

Beyond a Matter of Rights: The UN's 1267 Committee and the Hidden Role of International Law in Anti – Terrorist Policy

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Abstract.

This paper is written as an effort to escape the dialogue of the deaf between those who believe that international law can do no wrong in the war on terrorism, and those who argue its utter irrelevance. It argues that international law can be seen as a tool for governance of the suspended space between war and peace, characteristic of the so-called 'war on terror'. Through the case of the terrorist blacklist administrated by the UN's 1267 Committee, it shows how administrative law, and not the law of war, is the paradigm of the international legal order within antiterrorist policy. International law, then, is not to be read as matter of rights, but as a legal form, which features independent agency. It is in the legal form and its design, and not in the current obsession with compliance, where lie the possibilities of resistance in this new time.

International law seems to exert an irresistible attraction on otherwise balanced individuals. It is perceived to be, somehow by definition, something good. The notion of 'law' that is 'international' is inherently appealing; there is no denying that.

Another expression with appeal: 'war on terror'. For different reasons, this expression seems to incite also amazing reactions. Now, put those two expressions in a single sentence, as in 'what is the role of international law in the war on terror'? And wait.

This paper is written as an effort to escape the dialogue of the deaf that normally erupts from answering that question. It seeks to go beyond the divide between those who believe that international law can do no wrong in the war on terrorism, and those who argue its utter irrelevance.

To do so, it argues the existence of a hidden role of international law in antiterrorist policy, which is discernable in the blacklist administrated by the UN's 1267 Committee. International law can be read as a tool for governance of the suspended space between war and peace, characteristic of the so-called 'war on terror'. As such, it is not to be read as matter of rights, but as a legal form, which features independent agency. It is in the legal form and its design, and not in the current obsession with compliance, where lie the possibilities of resistance in this new time.

In order to present these patterns and possibilities, the first section of this paper features the UN's Taliban and Al-Qaeda Associates blacklist, administrated by the 1267 Committee. Based on this presentation, section two shows why the 1267 regime is an anomaly in the international regulation of antiterrorist policy, for reasons that go mostly overlooked. This is evidenced by current criticism of the regime, presented here in section three as a 'rear – view mirror strategy'.

The hopelessly dichotomical discussion arising from such strategy gives floor to the central argument of the paper. To begin with, section four explores the existence of a 'middle ground' (the not-war, not-peace status where we seem to be suspended) that is constituted through the rhetoric of war.

Then, section five addresses international law's hidden role as governance of that 'middle ground'. Nothing more pretentious, but nothing less important, is what this section presents as the hidden role of international law in the war on terror.

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The idea of international law as ‘governance’, though, seems to purport in practice a merely instrumental view of the law. How is law as governance different from lawless governance? The answer, I propose in section six, lies in the international legal form and its independent agency. This section explores in detail these two concepts.

That argument opens an important frame of opportunities for resistance, which are introduced in section seven, to conclude that international law, in its hidden role, places the discussion beyond a matter of rights, and into the realm of the legal form.

To close, the conclusion of section eight (‘is the law out there?’) is an effort to engage in further debate with the objections that my arguments may rise, specifically referred to the notion of ‘middle ground’ and the role of human rights therein.

1. The UN’s 1267 Committee

After the first war in Iraq, the UN Security Council (SC) tried to put pressure on the Saddam Hussein regime through a set of sanctions that was severely criticised for its effects on vulnerable Iraqi population¹. As a reaction, at the end of the so – called ‘UN’s sanctions decade’², the SC developed a new generation of measures that, it seemed, were more effective and produced less harm to the general population³. That new generation of measures was known as ‘targeted’ or ‘smart’ sanctions, and was imposed for the first time in 1997, on members of the União Nacional para a Independência Total de Angola - UNITA⁴.

Although not a term of art, targeted sanctions refer generally to, ‘financial, travel, aviation, arms and commodities restrictions with the objective of applying coercive pressure on transgressing parties, leaders and the network of elites and entities that support them, in order to change behaviour or prevent actions contrary to international peace and security’⁵.

At the end of the 1990’s, targeted sanctions were deemed to be a successful undertaking⁶, which required perhaps some tuning regarding their implementation⁷. It was, thus, predictable enough that the same tool was used when the challenges of a Taliban - controlled Afghanistan and of global networks of terrorism appeared.

¹ Among many, cf. D. J. Halliday, ‘The Impact of the UN Sanctions on the People of Iraq’, XXVIII *J. of Palestine Studies* (1999) 29. Halliday was administrator of the UN’s Oil – for – Food programme in Iraq from September 1997 to September 1998, and famously resigned ‘to speak publicly about the deadly impact of economic sanctions on the people of Iraq’ (Cf. ____, ‘U.N. Aide Quits Iraq Relief Post’, *The New York Times (NYT)*, July 22, 1998). He then joined the Voices in the Wilderness Foundation, at: <[//vitw.org](http://vitw.org)>. Halliday’s successor in the post, Hans von Sponek, also argued for the lifting of sanctions due to their effects (cf. D. Jehl, ‘U.N. Official Seeks an End to Sanctions Against Iraqis’, *NYT*, September 20, 1999).

² Before 1990, the SC had imposed sanction to two states: Southern Rhodesia (1965) and South Africa (1977). Between 1990 and 2000, the SC imposed sanction on 14 states: Iraq, Libya, the Federal Republic of Yugoslavia (first as the SFRY), Haiti, Somalia, Angola, Rwanda, Liberia, Sudan, Sierra Leona, Cambodia, Afghanistan and Eritrea / Ethiopia (Cf. D. Cortright & G. A. López, *The Sanctions Decade: Assessing the UN Strategies in the 1990’s* (Rienner Publishers, 2000)

³ Cf. M. Craven, ‘Humanitarianism and the Quest for Smarter Sanctions’, 13 *EJIL* (2002) 43 at 43 - 46

⁴ Cf. SC Resolutions 1127 (1997), 1130 (1997), and specially 1173 and 1176 (1998), which created travel and financial sanctions for the members of UNITA. Res. 1173 also targeted the diamond market by requiring all states ‘to prohibit the direct or indirect import from Angola to their territory of all diamonds that are not controlled through the Certificate of Origin regime of the GURN’ [Government of Unity and National Reconciliation] (Par. 12.b).

⁵ Cf. Watson Institute for International Studies, Brown University, ‘Strengthening Targeted Sanctions through Fair and Clear Procedures’. *White Paper, Targeted Sanctions Project Brown University*. March 2006. At: <http://watsoninstitute.org/> (last visit: 20.08.2007) at 55

⁶ Cf. A. Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’, 17 *EJIL* (2006) 881 at 882.

⁷ Problems of implementation were addressed in the so called Interlaken, Bonn-Berlin and Stockholm processes, wherein diplomats, NGO’s and other interested agents participated. The last ‘process’ (Stockholm) ended with the presentation of the Stockholm Report (‘Making Targeted Sanctions Effective’) to the SC on February 25, 2003 (at: <www.smartsanctions.se>) (last visit: 09.08.2007)

The Al-Qaeda and Taliban Sanctions Committee was established by the Security Council (SC) through Resolution 1267 (1999), with the mandate of overseeing the sanctions regime against the Taliban – controlled Afghanistan.

After 9/11, sanctions and mandate were expanded through Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005) and 1735 (2006), to cover, *inter alia*, the administration of a ‘blacklist’ which includes individuals or entities associated with Al-Qaeda, Osama bin Laden and/or the Taliban, as designated by the Committee. If an individual is listed, all States are required to freeze that individual’s assets, prevent his/her entry into or transit through their territories, and prevent the direct or indirect supply, sale and transfer of arms and military equipment.

The blacklist’s actual work is simple: under the 1267 Committee’s 2002 Guidelines⁸, any SC member may propose a name, which is then circulated among other members for five working days. If no member objects, then the name is included in the list. As to June 2007, there were 142 individuals and one entity associated with the Taliban included in the consolidated list, as well as 223 individuals and 124 entities associated with Al-Qaida.

2. The 1267 Committee as an anomaly in the international regulation of antiterrorist policy

The 1267 Committee is one of three subsidiary bodies created as part of the ‘UN Action to Counter Terrorism’⁹, the other two being the Counter-Terrorism Committee (CTC), established by Resolution 1373 (2001) and the 1540 Committee, established by Resolution of the same number (2004).

The 1267 Committee is different from the other two bodies and, generally, from all other targeted sanctions taken before. It constitutes an international regime directly targeting individuals who, once the Taliban was removed from power, have no common connection whatsoever to a specific state¹⁰.

To be sure, the 1540 Committee, and specially the CTC, are also fairly controversial. Resolution 1373 (2001) provides for antiterrorist measures (mostly mirroring the 1999 Convention for the Suppression of the Financing of Terrorism) of quasi - legislative nature, with no time – limits. The same, except for the lack of time limits, can be said of the 1540 Committee: it provides for legislative measures seeking to prevent non-State actors from acquiring, developing, trafficking in or using nuclear, chemical and biological weapons¹¹.

However, even if Resolution 1373 is (controversially) drafted as general legislation, its effects are limited to impose on states the duty to adopt its mandates in their domestic systems, reporting to the CTC on their compliance¹². In turn, the 1540 regime is analogous in structure, and

⁸ As adopted on November 7, 2002 and amended on April 10, 2003, December 21, 2005, November 29, 2006 and February 12, 2007. These guidelines were the result of an *impasse* between Sweden and the US concerning the blacklisting of Abdirisak Aden, Abdulaziz Abdi Ai and Ahmed Ali Yusuf, three Swedish citizens of Somali origin who were connected by the US to a Somali banking network known as Al Barakaat, which has, in turn, been linked to terrorist activities. The Swedish government took the issue before the SC and the US, perhaps also bolstered by the fact that Aden was running for office on behalf of the governing Swedish Social Democratic Party. After negotiations, the US agreed to withdraw Aden and Abdi from the list. The third name, Yusuf, was kept and became the sole applicant before the EC Court of First Instance in case T-306/01, which will be referred to in this same paper, below (Cf. S. Schmemmann, ‘Sanctions And Fallout; Swedes Take Up the Cause of 3 on U.S. Terror List’, *NYT*, January 26, 2002; _____, ‘U.S. Drops Names of 2 Swedes From Al Qaeda List at U.N’, *NYT*, August 23, 2002.

⁹ Cf. <www.un.org/terrorism/> (last visit: 11.08.2007)

¹⁰ Cf. I. Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, 72 *Nordic Journal of International Law* (2003) 159 at 164

¹¹ However, it should be noted that the 1540 Committee time-limit was extended: as its mandate was about to expire in April 28 2006 (two years after Resolution 1540), SC Resolution 1673 of April 27 2006 extended it for two more years. One further nuance should be noted: the time limit is attached to the Committee’s mandate, and not to state obligations. Hence, arguably, even if the term expires, states would still have the legal obligation of adopting Resolution 1540’s mandates.

¹² The monitoring mission entrusted to the CTC proved to be quite demanding. After facing several problems, the SC decided to ‘revitalize’ the CTC, by providing in Resolutions 1535 and 1566 (2004) that the Committee would consist of

differs only in the specific measures to be adopted by domestic systems, and the competent compliance organ (the 1540 Committee)¹³.

The 1373 and 1540 regimes are, thus, aimed at friendly states; they impose no sanctions, and would require further SC action to produce an impact on anyone beyond member states. Obligations derived from them are only indirectly instrumental for attacking the perceived enemy. For that reason, controversy is not focused in their impact on individuals or their effectiveness, but on the SC's powers to adopt them and its limits¹⁴.

In this sense, even if controversial for their general content and partial lack of time-frame, the 1373/1540 regimes do not feature, in their structure, specific novelties with regard to international law's role in the war on terror.

On the contrary, the 1267 regime is targeted at individuals against whom war is being waged, and affects them directly. The international legal form empowers international civil servants to take direct action against individuals who are perceived to be the enemy. These are crucial decisions that are taken far away from traditional diplomatic setting, and go mostly unchecked by them.

The 1267 regime constitutes, in this sense, an anomaly. In this regime, international law is not intended to limit power, or to verify the legality of the war on terror. The question of whether this 'war' is actually a 'war' seems unimportant in this context. Rather, the issue is governance: international law seems to be called to administrate the different fronts of a self-defined war (e.g. migration, financial assets, weapons trade), and to do so through the deployment of further international legal forms.

3. Criticism of the 1267 regime as a rear-view mirror strategy

The 1267 Committee has raised wide criticism related to human rights, specifically with regards to due process requirements and the difficulty of individuals to challenge sanctions taken against them in listing procedures. Yet, this line criticism and its obsessive focus in compliance overlook the anomalies featured by the regime, specifically in regards to the role assumed by international law within it. It seems to be focused in what lies behind the regime, and not the challenges and risks the posed by it in the future.

Indeed, it is constantly argued that the Consolidated List unduly restricts due process of individuals, as (a) the burden of proof for listing is not demanding enough; (b) there is no procedure of independent reviewing of a listing decision; (c) there is no legal remedy available for listed individuals; and, (d) individuals lack legal standing before the Committee to challenge listings¹⁵.

a Plenary (composed of the SC member States) and a Bureau, which would in turn be given expert advice by the Counter-Terrorism Committee Executive Directorate (the 'CTED'), established as a special political mission, under the policy guidance of the Plenary, for an initial period ending 31 December 2007. The CTED is also, from September 2005, entrusted with monitoring Resolution 1624 (2005) on incitement to commit acts of terrorism.

¹³For further information on the 1540 regime, cf. R. Laval, 'A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)', 51 *Netherlands International Law Review* (2004) 411

¹⁴Cf. on the CTC: M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of International Law* (2003) 593. On both regimes: A. Marschik, 'The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power', *New York University School of Law, IILJ Working Paper 2005/18*. Generally: J. Álvarez, *International Organizations as Law Makers* (OUP, 2005) at 174 - 176

¹⁵Cf. Watson Institute for International Studies, *supra* note 5 at 32; A. Bianchi, *supra* note 6 at 888; I. Cameron, *supra* note 10 at 168. Further, the burden of proof for listing is so lax, that the European Banking Industry Committee (EBIC) has expressed its concern and recommended that 'the identification of persons or organisations targeted by financial sanctions should be improved'. Similarly, and rightly perceiving the risk of legal consequences derived from applying sanctions to poorly identified individuals, the EBIC recommends that 'the legal security of banks and their staff should be improved by an exemption from liability when applying the resolutions in good faith' (European Banking Industry Committee's recommendations for improvements to UN Resolutions in the field of financial sanctions. Open letter to Richard Barrett. Brussels, 11 April 2007. At: <www.esbg.eu/uploadedFiles/Position_papers/Banking%20Industry%20recommendations%20for%20improvements%20to%20UN%20Resolutions%20in%20the%20field%20of%20financial%20sanctions.pdf> (last visit : 01.08.2007)

This line of critique is certainly well-intentioned. It seems clear that the Consolidated List leaves, in effect, little room for challenge on behalf of individuals. That fact is particularly serious with asset-control decisions and travel bans, which impact individuals in their most inner private sphere and choices.

The Committee and, generally, the SC, have the power to negatively affect lives in ways that were formerly available only to national police powers, under strict due process regulations. It is, therefore, highly inconvenient for these organs to run amok without some kind of limits, *inter alia*, those put forward by human rights. Massive literature on Article 39 of the UN Charter, the SC's powers under it and the possibility of judicial review bears witness to that point¹⁶

The problem is that the SC is not evidently bound by human rights. The SC and, for that matter, the UN, are not parties to human rights treaties containing the right to fair trial or an effective remedy¹⁷. Such is the first problem that all critics have to tackle, and perhaps the only source of real complexity in the matter. After all, the factual issue here is fairly straightforward: it is clear that the Committee is not providing an effective remedy, and it is clear that it should. The question is whether it legally has to.

Yet, framed in those terms, criticism of the Committee's activities becomes still another instance of the all-too-familiar 'independent normative pull' debate and its compliance debate¹⁸: is the Committee bound to provide fair trial and an effective remedy, even in the absence of consent from the relevant organization?

And, predictably enough, answers come in two blocks that exclude each other. On one hand, some argue that international law is hopelessly irrelevant, for the SC was originally devised as a last resort, whose only limit is functional peace enforcement. Hence, 'textual constraints' of its powers being 'tenuous', 'a textually convincing argument, as opposed to a policy one, that the SC is prevented from sailing the uncharted waters of international law-making is yet to be produced¹⁹'.

Conversely, others have argued that the SC is legally obliged, by sources different from consent, to provide an effective remedy. For this purpose, estoppel²⁰, legitimate expectations²¹, *ius cogens*²² or even general international law²³ have served as cornerstones for arguing that, regardless

¹⁶ For a review of literature see, generally: D. Schweigman, *The Authority of the Security Council under Chapter VII of the Charter. Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, 2001) and D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press, 1999)

¹⁷ International Covenant on Civil and Political Rights, Article 14; African Charter of Human and Peoples' Rights, Article 7; European Convention for Human Rights, Articles 6 and 13; American Convention of Human Rights, Articles 8 and 25.

¹⁸ Thus sparking the all-too-familiar 'is international law really law?' question, that opens most text books dealing with the issue. For a brief introduction: H. Bull, *The Anarchical Society* (Columbia UP, 1995) (3rd ed.) at 122 - 155. The concern has not been always as acute. It derives from the so - called 'Austinian challenge', which was of no special interest to legal scholars before the late XIX Century (Cf. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005) at 44)

¹⁹ A. Bianchi, *supra* note 6 at 888. The crucial elements of this argument are somehow playfully laid out in: G. H. Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law', *12 Leiden Journal of International Law* (1999) 549. Interestingly, Kelsen has also been linked to this approach as he argued, *inter alia*, that "[...]the purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law" (H. Kelsen, *The Law of the United Nations, A Critical Analysis of its Fundamental Problems* (Stevens & Sons, 1951) at 294. However, Kelsen did not argue for complete leeway for the SC, as he considered it to be constrained by express powers presented in the UN Charter. For example, see his discussion of the Free Territory of Trieste supervision mandate, as accepted by the SC in Resolution 16, January 10, 1947, in: *Ibidem*, at 827 - 835. This discussion has been read as a proof of Kelsen's incoherent interpretative approach; cf. S. L. Paulson, 'Kelsen on Legal Interpretation', *10 Legal Studies* (1990) 136 at 147.

²⁰ Cf. E. de Wet, 'The Security Council as a Law Maker: The Adoption of (Quasi-)Judicial Decisions', in R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty-Making* (Springer, 2005) 183 at 194

²¹ Cf. B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the UN - Office of Legal Affairs. 20 March 2006. At: <www.un.org/law/counsel/Fassbender_study.pdf> (last visit, 20.08.2007) at 21

²² Cf. Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649. It should be recalled that Yusuf was the third Swede of Somali origin whose name was kept on the List after negotiations between the US and Sweden in 2002. In the

of current treaty law obligations (or better, lack thereof) the SC is still bound by human rights, and should thus provide remedy.

This dichotomical approach seems to regard compliance as the only relevant question in the 1267 regime, and thus reproduces the standard debate of legal scholarship on whether international law lacks an independent, distinctively “legal” pull. A structurally dichotomous discussion that leads nowhere useful, as forty years of estrangement between international relations and international law have shown²⁴.

On one hand, the strict view that international law is all but a dinner-party anecdote, only complied with out of pure self – interest²⁵, fails to explain the omnipresence of international legal language in the war against terror, and the need to justify it on a legal basis²⁶.

However, the idea that international law regulates anti – terrorist policy with independent authority is also misleading. The wishful domestic analogy fails to grasp the complexities and limits of a regime that depends in great measure of its subject’s consent and unilateral interpretation.

By getting in this debate, criticism of the 1267 Committee seems to get trapped in a rear – view mirror strategy. For every *ius cogens* reasoning, an exceptionality argument will appear; and thus, *ad infinitum*. And yet, as seen before, the regime does pose novel challenges. How are we to make sense of them, of we insist in looking backwards?

The hidden role of international law is to be found by moving our focus beyond mere compliance. To do so, I propose that we begin by rethinking what the “war on terror” is, and its rhetorical effects. This move will allow us to see the 1267 regime as a legal form, featuring independent agency.

In this context, the quest for the magic word that justifies the normative pull of human rights over the SC becomes irrelevant. If the 1267 regime is regarded as an object, the question of how to superimpose that object to *realpolitik* is beyond the point. The question is how that object is constructed: what specific agency that legal form deploys.

4. Moving beyond compliance I: The ‘middle ground’

Let us start by rethinking what we call the “war on terror”. When the Bush administration framed as a “war” its response to 9/11, several commentators were quick to respond that such reference was all but mere politics, without actual legal effects. Pellet put it best, in an article appeared on September 21, 2001, under the revealing title of ‘*Non, ce n’est pas la guerre!*’:

‘(...) For [this] is not war, which supposes an armed conflict between identified, or at least identifiable adversaries, to whom the law and customs of war can be applied – the old and still

Yusuf decision, the CFI held that it had no competence to review the legality of SC Resolutions (at par. 276), only to affirm its competence with regards to *ius cogens* violations (at par. 277). Under such competence, the CFI expressly held that observation of *ius cogens* is the only limit to the binding effect of SC resolutions (at par. 281). In this case, the Court found it had been observed (at par. 346). The case is currently sitting for appeal. For a critique of the decision, arguing that UN law does not enjoy supremacy over primary EC law, cf: N. Lavranos, ‘UN Sanctions and Judicial Review’, 76 *Nordic Journal of International Law* (2007) 1.

²³ Cf. A. Reinisch, ‘Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions’, 95 *AJIL* (2001) 851 at 858.

²⁴ On the tortuous relation between the disciplines, the prominent role of international law’s “special status” in it and latest developments, cf: K.W. Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’, 14 *Yale Journal of International Law* (1989) 335; A.M Slaughter, ‘International Law And International Relations Theory: A Dual Agenda’, 87 *AJIL* (1993) 205; A.M Slaughter, A.S Tulumello & S. Wood, ‘International, Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, 92 *AJIL* (1998) 367; and C.L Sriram, ‘International Law, International Relations Theory and Post-Atrocity Justice: Towards A Genuine Dialogue’, 82 *International Affairs* (2006) 467

²⁵ A recent example is J.L Goldsmith & E.A. Posner, *The Limits Of International Law* (OUP, 2005). Their strict rational-choice view was called into question by several commentators. E.g, cf. O.A Hathaway & A.N Lavinbu, ‘Rationalism and Revisionism In International Law’, 119 *Harvard Law Review* (2006) 1404

²⁶ See, notably, U.S. State Department’s legal adviser J.B Bellinger III efforts in: *The United States and International Law* (Address at The Hague, June 6 2007) (at: <www.state.gov/s/rls/86123.htm> (last visit: 15.08.2007) or his interesting cross – posting in January 2007 at the Opinio- Juris blog, at: <www.opiniojuris.org> (last visit: 15.08.2007)

valuable “law of the Hague”, and the “international humanitarian law” – the “law of Geneva”, mainly the 1949 Red Cross Conventions and the 1977 Protocols. [This] is something else, for which our legal arsenal is not yet adapted²⁷, (trans. RU).

Since then, lawyers’ dictum has remained essentially unchanged: terrorism is a technique, not an enemy, and the so-called ‘war on terror’ is nothing beyond mere discourse²⁸. Yet, in order to move beyond focus on compliance, the importance of moving to the rhetoric of war cannot go unnoticed²⁹. Beyond the formalist denunciation of ‘war on terror’ as a legal fallacy, the reality that is constituted by the discursive act needs to be considered.

The move towards the rhetoric of war constitutes a space that could be called the ‘middle ground’. The middle ground is, in essence, the lasting status in which we seem to be suspended, which may not be a war, if we are to believe the lawyers. But it is certainly not peace.

The rhetoric of war and the construction of the ‘middle ground’ are crucially dependant on international legal language. The war on terror, as Anghie has pointed out, ‘might be crudely understood in terms of three concepts: the doctrine of pre-emptive self-defense; the concept of ‘rogue states’ the most prominent of which constitute an ‘Axis of Evil’; and the idea of democracy promotion in order to transform these violent and threatening entities’³⁰.

Such concepts are defined in reference to international legal categories: ‘self – defense’, ‘proportionality’, ‘international rule of governance’³¹, *et cetera*. The rhetoric of war consists essentially of appealing to international law categories: these categories define what the war on terror is (and is not).

International legal language, then, is not external to the ‘middle ground’. It is a part of it, and even more: it is its constituting element. It is within that framework, and especially in reference to the ‘middle ground’, that the role of international law in antiterrorist policy is to be addressed.

5. Moving beyond compliance II: The hidden role: Administrative law as a paradigm of the law of war

As we have seen, the middle ground is characterized by the eminent collapse of the sharp distinction between war and peace³². When did the war begin? When does it end? The taxonomy is moot: there is no divide. Problematization of the ‘war’ and ‘peace’ categories is the fundamental element that defines the middle ground.

It is in that expectant tranquillity, calmed as a bomb, where international law assumes its hidden role in antiterrorist policy. If the sharp distinction between war and peace becomes blurry, then the idea of an exceptional law, which regulates war as an exceptional affair, becomes inadequate. In this context, international law’s main role is not to exceptionally limit warfare: it is to administrate it.

Indeed, the middle ground implies that international law’s role is not to distinguish between war and peace. Distinctions are inapplicable: we are in war *and* peace. The law, then, is only called to administrate the situation. Governance of the middle ground between war and peace: such is the hidden role of international law in antiterrorist policy.

²⁷ A. Pellet, ‘Non, ce n’est pas la guerre!’, *Le Monde*, September 21 2001). For an expanded version of the argument, cf: A. Pellet, ‘La Terreur, la Guerre, l’ONU - que faire des Nations Unies?’, at: <www.uni-miskolc.hu/uni/res/kozlemenyek/2002/pellet.html> (last visit: 25.08.2007); A. Pellet & V. Tzankov, ‘Can a State Victim of a Terror Act Have Recourse to Armed Force?’, 2 *J. of International Law of Peace and Armed Conflict* (2004) 68

²⁸ For a recent statement, cf: B. Ackerman, *Before the Next Attack*, (Yale UP, 2006) at 13.

²⁹ Others have noted the importance of this move before. Cf. F. Mégret, ‘“War”? Legal semantics and the move to violence’, 13 *EJIL* (2002) 361; M. Howard, ‘What’s In A Name?: How to Fight Terrorism’, 81 *Foreign Affairs* (Jan – Feb. 2002) 8.

³⁰ A. Anghie, *supra* note 18 at 275

³¹ On the existence of such a rule, cf. S. Marks, *The Riddle of All Constitutions: International Law, Democracy y the Critique of Ideology* (OUP, 2000).

³² This fact has been noted before in D. Kennedy, *Of Law and War* (Princeton UP, 2006) at 99-140

International law as governance and the general “global governance mindset” have incited a good deal of controversy. We seem to have governance without governments³³, and we fear to lack legal rules that exist outside such mindset, and would thus be able to control it³⁴.

These worries are well – founded. In our case, if the role of international law is all but a scanty administrative mission, how is this different from arguing its total irrelevance in anti – terrorist policy? How is law as governance different from lawless governance?

To reach an answer, we need first to understand that governance of the middle ground takes place away from traditional diplomatic settings, and its subjects are not only states. More importantly, it seems to overlook, for most practical purposes, the domestic/international divide.

Governance of the middle ground, then, takes place in what Kingsbury, Krisch and Stewart have called the ‘global administrative space’: ‘a space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each³⁵’.

Therein, international law serves not as limit of power, but as the exact opposite: it constitutes power. And it does so, not only in the evident sense of serving as vehicle for power delegation to international organizations³⁶, but also, and more importantly, as it empowers non – representative functionaries to make decisions, impose sanctions and affect lives.

Indeed, away from *realpolitik* diplomatic circles and into regulatory networks³⁷, the international legal form is the sole source of empowerment. It defines procedures, competences and draws frontiers of possibility. What lies beyond the powers recognized by the legal form is, quite simply, not possible. In this context, legal form is queen.

The question of international law in the war on terror, then, steps into the realm of the legal form, whose crucial importance marks the difference between international law as governance and mere lawless governance. And this, I propose, it does through the legal form’s independent agency.

6. Moving beyond compliance III: The legal form and its independent agency

One of the fundamental features of the ‘global governance mindset’ is to understand international law as nothing but an instrument for achieving a given goal. Such mindset, in Koskenniemi’s words,

‘recognizes no independent compliance pull for the pure form of the law. After all, international law is just a set of diplomatic compromises made under dubious objectives. We use it

³³ Cf. J. N. Rosenau & E. O. Czempiel (Eds.), *Governance without Government: Order and Change in World Politics*. (CUP, 1992). Specifically, the concern relates to ‘the extent to which the functions normally associated with governance are performed in world politics without the institutions of government’ (at 7).

³⁴ Such concern may be formulated as a problem of democracy, by arguing the risk of having an illegitimate governance arrangement. An example of the such an approach is J.H.H Weiler, who has spotted in this point a problematic lack of legitimacy of international law as regulation (J.H.H Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547).

³⁵ B. Kingsbury, N. Krisch and R.Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems*. (2005) 15 at 25.

³⁶ International organizations (IO’s) can only exercise powers bestowed upon them (either explicitly or implicitly) by member states. Such powers are delegated to IO’s through a constituent treaty, which commonly establish also its organs (*See*, generally: J. Klabbers, *An Introduction to International Institutional Law*, (CUP, 2002) at 60 – 81). In this sense, international law evidently constitutes IO’s power. Yet, my point goes further, as we now turn to see.

³⁷ ‘Regulatory networks’ is used here as ‘informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways’, presenting also an intergovernmental element, defined by ‘pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the “domestic” from the “international” sphere’ (A.M Slaughter and D. Zaring, ‘Networking Goes International: An Update’, 2 *Annual Review of Law and Social Sciences* (2006) 211 at 215). Given the discussion of the UN sanction regime, *infra*, the paradox of framing an action taken by the quintessential state-centred IO (the UN), through the quintessential organ of the post - war regime (the SC) as “informal” and a “network” will not passed unnoticed. Yet, activities of the 1267 Committee have been criticized precisely because their procedures are too informal, their substantive aspects depending solely on the word of like – minded domestic intelligence functionaries. (*Cf.*, *inter alia*, Watson Institute *supra* note 5 at 58, Appendix B)

if leads into valuable purposes. And if it does not lead us into those purposes –well- then that is all the worse for the law³⁸.

This instrumental view of the law reproduces a familiar realist metaphor: law as tool for achieving social goals³⁹. That view, in turn, is easily tagged on to international law, as it lacks a sovereign centre of rule production and enforcement. Hence, the perception that there is nothing inherently normative in international law; as a tool, it is only useful inasmuch as it achieves the extra – legal goal set to it by policy makers.

Such an idea has come under fire from different fronts. Of interest for my argument, though, is the fact that the ‘law as a tool’ metaphor fails to explain the specificities of the legal form. That is, even if one does agree that law can be understood as a mere tool, this approach still fails to address the features of the legal form that makes *that* tool preferable to others. It fails to explain what makes the legal form *legal*.

The notion of ‘legal form’ is, as Miéville has aptly put it, a ‘black box’⁴⁰. Yet, its importance lies in its very existence. It implies that legal arguments features certain inherent characteristics, not derived from the extra – legal goal they are used to accomplish, that define the way in which such goal can be achieved. The notion of ‘legal form’, in short, implies that the law has independent agency: it features in itself the capacity of exerting power. Independent agency: such is the specific characteristic that makes the legal form *legal*.

This point requires further elaboration. Focus on the legal form implies taking the essential realist metaphor (law *as* a tool) and turning it into a reality, an object (law *is* a tool). It is, most literally, a transmutation of the metaphor.

This transformation is not a new idea. Analyzing the anthropology of myths, Wagner presented in 1981 the concept of ‘obviation of symbolic practices’. The central idea is that, in the process of building meaning to a symbol, there is no level of meaning that has an ultimate founding role.

There is, thus, no ‘original meaning’: a symbol that is used outside its original semiotic context becomes a symbol that ‘stands for itself’⁴¹. The symbol becomes an object, which in turn generates new symbols. Wagner’s insight is quite useful, as it shows the almost alchemic nature of the process: the ‘immaterial’ may become “material”. From metaphor, object is born. Anyone who has seen a Ché Guevara T –shirt should get an idea of the concept.

Such an idea was bound to have important implications for legal scholarship. Building on Wagner’s approach, Riles has remarked a similar transformation occurring with technologies of private international law (“PrIL”, or “Conflicts”, for US lawyers)⁴². According to Riles, the evolution of PrIL was marked by the move from asserting legal knowledge as a tool to actually using ‘the theory that knowledge is a tool as a tool of its own’⁴³.

As may be known, PrIL refers to principles and rules that point to the applicable law in a conflict that involves different jurisdictions. Typically, it consists of tests that involve deducing the parties’ will (have they agreed on applicable law?), the nature of the obligation (is there a

³⁸ M. Koskenniemi, ‘Global Governance and Public International Law’, 3 *Kritische Justiz - Vierteljahresschrift für Recht und Politik* (2004)

³⁹ For a summary of the metaphor’s evolution as legal knowledge, see: A. Riles, ‘Property as Legal Knowledge: Means and Ends’, 10 *J. of the Royal Anthropological Inst.* (2004) 775.

⁴⁰ C. Miéville, ‘The Commodity-Form Theory of International Law’, 17 *Leiden Journal of International Law* (2004) 271 at 275. Recent efforts have been notably done, among them Miéville’s own, to open that box and further theorize on the international legal form’s specific contours. Cf. C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2004) at 75 -152.

⁴¹ The original discussion is introduced in R. Wagner, *The Invention of Culture*, (Chicago UP, 1981). The ‘symbols that stand for themselves’ concept is included in R. Wagner, *Symbols that Stand for Themselves*, (Chicago UP, 1986).

⁴² A. Riles, ‘A New Agenda for The Cultural Study of Law: Taking on the Technicalities’, 53 *Buffalo Law Review* (2005) 973

⁴³ *Ibidem*, at 1021

‘characteristic obligation’?) and, most importantly, the goal of the law (what is the purpose of each law in conflict?)⁴⁴.

These questions embody the substantive content of doctrinal PrIL. When applied, they make possible the transformation of metaphor into object. According to Riles, this transformation is performed through the inclusion of the extra – legal goals in the law to be applied. By including them, the extra – legal goal is defined by the law applied.

The realist ‘law *as a tool*’ metaphor is incapable of framing this idea. If considered the mere metaphor of a tool, the law would not be able to influence the extra – legal goal: it would simply strive to achieve it. However, when the metaphor becomes object, the law becomes a tool: it defines the ‘reality’ that we perceive as being ‘out there’, outside the law.

Imagine, if you will, a microscope: it is a tool for the scientist, because it serves her goals; but it also defines (confines, even) the scope of those goals. Similarly, the PrIL apparatus is a tool striving for an extra – legal goal, but it defines (confines, even) the scope of that goal. Following the example, considering that international law “just politics” is as fallacious as claiming that a simple light microscope allows the scientist to see electrons, because it is her tool and it is her will that it does so.

This interaction defines the independent agency of legal forms. It is a dance between the lawyer and the legal form: when developing the legal form (*e.g.*, PrIL or the 1267 regime) the lawyer is active, treating law *as a tool*; but when the legal form is deemed to be ‘finished’, the lawyer becomes passive: the law *is a tool*. The lawyer is expectant to see what comes out of the invention: will the applicable law be A or B? Will the microscope show these bacteria or those? The law, thus, has agency of itself.

Crudely put, one may agree that a hammer is as much a tool as a knife; however, as actual objects, each of them limits the purpose they may serve. Even though, as tools, both of them are only instruments to serve a purpose, one would be simply wrong to use the knife to nail. Each instrument’s characteristics define what external purpose it is able to serve: the hammer nails, the knife cuts. Regardless of the operator’s will, each instrument has agency of itself that limits the goal it is able to achieve.

The same conclusion can be reached if one focuses in the legal form and reads international law as an object. When understood beyond metaphor, international law presents certain features that define the purposes it is able to serve: its agency defines its frontier of possibilities. The tool is not neutral, but it is certainly not passive. It is its independent agency that defines its value as legal form.

One could, of course, use a different tool to achieve the same goal. For example, one could use an economic incentive, instead of a legal norm, in order to achieve the result that is desired. That possibility does not contradict the idea of law’s independent agency: on the contrary, it goes to show that *if* the legal form is chosen, it is because it features certain inherent characteristics lacking in other available tools (*e.g.*, economic incentives). Those inherent characteristics limit the objective that the law is able to achieve. One is able to use several tools to get one result, but not all results can be achieved with one tool. That is the relevance of law’s independent agency.

7. Moving beyond compliance IV: Beyond a matter of rights

International law’s independent agency implies that, even if international law is governance of the middle ground, not any kind of governance is possible. Only the kind that is defined by international law is possible. Of course, if international law makes everything possible (the ‘extraordinary renditions’, the lack of remedies, etcetera), then everything will be possible.

⁴⁴ Commonly, PrIL text books start from the law of conflicts of a certain domestic system and study international instruments from that perspective (*Cf. e.g.*, J. G. Collier, *Conflict of Laws*, (CUP, 2001). However, a useful introduction of the main international instruments and organizations has been developed by the ASIL, at: www.asil.org/resource/pil1.htm (last visit 18.08.2007)

Yet, the crucial concept here is that everything is not possible *per se*. Not all goes: if international law, as a literal tool, has an independent agency, then only that which the tool defines falls within the frontier of possible actions in the middle ground.

This important ability gives our cue to focus on the design of the legal form, as to shape its agency, which in turn defines the frontiers of possibility in governance. Once revealed, the hidden role of international law as governance of the middle ground shows that sharp distinctions are misleading: in antiterrorist policy, international law is closer to administrative law than to the laws of war. Such is the paradigm of the international legal order within the war on terror.

This move puts forward a different set of questions that are not possibly considered in the current debate on the war on terror. If the middle ground is the status quo, and the legal paradigm is its governance, then naturally issues of governance gain the utmost importance. And, with them, questions about the process of international legal form design.

Human rights and IHL are not, in essence, matters of process. That is their premium: in difficult cases, they are to trump over certain choices that are procedurally appropriate⁴⁵. Hence, the difficulty of framing concerns about governance in rights language, and the importance of looking further into administrative law as a paradigm of international law.

Is democratic participation possible in middle ground governance? Is it needed? Should arrangements of middle ground governance always contain accountability procedures? Accountability to whom? Who is entitled to participate? Who is the constituency? Who wins and who loses with a certain choice of legal form? Those are the questions that define the agenda for resistance in the middle ground.

Certainly, legal forms are unintelligible outside their context. General prescriptions for their design are ill – advised and tend to end up badly⁴⁶. Yet the critical factor that defines the role played by international law in antiterrorist policy is, precisely, the design of legal forms. It follows, then, that a one-size-fits-all solution is not available: it will necessarily require variable geometry. The answer to it all is not human rights. Nor is it act “as if” the international legal order did not exist.

Which specific geometry? Such is the central question of legal design, whose answer depends on the context. For example, the 1267 regime requires, as a legal form, to enhance its review and accountability procedures, without resorting to electoral means⁴⁷.

In this context, review and accountability are not issues of effective remedy and, most importantly, *are not a matter of rights*. They are a problem of how the legal form can include a certain feature (in this case, *e.g.* independent review of listing decisions) that, as the legal form’s agency is deployed, defines the frontier of possibilities available to the functionaries. Independent review of listing decisions, then, defines the listing and delisting choices available, thus opening the space for limiting unfair listings.

Such is the skill required. Away from the outcry of international law’s failure in the war on terror, governance of the middle ground demands shape – crafters, who will mould the legal form to use the law’s agency purposefully. The hidden role of international law reveals that all we have left is the legal form. But perhaps that is all we need.

⁴⁵ Cf. R. Dworkin, *Taking Rights Seriously* (Harvard UP, 1977) at 150. Dworkin refers to the idea that rights trump non – rights objectives, even if they are sanctioned in due way, for example, by Parliamentary approval. I propose that, in this given context, the same argument can be made of IHL

⁴⁶ Literature on legal transplants gives good account of such problems. For the central points, the debate between Watson and Legrand is instructive: Cf. A. Watson, ‘Legal Transplants and European Private Law’, 4 *Electronic Journal of Comparative Law* (2000) at: <<http://www.ejcl.org/ejcl/44/44-2.html>> (last visit: 25.08.2007); P. Legrand, ‘The Impossibility of “Legal Transplants”’, 4 *Maastricht Journal of European & Comparative Law*, (1997) 111. For an example of the risks of general prescription, see: G. Ajani, ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe’, 43 *American Journal of Comparative Law*, (1995) 93

⁴⁷ For concrete examples of ways in which this can be done, see: T. MacDonald & K. MacDonald, ‘Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry’, 17 *EJIL* (2006) 89

8. Conclusion: Is the law out there?

The notion that law features an independent agency is effortlessly accepted by most international lawyers. It seems natural that international law has certain *inherent* characteristics, which makes it different from other forms of language. We seem to like the idea that, even if one concedes to the law being a tool, there is something in that tool that is “properly legal”. This idea fits nicely with the belief the law is “out there”; our task is, then, to “discover” and then apply it to a given reality.

However, the suggestion that such independent agency is used to shape the ‘war on terror’ tends to create greater resistance. A resistance that seems to focus in two points: (1) The notion of a ‘middle ground’; and, (2) the suggestion that, at the end of the day, the relevant question posed here is not one of human rights, but of legal forms.

As a way of conclusion, I would like to put forward certain elements that may allow a better understanding of my arguments regarding these two issues. I will begin with the latter issue, and then turn to the reserves the ‘middle ground’ creates. These ideas should open ground for further discussion and, most surely, for rejoinders from those who remain unconvinced.

A. *Beyond a matter of rights (revisited):*

The first source of resistance relates to the suggestion that international law’s role in the war on terror is not a matter of rights. This objection notes that the 1267 regime is quite simply violating certain individuals’ rights, and asks: how come this is *not* a matter of human rights?

To a point, this is a fair objection. The 1267 Committee is, indeed, a matter of rights. But it is much more than that, hence my call to go *beyond* such approach. Human rights language tends to excessively simplify the interests that are at stake⁴⁸, thus obscuring the important change that this regime entails.

The issue gravitates, ultimately, around the emancipatory possibilities of the human rights discourse. Human rights are rightly believed to be a powerful tool for social emancipation. Yet, this is truth only in certain contexts: outside these contexts, human rights may not be instrumental to a progressive agenda but can, on contrary, work as an element that perpetuates the *status quo*⁴⁹

Such is the case of middle ground governance. Human rights discourse is able to provide us with tools to perform critique only in as much as the subjects of human rights law are concerned. However, in the middle ground, as in much of the ‘global administrative space’, the role reserved to individuals remains unclear⁵⁰. Therefore, human rights can only walk a certain distance in its critique: if we focus in human rights, we seem to run out of tools beyond that point.

Indeed, focusing on human rights turns the issue into a problem of legal transplants: how do we transplant administrative law’s protection of individual rights to international (global) contexts? But, is that really the problem? When we frame the issue in those terms, we end up having the “independent normative pull” discussion that gets us nowhere productive. Therefore, even if human rights are obviously relevant, focusing in them puts us on a dead-end from the start.

That is the importance of moving *beyond* rights. It provides us with a new case of instruments, which allow us to better frame, understand and evaluate the hidden role of international law in the war on terror.

⁴⁸ This fact has been noted before in: D. Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, 15 *Harvard Human Rights J.* (2002) 101

⁴⁹ Cf. J. Petman, ‘Human Rights, Democracy and the Left’. 2*Unbound: Harvard J. of the Legal Left* (2006) 63

⁵⁰ For possible roles of the individual in a global administrative law context, cf. S. Cassese, ‘Global Administrative Law: An Introduction’ at 28. At: www.globusetlocus.org/it_data/fil/s_cassese_global_administrative_law.pdf (last visit: 18.08.2007).

B. Two concerns with the ‘middle ground’:

A second node of discussion seems to be my notion of ‘middle ground’. There are two controversial flanks: the first one is referred to the political risk of accepting that, to a point, the ‘war on terrorism’ does create a new space called the ‘middle ground’. The second one is related to international humanitarian law (IHL) and its application in a certain context. Let us turn to these issues briefly:

1. The middle ground is not ‘playing the game’:

The first charge is that, by putting forward the notion of middle ground, one is falling into some kind of trap, where the war metaphor is used to transmit the sense of exceptionality that justifies gross violations of human rights and, more generally, a normalized status of international lawlessness⁵¹.

This concern builds on the idea that international law is somehow external to the ‘war on terror’. In essence, according to this the argument, war rhetoric is a discursive device to *exclude* international regulation: therein lies its danger. Through the ‘emergency’ argument and its ‘essential enemy’ complement, cunning political advisors try to place their actions above international law⁵². What we would need, then, is *more* international law: more rules, and more compliance.

Yet, the ‘war on terror’ needs international law for its sheer existence. The exclusion of international law that is denounced by this concern can only be performed through international legal arguments. Concepts such as ‘enemy combatants’⁵³, ‘preemptive self defense’⁵⁴ and the like bear witness to this situation: international law is not external to the war on terror, *more* international law may, in effect, mean *more* war on terror.

The war on terror/international law dichotomy is but a false one. It builds upon a distinction that lies beneath international legal analysis: the notion that facts are *essentially different* from norms. Indeed, that the law is supposed to regulate facts, not ‘constitute’ them.

This same point has been tackled by critical legal scholars for some time now: international law is not “imposed” on *realpolitik*, but is a part of the power complex. Efforts to obscure that unity by showing as natural the division between them are only aimed to maintain that very power complex⁵⁵. Arguing the ‘real life’ war on terror/international law dichotomy only makes invisible that other very real human suffering that international law is capable of causing.

In this context, the idea of law being *essentially* separated from war can be read as nothing but a necessary premise for arguing that it effectively regulates warfare, thus legitimizing the

⁵¹ J. Bolton is commonly named as one of the key proponents of such a strategy. Cf. J. Bolton, ‘Is There Really “Law” in International Affairs?’, 10 *Transnational Law & Contemporary Problems* (2000) 1. For a critical overview, cf. W. Mansell & E. Haslam, ‘John Bolton and the United States’ Retreat from International Law’, 14 *Social and Legal Studies* (2005) 459

⁵² This argument is commonly followed through, either explicit or implicitly, to C. Schmitt. In international law see, e.g. F. Mégret, *supra* note 29 at 367. G. Noll, ‘Force, Partisanship, Dislocation: An Essay on International Law in the State of the Exceptional’ in: J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International law for Martti Koskenniemi* (Nijhoff, 2003) 207; generally, see M. Koskenniemi, ‘International Law as Political Theology: How to Read *Nomos der Erde*?’, 11 *Constellations* (2004) 492

⁵³ Cf. J. Woolman, ‘The Legal Origins of the Term “Enemy Combatant” Do Not Support Its Present-Day Use’, 7 *J. of Legal and Social Challenges* (2005) 145

⁵⁴ Cf. D. Murswiek, ‘The American Strategy of Pre-emptive War and International Law’, *Albert Ludwigs Universität Freiburg – I. of Public Law. Working Paper Series* (2003); M. E. O’Connell, ‘The Myth of Pre-emptive Self-Defense’, *ASIL, Task Force on Terrorism Papers* (2002)

⁵⁵ Cf. generally: B.S Chimni, *International Law and World Order*, (Sage Publications, 1993).

humanitarian project. That division, although certainly useful to push legal policy, is not a 'fact': it is an argumentative device, which seems to have been naturalized⁵⁶.

This move is not new. Generally, the distinction between a fact and its regulation is not naturally given. It is constructed, and the construction is normally obscured. Economic theories of regulation have always had this point clear: the market *is* created by regulation (through property rights, *et cetera*), but we choose to see that part of regulation as a 'fact', and then regulate *stricto sensu* within it⁵⁷.

International law is not different. That facts constitute international law is a truism: the practice/opinio iuris structure of the most traditional of international legal sources (custom) acknowledges so. Moreover, that same structure allows law to be considered as fact in order to prove 'practice'⁵⁸. The constant flow between fact and norm is not an exception in international law; to some, it is perhaps its very structure⁵⁹.

To sum up my reasoning with regards to this objection, arguing that the 'middle ground' is a move to evade international regulation of the war on terror is, in short, to overlook international law's crucial role in constituting that very war. It means to build on constructed dichotomies in order present a 'reality' that is then regulated. None of that is accurate: the so-called 'reality' is constituted by international law. There lies the relevance of the 'international legal form' and its independent agency, as we have seen before.

2. Application of international humanitarian law:

The second concern is somehow related to the first, and focuses in the distinction between war and peace. It calls for a sharp distinction between these two statuses, as blurring such line would serve, either (a) to justify a state of exceptional lawlessness (then overlapping with the first concern), or (b) to imply the application of IHL to the war on terror, which would be incorrect, as 'this not a war'.

The sharp division between war and peace is not naturally given. The concept of 'armed conflicts of non – international character'⁶⁰, as applied by IHL is strong evidence of the artificiality of this divide.

Regardless of the actual violence level, defining that a state is in 'armed conflict' is ultimately dependant on the state itself⁶¹. There is no objective criterion to define whether states deal with an 'internal disturbance' or are actually engaged in internal conflict⁶². 'War', in that case,

⁵⁶ Naturalization refers the move whereby '[...] existing social arrangements come to seem obvious y self - evident, as if they were natural phenomena belonging to the world "out there" [...] domination is stabilized by making it impossible to imagine more symmetrical social relations'. (Cf. Marks, *supra* note 31 at 22)

⁵⁷ Cf. Duncan K. Foley. *Adam's Fallacy: A Guide to Economical Theology*. (Harvard UP, 2006).

⁵⁸ This has been the case since, at least, 1949, when the ILC drafted its *Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General* (UN Doc. A/CN.4/6, at: <untreaty.un.org/ilc/sessions/1/1docs.htm>) (last visit: 18.08.2007). The International Court of Justice has recognized bilateral and multilateral treaties as evidence of the practice element of custom in several occasions. Cf, for example, *North Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, I. C.J. Reports (1969) at 43 – 44, pars. 75 – 76.

⁵⁹ Cf. M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2006) (2nd Edition)

⁶⁰ Common Article 3 of the 1949 Geneva Conventions, *chapeau*.

⁶¹ Cf. J. Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', 14 *EJIL*, (2003) 299 at 305

⁶² The 1949 Geneva Conventions leave an appreciable margin of manoeuvre for states to define whether armed action configures peace-time policing, or an internal armed conflict. Common Article 3 provides that 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict'. Similarly, Article 1 (2) of the 1977 Protocol II ('relating to the Protection of Victims of Non-International Armed Conflicts') states that 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts', without stating who is competent for defining when a hostility is an internal riot. Moreover, Article 3 (1) of the same protocol states that 'Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate

is only ‘peace’ with a different name; or, even worse, ‘peace’ is only a war called ‘internal disturbance’ by the interested government⁶³.

Such ‘grey zones’ had been correctly spotted by humanitarian lawyers decades before 9/11, who proposed a cumulative application of human rights law and IHL⁶⁴. This concern led to the 1990 Turku Declaration of Minimum Humanitarian Standards⁶⁵ which, however, failed to be elevated to an instrument adopted by the United Nations⁶⁶. All this goes to show that the flow between categories is nothing new. ‘War’ and ‘peace’, as legal categories, are not carved in stone. Such is the defining element of the middle ground.

To be sure, statements such as now – ex A.G Gonzalez’ infamous view that ‘[t]he war against terrorism is a new kind of war (...) that renders obsolete Geneva’s strict limitations⁶⁷, does not make it any easier to defend the importance of this middle ground.

Nonetheless, yelling in the dessert that ‘*Ce n’est pas la guerre!*’ only obscures international law’s crucial role in framing and communicating war rhetoric, in general, and the war on terror, in particular. Hence, the relevance of discussing, away from stubborn denials, what role is reserved for international law in that middle ground, and which possibilities of resistance it entails.

means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State’.

⁶³Cf. D. Kennedy, *Of Law and War*, *supra* note 32. The practical implications of the fluidity that characterizes the war/peace divide are patent. For example, in 2004, after 40 years of hostilities and three peace processes, Colombian President A. Uribe started pushing the thesis that Colombia was not immersed in an ‘armed conflict of non – international character’ but, rather, was facing a terrorist threat (Cf. _____, ‘Sí hay Guerra, Señor Presidente’, *Revista Semana*, February 6 2005). Regardless of domestic and international outrage, the thesis went essentially unchallenged as a matter of IHL: it was, after all, the President’s competence to make that definition. Although patently incoherent from a historical point of view, the President’s legal strategy did leave the ICRC desperately asking to look ‘[...] beyond the discussion of the conflict’s name, as today it is urgent to work in the diffusion and application of IHL [...]’. Of course, the ICRC strategically overlooks the fact that, if there is no conflict, there is no IHL to be applied; yet the war/peace divide would seem to leave them no other option. (Cf. CICR, *Colombia Informe 2004*. At 4. At: [www.icrc.org/Web/spa/sitespa0.nsf/htmlall/colombia-report-050505/\\$File/informe_colombia_2004-Introduccion.pdf](http://www.icrc.org/Web/spa/sitespa0.nsf/htmlall/colombia-report-050505/$File/informe_colombia_2004-Introduccion.pdf)) (last visit: 27.08.2007)

⁶⁴Cf. T. Meron’s extensive work on the issue: *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications Limited, 1987); ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument’, 77 *AJIL* (1983) 589; ‘Towards a Humanitarian Declaration on Internal Strife’, 78 *AJIL* (1984) 859; ‘Draft Model Declaration on Internal Strife’, *International Review of the Red Cross*, No. 262 (1988) 59; T. Meron & A. Rosas, ‘A Declaration of Minimum Humanitarian Standards’, 85 *AJIL* (1991) 375; T. Meron & A. Rosas, ‘Combatting Lawlessness in Grey Zone Conflicts Through Minimum Humanitarian Standards’, 89 *AJIL* (1995) 215

⁶⁵ UN Doc. E/CN.4/Sub.2/1991/55

⁶⁶ Cf. M. Scheinin, ‘Turku/Åbo Declaration of Minimum Humanitarian Standards (1990)’, International Council on Human Rights Policy, at: www.international-council.org/paper_files/120_w_02.doc (last visit: 27.08.2007)

⁶⁷ A. Gonzales, Memorandum for the President, January 25 2002 at 2 www.msnbc.msn.com/id/4999148/site/newsweek/ (last visit: 23.08.2007)