantically and structurally open for interpretation, prevalent meanings tilt the balance of argument. Concepts have histories that constrain powerful and weak alike. Power is likely to be embedded in prevalent interpretations of a legal expression which then makes it harder to find acceptance for contravening interpretative claims. Furthermore, acceptance can be induced by moralization and appealing juxtapositions of good and evil which in turn shape the identities of actors trying to do the 'right thing'. The US government's claim finds more acceptance because of the demonization of the enemy.[114] This is a common technique of justification through the shaping of identities.[115] It amounts to a threat to formal argumentative practice because it undermines precisely its formal attributes. It drives at exclusion and unequal application to the detriment of the 'outlaw'.[116] In other words, substantive convictions undermine the formal argumentative practice.

The illustration of contestation offers a critical distance and thrusts the individual participant into the spotlight:

> [T]he abandonment of aspiration to 'absolute' knowledge has exhilarating effects: on the one hand, human beings can recognize

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[113] Andrew Hurrell, 'International Law and the Changing Constitution of International Society' in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, New York: Oxford University Press, 2000) 327 at 330.

[114] Vincent-Joël 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 L.J. 801 at 864.

[115] Teun A. van Dijk, 'Discourse and Manipulation' (2006) 17 Discourse & Society 359. For the rhetoric on the 'war on terror' see Phil Graham, *et al.*, '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.

[116] See Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

> 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.[117]

The possible merits of understanding interpretative exchanges in light of critical constructivism and from the perspective of legal contestation might lie in supporting the effective use of contestation against the fixation of meanings.[118] Law would be understood as the battleground for semantic fights. It is not itself a cure that eases concerns about unwarranted exercises of power but rather a potential to be used.

2. Responsibility

Contestability leads to responsibility. The US conception of 'enemy combatants' is novel in the present discourse and, if successfully implemented, would have consequences that many would not welcome. If a contestant is convinced that a certain interpretative claim ought to be rejected, then she should do so—fighting in the same form for subjective convictions. This would reflect the normative program of a 'culture of formalism'.[119] The legal argumentative form sets the stage on which actors pursue different interests, normative convictions and possibly distinct philosophical commitments. The contestability of the law leaves room for a political choice.[120] In fact, Martti Koskenniemi suggests that 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.'[121]

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[117] Ernesto Laclau, *Emancipation(S)* (New York: Verso, 1996) at 16-17.

[118] On the symbol of the 'empty' legal form as a counter-hegemonic assumption with recourse to Hans Kelsen's international law theory, Jochen von Bernstorff, *Hans Kelsen's International Law Theory: Believing in Universal Law* (Cambridge: Cambridge University Press forthcoming, 2009). From a perspective of systems theory a very similar argument has been made by Andreas Fischer-Lescano & Ralph Christensen, 'Auctoritatis Interpositio. Die Dekonstruktion des Dezisionismus durch die Systemtheorie' (2005) 44 Der Staat 213, exposing the paradox of decisions in legal interpretation as never quite grasping what the law is and concluding on a positive note that the process of decision-making in law can be seen as an attempt to prevent the reification of justice by every trick in the book, at 231.

[119] Koskenniemi, *supra* note 13 at 616.

[120] Hart, *supra* note 10 at 128.

[121] Martti 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 L.J. 1087 at 1089; compare Armin von Bogdandy,

This adds to the understanding of the relationship between law, politics and ideas of justice in international relations.[122] A political decision is at the heart of legal contestation and it can be subjected to continuous challenges. Politics within the legal form is of a particular kind. It is shaped by the rules of interpretation and standards of legal argument. Law is itself neither utopian nor apologetic. Rather it oscillates between apology and utopia barely coming to rest.[123] An interpretation might be called apologetic or hegemonic. When it does not find any acceptance it is without effect or benefit – an empty claim whose pretence to legality can be easily refuted. It might well be argued that the argumentative form disguises what is at issue; namely, responsible political decisions. Claims to legality might preclude awareness of responsibility.[124] 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 *legally* impermissible.[125]

The perspective of legal contestation on legal practice elucidates the political decisions and the expressions of power inside the outward show of legal argument. It pursues an outright project of modernity; that is an improved understanding of practice that expands the basis for individual judgment and critique. A sociological analysis of law might have, in this sense, 'liberating force'.[126] When powerful actors cannot plausibly convey

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'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harv. J. Int'l L. 223 at 227. Also see the conception of law by Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958): 'Before men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law; legislator and architect belonged in the same category', at 194-5.

[122] See Jochen von Bernstorff & Ingo Venzke, 'Ethos, Ethics and Morality in International Relations' in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press forthcoming, 2009).

[123] Also see Nico Krisch, 'International Law in Times of Hegemony Unequal Power and the Shaping of the International Legal Order' (2005) 16 Eur. J Int'l Law 369.

[124] See Jason A. Beckett, 'Rebel without a Cause? Koskenniemi and the Critical Legal Project' (2006) 7 German L.J. 1045 at 1078 and David Kennedy, 'The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's "from Apology to Utopia")' (2006) 7 German L.J. 982 at 990. This is also the central thesis in Kennedy 2006a, *supra* note 106.

[125] *Cf.* Shirley V. Scott, 'The Political Life of Public International Lawyers: Granting the Imprimatur' (2007) 21 Int'l Rel. 411.

[126] Such an aim of sociology can be found, for instance, in the work of Pierre Bourdieu; Pierre Bourdieu & Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992); *cf.* Markus Schwingel, *Pierre Bourdieu* (Hamburg: Junius, 1995) at 147-163; David Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 J. L. & Soc'y 407.

their interest in prevalent legal concepts, they push for change. This translates into a push for new expressions like 'enemy combatants' or different uses of established expressions. It translates into semantic fights. A grand potential for critique then lies in exploring the histories of concepts and legal expressions and in pointing out that change.[127] Few have put this more to the point than Milan Kundera: 'The struggle of man against power is the struggle of memory against forgetting.'

[127] Reinhart Koselleck, *Begriffsgeschichten* (Frankfurt am Main: Suhrkamp, 2006); for a collection of treatises in English, Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press, 2002); *cf* the early argument by Richard Koebner, *supra* note 31.