The Law of the List

UN counterterrorism sanctions and the politics of global security law

Sullivan, G.

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The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law

Gavin Sullivan
THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS
AND THE POLITICS OF GLOBAL SECURITY LAW

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ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College

voor Promoties ingestelde commissie,

in het openbaar te verdedigen in de Agnietenkapel

op dinsdag 21 maart 2017, te 12:00 uur

door Gavin Sullivan

geboren te Sydney, Australië
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Faculteit der Maatschappij- en Gedragswetenschappen
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Amir Attaran and Kim Lane Scheppele inspired me, both intellectually and politically, to undertake critical empirical research on global security law. Both supported and encouraged my early research on terrorist blacklisting at a time when it was sorely needed, for which I am grateful. Amir urged me to make whatever I do ‘forensically valuable’ for others seeking to understand and challenge this global regime down the line. Kim was one of the first to grasp the constitutional and political significance of the Security Council’s post-9/11 ‘anti-terrorism campaign’ and has been both friend and intellectual mentor throughout. Without the engagement of friends and colleagues in Amsterdam this project would never been realised. I particularly wish to thank Julien Jeandesboz, Geoff Gordon and Francesco Ragazzi for the innumerable discussions over coffee, lunch and drinks. You made undertaking this research more exciting and far less isolating than it could have otherwise been – my apologies if I talked about my PhD too much. Wouter Werner has been an important interlocutor and collaborator throughout this project, who has always engaged with and supported my research and been a pleasure to work with. Merijn Oudenaarden has been a solid friend who has had my back for years, for which I am immensely grateful and bestow upon thee the honour of ‘paranymph’!

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This project began in 2011 two months before the birth of my first daughter, Nova, and at the end of 2014 my second daughter, Aelle, was born. Writing a PhD with two little children is a challenge. But it is with deep love and gratitude that I thank both my extraordinary kids for being with me throughout this project. They certainly made it harder at times by stealing my sleep, time and attention. But they bring joy and unbridled enthusiasm and with them I experience the world differently each day. And for that I am immensely grateful. When Nova told me a character in one of her made-up stories was called ‘Ever’ after ‘your book, because it goes on for ever’, I knew it was time to end it and submit. I want to also acknowledge the contribution of my parents, Rhonda and Peter Sullivan, who have always supported and encouraged me in what I want to do, however uncertain it may seem at the time. My sister, Tracey Sullivan, also helped along the way - including by transcribing some of my interviews! And without the affective labour of my mother-in-law, Guadalupe Alzaga, this project would have never finished. Thank you for nurturing my kids when this project demanded more of my time. My deepest thanks go to my partner and accomplice, Valery Alzaga, for her unwavering support, love of learning and belief in the importance of what I’m doing. During this project we have crossed three countries, had two kids, changed careers and cut through innumerable problems together with creativity, verve and grace. She critically engaged with and helped shape the ideas of this book in countless ways and reminded me of its underlying politics, when I had forgotten.
**Abbreviations**

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<th>Abbreviation</th>
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<td>AG</td>
<td>Advocate General</td>
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<td>ANT</td>
<td>Actor-Network Theory</td>
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<td>API</td>
<td>Advanced Passenger Information</td>
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<td>AVSEC</td>
<td>Aviation Security Plan of Action</td>
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<td>CSIS</td>
<td>Canadian Security Intelligence Service</td>
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<td>CTC</td>
<td>Counter Terrorism Committee</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EGC</td>
<td>European General Court</td>
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<td>European Union</td>
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<td>EUI</td>
<td>European University Institute</td>
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<td>FOIA</td>
<td>Freedom of Information Act</td>
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<td>FTF</td>
<td>Foreign Terrorist Fighter</td>
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<td>GAL</td>
<td>Global Administrative Law</td>
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<td>GDS</td>
<td>Global Distribution Systems</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>IATA</td>
<td>International Air Transport Association</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
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<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
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<td>IO</td>
<td>International Organisation</td>
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<td>IR</td>
<td>International Relations</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OFAC</td>
<td>Office of Foreign Assets Control</td>
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<td>PNR</td>
<td>Passenger Name Record</td>
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<tr>
<td>R2P</td>
<td>Responsibility to Protect</td>
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<tr>
<td>SARPS</td>
<td>Standards and Recommended Practices</td>
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<tr>
<td>SCAD</td>
<td>Security Council Affairs Division</td>
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<td>SCR</td>
<td>Security Council Resolution</td>
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<tr>
<td>SIAC</td>
<td>UK Special Immigration Appeals Commission</td>
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<td>STS</td>
<td>Science and Technology Studies</td>
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<td>TPN</td>
<td>Transnational Policy Network</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>USAP</td>
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National

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Interview with expert from INTERPOL New York (via Skype), September 2014

Interview with expert from International Air Transport Association (IATA) Montreal (via Skype) October 2014
1. **Introduction: The Law of the List**

The United Nations was created after World War II as an intergovernmental organisation of states. The constituent instrument that created the UN and gave the Security Council its enforcement powers (the UN Charter) reflects this state-centred focus. The collective security provisions that empower the Council to determine threats to the peace and decide what enforcement action to take were aimed at preventing inter-state war. Economic sanctions were originally designed as political measures for disciplining recalcitrant states deemed threats to international peace and security. They offered a means of intervention ‘between words and war’ for the Council to ‘deter individual states from taking matters into their own hands’. Because they are imposed under Chapter VII of the UN Charter, sanctions must be implemented by all states. This extraordinary power was to be limited to specific and concrete threats. When threats receded, the sanctions would be withdrawn.

With the Security Council in stalemate during the Cold War these powers were rarely used. During the first forty-five years of the United Nations, sanctions were only imposed twice. It was only with the post-Cold War political consensus in the Council that the potential of this powerful global tool began to be innovatively developed and explored. During the 1990s, UN sanctions were issued against Iraq, Libya, Angola, Liberia, Somalia, the former Yugoslavia, Sudan, Cambodia, Rwanda, Sierra Leone and Afghanistan. What were considered ‘threats to international peace and security’ capable of justifying Council intervention was elastically reinterpreted - with sanctions imposed for promoting human rights, restoring democratic leadership and furthering arms control. Non-state actors were targeted for the first time, re-orientating the inter-state focus of collective security. UN sanctions also started being triggered by domestic violations internal to states - encroaching on the sphere of state sovereignty long deemed the foundational and inviolable principle of world order.

This global governance activism ushered in a new rationale for security intervention based on ‘global law and community values rather than international peace per se’ and facilitated the Council’s governance of terrorism as a novel threat. After the 1998 Al-Qaida attacks on US embassies in Kenya and Tanzania, the Council adopted Resolution 1267 (1999) which required all states to ‘freeze the funds and other financial resources, either directly belonging to or indirectly benefitting, the Taliban’. The original aim was to pressure the Afghan regime to extradite Osama bin Laden and stop providing a ‘safe haven’ to members of Al-Qaida. To facilitate this, a Sanctions Committee was set up - composed of the permanent members of the Security Council - to draft and administer a blacklist of individuals and entities associated with the Taliban. After the bombing of the USS Cole in Yemen in 2000, the Council broadened the scope of the regime to anyone deemed ‘associated with’ Osama bin Laden or Al-Qaida. According to the Committee ‘A criminal charge or conviction is not a prerequisite for listing.

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2 Peter Wallensteen and Carina Staibano (eds.) *International Sanctions: Between Words and Wars in the Global System* (Frank Cass, 2005)


8 S/RES/1267 (1999), para. 4(b).

9 S/RES/1333 (2000), para. 8(c).
as the sanctions are intended to be preventative in nature’. In other words, listed individuals are not targeted for acts they have done but for things they might do in the future.

After the 9/11 terrorist attacks in 2001, the ‘global war on terror’ began in earnest on many fronts. States passed draconian emergency legislation, massively expanded executive powers and engaged in pre-emptive security actions that undermined constitutional protections at home and disregarded human rights abroad. ‘America’, we were told, ‘will never seek a permission slip to defend the security of our country’. From the indefinite detention of ‘enemy combatants’ in Guantanamo Bay and extraordinary rendition of terrorism suspects to secret black-sites around the world to the torture and abuse of prisoners at Abu Ghraib and the military invasions of Iraq and Afghanistan. The world was given an unequivocal message by the US and its allies: ‘Either you are with us or you are with the terrorists’.

Yet despite all this unilateralist rhetoric, the most far-reaching legal developments in the global war on terror developed from the UN Security Council. New binding resolutions required states to change their laws to criminalise terrorism and terrorist financing, effecting a fundamental ‘change in the legal bases of state action’. The Security Council was transformed from an executive policing body into a new global legislator, ‘imposing general and permanent obligations on states ... not tied to any particular conflict’. After 9/11 the Al-Qaeda listing regime was altered into something that bore little resemblance to the UN sanctions of the past. The need for any geographic connection with Afghan territory was removed, allowing the sanctions to be applied to whoever was listed wherever they were located in the world. And time-limitations were abolished, allowing listing decisions to be applied for a potentially unlimited duration. Within three years the UN 1267 list was radically repurposed into a pre-emptive legal weapon for disrupting global terrorist networks and their perceived supporters worldwide, with unprecedented powers (temporally and spatially unlimited in scope) for the Security Council to target individual terrorism suspects using secret material suggesting potential ‘association with’ Al-Qaeda.

This book critically examines the UN Al-Qaeda listing regime as a novel form of global security law. It shows how the list works as an ordering device to render the uncertain future threats of global terrorism amenable to legal intervention in the present. I argue that the Law of the List is radically altering the relationship between national and international law and is best understood as a global legal assemblage. It is also generating new knowledge practices, governance techniques and mechanisms of pre-emptive security that are reconfiguring how legality works at a granular level. Understanding how law is transformed through globalisation, or how the governance of uncertainty transforms legal practice, requires grappling with the politics of expertise and seemingly mundane technical practices of problem management. Studying global security law empirically from the local sites that it inhabits provides a more dynamic and nuanced account of emergency in motion.

I first came to this research project as practising human rights lawyer. In 2010 I moved to Germany to work with an international human rights NGO. Whilst there I wrote a public report on terrorism blacklisting and fundamental rights. That initial research opened my eyes to how radically the international legal order was being altered in response to the 9/11 attacks and how far-reaching and exceptional the UN Al-Qaeda sanctions regime was. The UN Security Council were developing a unique

10 UN1267 Sanctions Committee, Guidelines of the Committee for the Conduct of its Work (15 April 2013) para 6(d).
12 George W. Bush, ‘Address to Joint Session of Congress and the American People’ (21 September 2001). Available at: http://cnn.it/1tw4r5W.
global legal weapon, that made individual terrorism suspects ‘effectively prisoners of the state’ without any political or legal redress. After that report circulated, I was contacted by a Tunisian migrant rights organisation in France to provide legal advice to some listed individuals about their rights. After interviewing these men and learning more about their stories I decided to take their cases on. Together with a network of legal volunteers specifically assembled for the task, we engaged in the lengthy task of preparing and filing delisting applications to the UN1267 Office of the Ombudsperson. Four applications were filed over a four-year period, all resulting in delisting.

This experience of working closely with listed individuals on these cases helped me see first-hand how unjust this regime of pre-emptive security governance is. People were being targeted on what appeared to be little or no grounds at all. And the consequences of being listed are incredibly severe. It is difficult, if not impossible, to work or rent a house. Your finances are either frozen or under the personal control of appointed central government officials. You cannot travel. And it is a criminal offence for anyone to give you money to help you get by. To be listed is to be subjected to powerful new techniques of ‘financial warfare’. One official has likened the effect to a ‘civil death penalty’. Once you are listed as a member of Al-Qaida, everyone from local police chief to immigration officials disrupt your life and make it as difficult as possible. In Italy (where my clients lived) listed individuals could take up employment and earn a small amount of money to survive. But regular workplace visits and harassment from intelligence officers ensured that no-one could keep down a job for long (‘Did you know you are employing a terrorist?’). Clients were told by intelligence officers that their listing might be discontinued if they only agreed to act as informants in their communities for the security services. All had been through criminal proceedings many years before and had been acquitted of international terrorism charges, and so were confused as to why they were being accused again. After reviewing the US Embassy cables released by Wikileaks I found that even the state that listed them had reviewed their cases years before and concluded there was ‘insufficient grounds’ to keep them designated. And yet here they were, many years later. Targeted by the UN Security Council as members of the Al-Qaida global terrorist network. With no real possibility for legal redress and - without pro bono legal advice - likely to stay preventatively targeted forever.

Some might say this is simply the political price to be paid for pre-empting potential terrorist attacks. That there will always be ‘false positives’ in the global war against terror; that you can’t make an omelette without cracking a few eggs. The ‘one percent doctrine’ that gained currency with policymakers after 9/11, for example, stipulated that even ‘if there is a one per cent chance of an event coming due’, states needed to ‘act as though it were a certainty’. Intervening early on uncertain knowledge is how low probability-high consequence risks like global terrorism must be governed. It requires throwing a deliberately broad net and avoiding what one US Treasury official referred to as ‘paralysis by analysis’ by getting too bogged down in the legal details of individual cases. In the aftermath of 9/11, moreover, governments needed to show demonstrable results. And terrorism listing enabled precisely that. In what was dubbed the ‘Rose Garden strategy’, the White House held press conferences every two weeks to announce new listings and show the counterterrorism progress they were making. This strategy prioritised ‘speed of designation, number of designations and

16 HM Treasury v Ahmed and Others [2010] UKSC 2 (Lord Hope) para. 60.
19 This process is discussed in more detail later in chapter 3.
21 Zarate (n 17) 36.
amount of money blocked’, not preparing strong evidence to justify the listings. It was almost comical’, said former US Treasury General Counsel David Aufhauser, ‘we just listed out as many of the usual suspects as we could and said. “Let’s go freeze some of their assets”. Scores of people (mostly Tunisians and Algerians) were hastily added to the UN Al-Qaida list without scrutiny or debate. As Thomas Biersteker put it, the political mood was one of global sympathy and blind trust: ‘if the US wanted a designation made, so the logic went, it must have good reasons’.24


But for constitutional and human rights lawyers all of this was rather difficult to stomach. The Al-Qaida list blatantly violates basic tenets of what most lawyers in the common law world understand to be due process, the rule of law and the protection of fundamental rights. One Canadian Federal Court judge likened the experience of listed persons to that of Josef K in Franz Kafka’s novel The Trial - who ‘awakens one morning and, for reasons never revealed to him ... is arrested and prosecuted for

an unspecified crime’. In their landmark Kadi decision - which is arguably the most powerful rebuke of the Security Council’s authority ever made by a regional court - the European Court of Justice (ECJ) tried to remedy these deficiencies by affirming that individuals have the right to be told the reasons why they are listed and the EU must respect fundamental rights when implementing UN targeted sanctions. As someone who has worked before the English High Court of Justice and the UN1267 Ombudsperson I am acutely aware of their differences and the procedural protections that listed individuals don’t have. And yet what became equally clear through my legal practice was that human rights discourse was unable to effectively speak to and challenge the novel form of global security law and governance that was emerging here.

Thinking about the list through the lens of human rights - as much of the legal literature on this issue does - allows us to see what it is not. It is not compatible, for example, with the right to fair trial and the right to effective remedy. But that still only shows us a very thin slither of what the Law of the List is. And it tells us very little about how this novel form of pre-emptive security is materially reproduced and expanded into new domains, despite years of human rights litigation in the courts. ‘Non-legality’, as Fleur Johns reminds us, ’is more than the flip side or remainder of international legal work. Rather, non-legality is, in its own right, a central structuring device of international legal thought and work’. That is, if we want to understand what the Al-Qaida listing regime is - and critique its modes of operation and administration of violence - we need to understand how it works as a global legal ordering device. Not just define it normatively and negatively in terms of what it lacks. But grasp it as what Michel Foucault calls a ‘positive present’ - a form of productive power analysed through the effects, practices, techniques and ‘methods of subjugation that it instigates’.

These were the experiences that provided the initial impetus for this study and that give shape to its core research questions: How does the Al-Qaida list work as form of global security law and governance? What kind of global law is it and how is it being made powerful? Existing accounts, as I discuss below, take the Security Council’s authority for granted. How does the practice of global security listing enable that power to emerge, congeal and grow? How, in other words, is the global in global security law produced? Is the list altering national and international legal orders - if so, in what ways and with what effects? Does it easily inhabit the inter-state and international legal system or depart from it, like other transnational governance regimes? If it exits existing normative frames, what alternative frames might we use to describe it and understand the problems it poses? How is the global governance of trans-boundary problems like terrorist networks changing the role of expertise in international law and decision-making? And what can UN terrorism listing practices tell us about how law and collective security is transforming under conditions of globalisation?

The Al-Qaida list isn’t just a novel form of global law. It is also a weapon of pre-emptive warfare. Whilst the turn towards pre-emption and exceptional governance in contemporary security has been widely examined, the implications of this shift for legal practice is inadequately understood. So this project also studies the Al-Qaida list to understand what happens to legality when it gets tangled up with pre-emptive security logics and orientated towards the governance of uncertain future threats. How are pre-emptive security measures like the list materially assembled and what can this assemble tell us about how law is changing in the face of unknown risks and threats? What legal and political tensions are created by using pre-emptive measures and how are these problems negotiated or neutralised? How are exceptional governance techniques (like security listing)

25 Abdelrazik v Canada (Minister of Foreign Affairs) 2009 F.C. 580, para. 53.
normalised, made durable and stretched through practice? And what can such practices tell us about the role of international law and organisations in creating global states of emergency?

Having outlined the key questions that animate this study, this introductory chapter will now briefly highlight the main currents of scholarship on the Al-Qaida listing regime. I focus on legal literature rather than sanctions scholarship in political science because my primary focus is on the politics of global security law, not improving economic statecraft or redesigning foreign policy tools to make them more effective in achieving their policy objectives. The chapter then outlines the analytical frameworks used to study these problems and highlights the contributions to current debates that this book seeks to make. We then move to questions of method where I explain why this book studies global security law ethnographically as a diverse array of knowledge practices and governance techniques assembled within and across multiple sites, rather than an abstract system of norms. I also critically reflect on my use of leaked material as an empirical resource and my own experiences as a lawyer working within the listing assemblage I am studying. The introduction will close with a brief overview of the structure of the book and outline of the key arguments that are developed in each site-specific chapter.

**Four Walls of Scholarship**

Given the novelty of this form of global security law and the profound conflicts it has created in the courts a vast body of legal literature on the UN1267 sanctions regime has emerged. This scholarship is dominated by four key theoretical approaches to post-national law and governance: global constitutionalism, global legal pluralism, global administrative law and international regime theory.

At its most general level, global constitutionalism suggests that governance beyond the state ‘should be confined by a set of constitutional principles analogous to those developed in the national constitutional context’. In other words, it seeks to order the fragmentation of international law either through containment via a constituent instrument (such as the UN Charter) or through the transfer of core domestic constitutional principles such as the rule of law, separation of powers and human rights compliance. There are at least three different strands of constitutionalist literature on this issue. Strong constitutionalists study the list from the traditional apex of the international system (the UN) and emphasise the conventional hierarchy of legal rules in resolving disputes between normative orders. Soft constitutionalist approaches are founded on the ‘assumption of an international community’, an ‘emphasis on universalizability’, and focus on ‘common norms or principles of communication for addressing conflict’ rather than the formal hierarchy of legal rules. In this literature, regime conflicts between different legal orders (like the EU and UN) can best be resolved through mutual interaction and a common commitment to shared normative principles (such as international human rights law or respect for the rule of law). Solange-based approaches

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32 de Búrca (n 29) 42 – 43.
claim the deficiencies of this global listing regime ought to ultimately be resolved at the UN level.\textsuperscript{34} But until sufficient procedural protections are put in place there, indirect review by national and regional courts - and the ‘constitutional conversation’ it stimulates - is both justified and necessary.\textsuperscript{35}

Global legal pluralists take a rather different approach, rejecting the idea that the normative complexity of the global can be contained by a unified legal framework.\textsuperscript{36} They stress ‘the existence of a multiplicity of distinct and diverse normative systems’, propose models for ordering global governance that stress ‘the heterarchical interaction of the various layers of law’, and highlight ‘the likelihood of clashes of authority-claims and competition for primacy in specific contexts’.\textsuperscript{37} So the Kadi case - where the EU courts indirectly reviewed global listing measures taken by the Security Council - is often celebrated as a paradigmatic example of global legal pluralism in action.\textsuperscript{38}

Constitutional pluralists claim that whilst the relation between different legal orders is properly horizontal there is a common point of legal reference (or ‘constitutional connective tissue’)\textsuperscript{39} through which conflicts can be resolved.\textsuperscript{40} Here principles of harmonisation and practices of ‘mutual embedded openness’ are emphasised as means of achieving overall coherence.\textsuperscript{41} Systemic pluralists take a more robust stance, by positing ‘a pluralism that is positioned outside, and is to some extent opposed to, international law’.\textsuperscript{42} They seek to move beyond the triad of domestic, regional and international law (by stressing the enmeshment of legal orders) and argue that it is politics (rather than any ‘overarching, hierarchical frame’) that determines the relationship between legal orders.

International regime theory starts from the observation that international law is rapidly fragmenting into functionally-differentiated regimes ‘such as “trade law”, “human rights law”, “environmental law” ... that seek to “manage” global problems efficiently and empower new ... forms of expertise’.\textsuperscript{43} These legal regimes are akin to those defined in IR scholarship - as ‘sets of implicit, or explicit principles, norms rules and decision-making procedures around which actors expectations converge in a given area of international relations’ - but can be distinguished insofar as they anchored to

\textsuperscript{34} This approach is modelled on the Solange jurisprudence of the German Federal Constitutional Court. In Solange I the Court held it could review the constitutionality of EC law so long as EU institutions had not enacted a binding charter of rights consistent with the German Basic Law (Grundgesetz). In Solange II the Court decided to no longer assert this competence because the ECJ provided a level of fundamental rights protection equivalent to the Grundgesetz. See: Solange I (29 May 1974) BVerfGE 37 and Solange II (22 October 1986) BVerfGE 73.


\textsuperscript{36} See, for example: Krisch (n 30); Paul Berman, ‘Global Legal Pluralism’ (2007) 80 Southern California Law Review 1155.


\textsuperscript{40} Halberstam (n 38). Constitutional pluralism and soft constitutionalism are therefore quite similar: de Búrca (n 29) 39 - 40.


\textsuperscript{43} Koskenniemi (n 1) 331.
specific problems of international law and normative conflict.\textsuperscript{44} Because of the functional and expert-driven nature of legal regimes, regime advocates in this area tend to be preoccupied with instrumental concerns - such as improving the implementation and effectiveness of sanctions and finding flexible, pragmatic solutions to listing problems to ensure ‘smooth functioning’ and optimal regime coordination.\textsuperscript{45} The protection of fundamental rights of listed persons by the courts - and concomitant refusal to play the flexible game of regime coordination - for example, has been dismissed by regime theory advocates as a counterproductive assertion of ‘peripheral hegemony’.\textsuperscript{46}

The Global Administrative Law (GAL) movement picks up from where international regime theory leaves off, but with a more implicit constitutionalist twist. It seeks to repurpose domestic administrative principles for use at the global level to attend to the legitimacy and accountability concerns that come with fragmentation and functional differentiation. The assumption is that ‘much of global governance can [now] be understood as regulation and administration’ unfolding in a ‘global administrative space’ where ‘the strict dichotomy between domestic and international has largely broken down’.\textsuperscript{47} IOs, transnational regulatory authorities and novel ‘hybrid public-private organizations’ are exercising powers that are outside of the control of domestic legal systems and international treaty-based regimes.\textsuperscript{48} Yet according to GAL advocates, domestic administrative principles – such as ‘principles of transparency, participation, reasoned decision-making and review in global governance’ - are being used to bring procedural fairness and accountability to global governance.\textsuperscript{49} From the WTO Dispute Settlement Mechanism and World Bank Inspection Panel to the Basel Committee for Banking Supervision, GAL advocates argue that this ‘embryonic field’ of law needs to be both nurtured and studied. This approach therefore takes a rather optimistic ‘better-than-nothing’ approach to managing the problems of the list, getting behind the UN1267 Office of the Ombudsperson, for example, as a nascent form of global accountability in action.\textsuperscript{50}

These four walls mark out the discursive space in which the Al-Qaida list is usually framed. Whilst they provide important insights into this global regime, I argue that they also carry analytical baggage that restricts us from addressing the key problems underpinning this research project.

Legal regime discourse, for example, privileges the idioms of expertise that proliferate and become

\textsuperscript{44} Stephen Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ in Stephen Krasner (ed.) \textit{International Regimes} (Cornell University Press, 1983) 1, 3. This book does not engage with IR regime theory debates. My focus concerns the legal literature on this issue. It is in this sense that I talk about ‘the listing regime’ throughout this book.


\textsuperscript{40} Krisch and Kingsbury (n 16) 2.

\textsuperscript{50} The relationship between the GAL and the UN1267 Office of the Ombudsperson is explored in more detail in chapter 3.
hegemonic through international legal fragmentation. Its focus on technical problem solving embeds a managerial approach to legal conflict as something self-evidently normal. Whilst it might be useful to talk about the ‘effectiveness of sanctions’ when interviewing officials and experts engaged in the daily work of list administration, this is a framework that takes the list for granted and obscures (rather than reveals) its underlying politics. It ignores, in other words, ‘how particular normative biases and preferences come to be embedded within an international regime at any particular point in its historical trajectory’ and misses ‘the processes by which these normative biases are sustained’. For a project seeking to understand how pre-emptive security logics are transforming global legal practices this displacement is analytically problematic. When studying international legal conflict, as Martti Koskenniemi observes, ‘managerialism is not a solution. It is a problem’. Legal managerialism ‘thinks of itself as a hill from which it is possible to see far. In truth it is a valley in which we always look in the same direction - and all the interesting questions lie behind our back’.

Whilst the GAL literature identifies crucial shifts taking place in national and international law it also brings an implicit teleology of global legal progress, that sees experiments in global accountability as incremental ‘steps in the right direction’. The key problem with this prefiguration narrative, as David Kennedy argues, is that ‘when partial efforts are seen as down payments on a better future, defects in current practice seem tolerable’. As shown in chapter 3, this makes critically analysing the governance effects and knowledge games of the UN1267 Office of the Ombudsperson difficult. In their eagerness to find empirical examples confirming the validity of their theory, GAL advocates gloss over real conflicts conditioning the emergence of global administration and so miss the politics of what is at stake. And ‘as they lead into specific proposals’ for nurturing and improving nascent GAL efforts, ‘they become part of those struggles themselves’.

The key problem with both constitutionalist and pluralist accounts is that they almost exclusively focus on legal reasoning in the courts or authoritative legal texts as the privileged sites for studying the Law of the List. Most legal literature on this issue, for example, is concerned with debating the significance of the Kadi case and preoccupied with establishing whether the EU courts got the answers to the norm conflicts posed there ‘right’ or ‘wrong’. These arguments are not unimportant. But they tell us little about how this novel domain of global security law is shaped and sustained in practice. Charting the contours and conflicts of global law through the optic of ‘high-profile cases’ - like telling world histories through the figure of powerful individuals - obscures more than it reveals. As legal anthropologist Marc Galanter suggests, ‘law is to be found in the courtroom no more than health is to be found in the hospital’. When legal texts and courts are privileged as authoritative containers of the Law, other crucial sites where legal governance is formed and put into circulation are taken out of view. Even systemic pluralist accounts of this regime - which pride themselves on foregrounding ‘the political’ - have been criticised as too ‘court-centric’ and ‘narrow’ for excluding ‘agency officials in transgovernmental networks, private economic actors, non-governmental activists, and legal and other professionals’ from processes of global legal production.

To grasp the Law of the List we need to be attentive to the shifting sociolegal terrain in which it is

51 This criticism is forcefully developed by Martti Koskenniemi: Koskenniemi (n 1) 63-75, 331 - 361. See also: Young (n 45).
52 Andrew Lang, ‘Legal regimes and professional knowledges: the internal politics of regime definition’ in: Young (n 45) 113.
53 Koskenniemi (n 45) 324.
54 This argument is elaborated and developed in more detail in chapter 3.
56 Koskenniemi (n 45) 321.
being formed. This means ‘following the list’ beyond the confines of texts and courts and examining how it is being materially reproduced through a plurality of governance techniques and knowledge practices. If globalisation is indeed decentring the foundational co-ordinates of law and putting them into motion, then different conceptual approaches - that are less static and reductionist and more empirical and dynamic - must be developed if we are to chart the emergent architecture of this security listing regime. To that end, this book makes three distinct analytical moves.

**Studying Global Security Law in Motion**

(i) **Global Legal Assemblage**

First, I develop a framework of global legal assemblage to analyse the Al-Qaida listing regime and its effects. I do so because conventional macro-accounts of the list - focusing on the interests of the Security Council and the legal reasoning of the courts - only reveal a small part of this pre-emptive security governance story. The concept of assemblage has been widely used as an analytical frame across the humanities and social sciences to understand complex and dynamic formations. It stems from the philosophy of Gilles Deleuze and Felix Guattari, who use it to describe the symbiotic co-functioning of heterogeneous elements across different domains ‘linked together to form a whole’. For Deleuze, ‘the essential thing, from the point of view of empiricism, is the noun multiplicity, which designates ... lines or dimensions which are irreducible to each other. Every ‘thing’ is made up in this way ... Things are never unities or totalities, but multiplicities’. Assemblages are ensembles of multiple, emergent relations clustered to produce effects. They are held together through the alignment of ‘heterogeneous elements including material substances, technologies, discourses and practices’ and they give rise to distinct social and political formations and forms of ordering.

This idea of assemblage, as the forging of connections between heterogeneous elements, is closely related to what Science and Technology Studies (STS) scholars call an ‘actor-network’ - that is, the sociotechnical chains of material-semiotic relations and agents that are aligned and stabilised to produce particular forms of organisation and knowledge across different fields of practice. For Bruno Latour, for example, the social ‘is not a homogenous thing ... [but] a trail of associations between heterogeneous elements’ and is ‘visible only by the traces it leaves ... when a new association is being produced between elements which themselves are in no way “social”’ - that is, the social sphere is organised as assemblages of relations. It is the forging of these associations and scale producing

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practices that determines whether actors can become relatively powerful and that produce political formations: ‘no actor is bigger than any other except by means of a transaction (a translation) which must be [empirically] examined’. Reframed through this lens, the key research task becomes one of ‘following the actors’ and performing a ‘sociology of associations’. As John Law explains: ‘realities, objects, subjects, materials, and meanings, whatever form they take, these are all explored as an effect of the relations that are assembling and doing them’.

Both of these approaches to the assemblage are deployed interchangeably throughout this book. But because I am primarily concerned with understanding the dynamics of global security law and governance - rather than with philosophy or the conditions of scientific knowledge production - I take the concept in a more explicitly sociolegal direction. I deploy the framework strategically - cherry-picking from different assemblage approaches and plugging them into the problems I am examining to generate ideas about the conditions of global legal production. My aim is to carve out a space, beyond the the four walls of mainstream scholarship, to chart how this novel form of pre-emptive security governance is configured and stretched through practice.

The concept of assemblage brings three analytical advantages to that task, and to the study of global legal problems more generally. First, it decentres the Law and prompts ‘an expansion of the dimensions of legality’. It does not perpetuate the positivist fiction that law is a bounded system of abstract norms that one knows through legal doctrine and application of legal theory. Nor does it start from the idea of a coherent body of global law and ask how it is applied in different social contexts or accommodated by courts to expose the gap between ‘law in the books’ and ‘law in action’. The concept of legal assemblage starts from the more far-reaching claim that if global law exists at all, it does so as ‘a practical and a contingent achievement’. And it re-orientates analyses towards the diverse array of techniques, knowledge practices, forms of expertise, rationalities, authority claims and dynamics that conflict and cohere to make that achievement possible. As Nikolas Rose and Mariana Valverde points out, ‘there is no such thing as ‘The Law’. Law as a unified phenomenon governed by certain general principles is a fiction’. Instead what we have are various ‘legal complexes - ill-defined, un-coordinated and often decentralized sets of networks, institutions … texts and relations of power and of knowledge’. Law, in other words, can be better understood as the relational effect of legal assemblages. This analytical shift transforms global legal research into a more empirical inquiry. One less concerned with grand theorisations of what global law is or transfixed with the ‘solid authority’ of international organisations. And more engaged with novel ‘projects of governance’ and particular arrangements of legal techniques and practices that are emergent and historically situated.

Second, the concept of assemblage is valuable because it foregrounds practices of assemblage. It animates a conception of legal agency as a distributed capacity rather than a powerful thing that

69 This division has long been the mainstay of law and society research. On the need to rethink this approach in the light of globalization, see: Eve Darian Smith, Laws and Societies in Global Contexts (Cambridge University Press, 2013) 1 - 21.
70 Andrew Barry, Material Politics: Disputes Along the Pipeline (Blackwell Publishing, 2013) 183.
powerful actors hold and wield. Most listing literature posits the UN Security Council as the primary institutional actor perched on top of the international legal order pulling the strings of this global regime. An assemblage approach doesn’t deny the power of the collective security system so much as to analyse the material conditions of its production, highlighting ‘the hard work required to draw heterogeneous elements together, forge connections between them and sustain these connections in the face of tension’. Anthropologist Tania Murray Li grounds this conceptual approach around six crucial assemblage practices that usually go unnoticed in studies of governance:

1) Forging alignments: the work of linking together the objectives of the various parties to an assemblage ... 2) Rendering technical: extracting from the messiness of the social world ... a set of relations that can be formulated as a diagram in which problem (a) plus intervention (b) will produce (c), a beneficial result. 3) Authorizing knowledge: specifying the requisite body of knowledge; confirming enabling assumptions; containing critiques. 4) Managing failures and contradictions: presenting failure as the outcome of rectifiable deficiencies; smoothing out contradictions so that they seem superficial rather than fundamental; devising compromises. 5) Anti-politics: reposing political questions as matters of technique; closing down debate about how and what to govern ... by reference to expertise ... 6) Reassembling: grafting on new elements and reworking old ones [and] deploying existing discourses to new ends.

These practices may seem peripheral to the more important task of understanding international counterterrorism law. But as this book shows, it is precisely through such seemingly mundane practices, associations and forms of expertise that global security law is being made operative, powerful and global. I argue that it is these kinds of assemblage practices that provide the glue that holds the Law of the List together. This is what it means to analytically repose global law as a contingent achievement and permanent work-in-progress: What pragmatic techniques and artefacts of governance are being crafted and used to resolve practical problems of list administration? And how do these novel assemblage practices and devices shape the listing assemblage in turn? How are the pre-emptive security logics animating the Law of the List reconciled (or not) with rule of law principles at different sites across the assemblage, and with what effects? What new discursive claims, knowledge practices and deferrals to the authority of expertise are being forged through good faith efforts to ameliorate legal or political conflict?

As we will see throughout this book, global security law and governance is assembled through such practices of problematisation and the forms of problem management and intervention they give rise to. By highlighting ‘the situated subjects who do the work of pulling together disparate elements without attributing to them a master-mind or a totalizing plan’, the assemblage allows for a more diffuse conception of legal agency to be deployed. This helps us understand how diverse practices - operating under the radar of formal Law in response to particular problems of the list - can translate into new forms of global security law on the ground. And by eschewing a priori assumptions about what can or cannot be associated together (humans, texts, institutions, objects, technologies) to ‘act’ in any given actor-network, an assemblage framework allows us to examine what role the list itself plays in configuring the domain of global terrorism it purports to merely represent or target.

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76 Ibid, 265.
77 The causal link drawn here between problematisation and governmentality is from Michel Foucault and will be discussed in more detail in the following chapter. See also: Tania Murray Li, The Will to Improve: Governmentality, Development and the Practice of Politics (Duke University Press, 2007) 7; Nikolas Rose, Powers of Freedom: Reframing Political Thought (Cambridge University Press, 1999) 20; Valverde (n 43) 546; Kennedy (n 55) 98 - 100.
78 Li (n 75) 265.
79 According to the principle of ‘generalised symmetry’ proposed in ANT, anything that produces effects within an actor-network is deemed an actor or, as it termed, an ‘actant’. See, for example: Bruno Latour, The Making of Law: An Ethnography of the Conseil d’État (Polity Press, 2010); John Law, ‘Notes on the Theory of the Actor-Network: Ordering,
Finally, the concept of assemblage enables us to approach questions of scale in more dynamic and nuanced ways. Most legal literature on the list assumes as given that domestic, regional (EU) and international law governance scales are arranged into a formal hierarchy of nested jurisdictions. That is, they implicitly spatialise global law as something big and ‘up above’, using what James Ferguson and Akhil Gupta refer to as logics of ‘verticality’ and ‘encompassment’. 

Because each scale is thought to absorb the other as one ascends up the international normative pyramid, domestic, regional and global jurisdictions end up locked in a zero-some game, where more of one is usually taken to mean less of the other. The key problem with such accounts is that miss how these supposedly stable structures are themselves undergoing change as they are interconnected in novel ways through the emergence of global security regimes like the Al-Qaida list. As we will explore in chapter 3, when the supranational Security Council starts directly targeting specific individuals through targeted sanctions, for example, international and national scales of governance become increasingly ‘enmeshed’ giving rise to a plethora of new problems and conflicts. And as chapter 2 shows, when sub-national security experts are enrolled through the list into new pre-emptive security networks that enable them to effectively produce global law, we start moving into terrain that is difficult to explain using the conventional toolkit and discourse of international law.

\[\text{Figure 2: Social Network Map of Al-Qaida according to the UN1267 list entries.}\]
An assemblage framework can help us make sense of these emergent topologies of governance because it is more dynamic in scope and better attuned to problems of scalar complexity. Rather than presupposing an international hierarchy that is immaterial and exists in the aether of abstract norms, it starts from the position that global processes are generating spatiotemporal dynamics and jurisdictional practices that are rearranging how governance works and making legal ordering more porous and heterogeneous. In Saskia Sassen’s account, for example, globalisation is marked by the emergence of novel assemblages composed of bits of territory, authority and rights previously part of the nation-state form that have been ‘reassembled’ into new transboundary domains.\(^\text{83}\) Whilst these assemblages ‘continue to inhabit national institutional and territorial settings’, they ‘are no longer part of the national as historically constructed’.\(^\text{83}\) They also sit uneasily with the international system of multilateral treaties and governance by supranational organisations. Instead, for Sassen assemblages are best thought of as ‘inchoate geographies [for] a new type of ordering, a reality in the making’. Diverse elements from different scales are rearranged together in new ways to produce global effects. The assemblage lens allows us to be especially attentive to these novel re-orderings.

In an assemblage framework, therefore, scales are not something pre-ordained but are produced through particular scale-producing practices. As I discuss in detail below, a key insight that I draw from assemblage thinking is that powerful global structures are produced from local structure-making sites, often through relatively fragile alignments of knowledge practices, infrastructures, techniques and relations.\(^\text{84}\) This transforms the creation of governance scales into an empirical problem to be examined ‘through tracing connections and breaks’.\(^\text{85}\) This is where this book on global security law really departs from most other global law texts. Because lawyers divide the world in jurisdictional terms, scales of governance tend to be taken for granted. But when ‘the global’ is no longer an \textit{a priori} assumption but a research problem demanding site-specific investigation, we can get a much more textured and dynamic account of global security law and governance in motion.

(ii) \textbf{Pre-emptive Security as Governmentality}

The second analytical move this book makes is to study risk and pre-emption as practices of governmentality. As discussed above, the Al-Qaida list is a pre-emptive security device - listed individuals are not targeted for acts they have done, but for things that they might do in the future. Pre-emptive security measures intervening to counter potential future threats have been at the forefront of the global war against terrorism and have stimulated considerable debate amongst scholars and jurists.\(^\text{86}\) From targeted killing and preventative detention to control orders and mass

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\(^{82}\) Saskia Sassen, ‘Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights’ (2008) 1(1–2) \textit{Ethics and Global Politics} 61; Sassen (n 60).

\(^{83}\) Ibid (2008), 61

\(^{84}\) The key reference here is Bruno Latour, including his earlier collaborative work with Michel Callon. See: Latour (n 64); Callon and Latour (n 65). See also: Saskia Sassen, \textit{The Global City: New York, London, Tokyo} (Princeton University Press, 2001; Sassen (n 60).

\(^{85}\) Müller (n 61) 35.

surveillance, since 9/11 the focus of states and IOs has been on risk-based techniques of ‘disruption, restriction and incapacitation’. With counterterrorism, the assumption is that ‘if we wait for threats to fully materialize we will have waited too long’. Early intervention on the basis of uncertain knowledge is now the new norm.

This turn towards risk and pre-emption - and the challenges it poses to the functioning of liberal democracies and the rule of law - is often portrayed in rather grandiose and epoch-defining terms across different academic disciplines. According to sociologist Ulrich Beck, the low probability-high consequence risks that we currently face (such as terrorism, nuclear contamination and climate change) are so unpredictable and incalculable that they exceed the logics of control and claims to scientific certainty that defined risk management in earlier times. For Beck, ‘the hidden central issue in world risk society is how to feign control over the uncontrollable - in politics, law, science, technology, economy and everyday life’. Law thus becomes an ideological construct concealing the painful truth that we are now interminably threatened by catastrophes of our own making.

Whilst legal scholar Alan Dershowitz rejects the claim that current risks are ‘unprecedented’ in this way, he argues there is currently a ‘desperate need in the world for a coherent and widely accepted jurisprudence of preemption’ that can quantify and ‘clarify the balancing judgments that must be made’ by ‘rational decision maker[s] responsible for taking preemptive actions’. In Dershowitz’s sweeping argument, existing legal categories and institutional mechanisms are represented as being simply ill-equipped to deal with the particular problems that anticipatory governance presents. Only the creation of a specifically pre-emptive jurisprudence can enable us to properly deal with the threat of global terrorism and provide ‘a check on impulsive ad hoc decision making during crises’.

And whilst criminologist Lucia Zedner criticises pre-emptive security for the way it erodes fundamental rights and ‘risks sweeping away the criminal justice system’, like Dershowitz she argues that ‘we need to evolve new normative structures, or perhaps an entire preventative jurisprudence’ to deal with the problems that the inexorable rise of the ‘pre-crime society’ poses. For Zedner, ‘existing legal categories are dissolving’ through the proliferation of ‘Future Law’ mechanisms, thus warranting ‘an entirely new conceptual and procedural framework’. This requires transforming criminology from a discipline of ‘dissociated critique’ into a discipline of constructive normative theory development capable of defending liberal values from encroachment by security.

In each of these accounts pre-emptive security effectively supplants the law. The key problem with these epochal approaches to risk is that things are rather less sweeping and more complicated in practice. As shown throughout this book, when pre-emptive security logics and rule of law principles inevitably come into conflict, one does not replace the other. It is not a zero-sum game. Rather, pre-emptive security dynamics modulate and rearrange conventional legal practices into novel amalgams.

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87 Jude McCulloch and Sharon Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the “War on Terror”’ (2009) 49(5) British Journal of Criminology 628, 629
88 George W. Bush, Graduation Speech at West Point Military Academy (1 June 2002). Available at: http://nyti.ms/2akwrsh.
92 Ibid, 237.
and recombinations that demand empirical attention. Moreover, against Beck, I show how the purportedly ‘incalculable’ threats of global terrorism are indeed being calculated and countered in new ways - this is what the global security law is all about. Incalculability is not a source of interminable doubt. It is the catalyst for new techniques of governing on the basis of uncertainty.

This book therefore relies on the work on Michel Foucault and the diverse body of interdisciplinary scholarship that analyses risk and pre-emption in counterterrorism as practices of governmentality. For Foucault, governmentality was an ‘ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics, that allow the exercise of this very specific albeit complex form of power’. Here government is not about political parties and institutions but rather the ‘diversity of powers and knowledges entailed in rendering fields practicable and amenable to intervention’. In governmental analyses, therefore, risk is not ‘a unitary and monolithic technology’ or the effect of ‘an inescapable “logic” of modernity’, but rather a ‘product of contingency and invention ... [and a] complex category made up of many ways of governing problems’. Understanding how pre-emptive security plays out as a practice of governmentality requires attention to its diverse empirical effects in specific settings.

This governmental approach to pre-emption has important consequences for how we study and understand processes of global legal change. Much of the legal literature on this issue, for example, defines pre-emptive security negatively in terms of what it is not. It violates due process and breaches fundamental rights. It is represented as something opposite to the liberal order. A governmental approach allows us to grasp the productive dimensions of this form of power in terms of the concrete rearrangements it effects. Furthermore, because of the centrality of knowledge production, ‘government is intrinsically linked to the activities of expertise’. As such, each chapter of this book analyses how different forms of expertise - including from UN listing experts, national security officials, judges, diplomats, the UN1267 Ombudsperson, academics and so on - embed and extend global security law and governance in far-reaching ways through technical means. The governmental frame therefore helps me to address the understudied nexus between global law and expertise and bring something new to the debate. My analysis of the list suggests that the politics of expertise is where the real global law-making action is taking place: connecting problems and technologies of global governance with the creation of new forms of pre-emptive security intervention, often in the background.

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98 Peter Miller and Nikolas Rose, ‘Governing Economic Life’ (1990) 19(1) Economy and Society 1, 3.


100 As Foucault argues:

We must cease once and for all to describe the effects of power in negative terms: it "excludes," it "represses," it "censors," it "abstracts," it "masks," it "conceals." In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.

Michel Foucault, Discipline and Punish: The Birth of the Prison (Allen Lane, 1977) 194. For an analysis of productive power in the domain of terrorism financing, see: de Goede (n 60) 47.


102 The notion of functional expertise operating in the background and driving global law making comes from David Kennedy and is discussed in more detail in the following chapter. See, for example: David Kennedy, ‘Challenging expert rule: the politics of global governance’ (2005) 27 Sydney Law Review 5; Kennedy (n 55).
Rethinking the Global Exception

In his 2012 General Assembly report the UN Special Rapporteur on Countering Terrorism and Human Rights noted that the Law of the List ‘provides a ready means by which individual States can make executive decisions with far-reaching consequences, apparently unconstrained by domestic judicial review, or the international human rights treaties by which they are bound’. The following year, the European Court of Justice dismissed the Security Council’s latest attempts at procedural reform (through the Office of the Ombudsperson) as inadequate, confirming that the list still operates in violation of basic fundamental rights, as it has done since its inception. Finally, scholar-experts from Brown University’s Watson Institute - who have long been some of the most fervent advocates of UN targeted sanctions policy - have now come to acknowledge that the ‘Al-Qaida sanctions regime … has evolved into the realm of the permanent exception’.

But if the list has evolved into a state of exception, what kind of exception is it? There is no formal derogation by any actor involved on grounds of ‘public emergency’. There is no national sovereign figurehead deciding to institute this exception, or any state of ‘normalcy’ that the Security Council might return to. Nor is there any pretence that the Al-Qaida listing regime is a temporary measure that will be rescinded once the global war on terror is finally won. Rather, it has been transformed to fight new enemies of the international community - the Islamic State of Iraq and the Levant (ISIL).

The third analytical move that this book makes is to rethink the problem of the exception in assemblage terms through my empirical study of the list. This exception has been the subject of heated debate since the 9/11 attacks, as scholars have struggled to theoretically reconcile liberal values of government with illiberal practices of executive rule and become engaged in moral conundrums about ‘ticking time bombs’ dilemmas and the like. Most scholarship on the issue draws on the work of Carl Schmitt or Giorgio Agamben. For these authors it is the decision of the sovereign to suspend the normal legal order that is of paramount importance - as Schmitt famously declared in Political Theology: ‘the Sovereign is he who decides on the exception’.

States of exception are also routinely characterised as ‘legal black holes’ defined by their absence of law.

This ‘decisionism’ and ‘lawlessness’ has important analytical and political consequences. In most scholarship, for example, emergencies have become synonymous with the unrestrained exercise of sovereign will. And so focus is placed on decrees by political figureheads (like George W. Bush), reproducing the idea that emergency power is something held by powerful heads of state and exercised in times of crises. This is not entirely inaccurate, but we also need to acknowledge that it also functions as an analytical alibi. It allows the broader field of emergency governance (composed of actors, agents, techniques and practices operating beyond the state) to pass by wholly unnoticed. Or as Jacques Rancière puts it, this approach ‘depopular[es] the political stage by sweeping aside its always ambiguous actors’, leaving only ‘the sheer relation of state power and individual life’.

Furthermore, because of the emphasis placed on national sovereign decision, these conventional

108 See, for example: Giorgio Agamben, State of Exception (University of Chicago Press, 2005). Agamben argues that the exception creates ‘a space devoid of law, a zone of anomie in which all legal determinations … are deactivated’. (at 51).
approaches are poorly equipped to grapple with how the exception is reconfigured in global terrain. As Kim Lane Scheppele argues, ‘we cannot understand what has happened since September 11 until we can see both international and domestic law together in thinking about the slide into emergency powers’. Moreover, the ‘lawless exception’ idea can only be sustained if we disregard empirical reality and confine ourselves to the realm of normative theory. As soon as we examine how things unfold in practice, we quickly see that laws and regulations permeate and condition exceptional security practices. In his analysis of Guantanamo Bay, for example, Nasser Hussain observes that:

... the difficulty in using the theoretical paradigm of the state of exception is that its specific substantive and connotative associations are ones of decision and declaration, abeyance and suspension, and an emptying out of set rules from governance. But this is all at odds with the proliferation of regulations and administrative procedures that mark the daily management of contemporary crises ... It is empirically the case that what one witnesses in contemporary emergency is a proliferation of new laws and regulations passed in an ad hoc or tactical manner, administrative procedures, and the use of older laws and cases tweaked and transformed for newer purposes.

This book addresses these deficiencies and pushes the problem of exception in an altogether different direction. In my analysis, the exception is not so much a ‘state’ standing opposed to normal affairs, something formally declared by an all powerful sovereign or the hidden matrix of power. It is the effect of diverse governance techniques, legal interventions, knowledge practices and mundane forms of functional expertise aligned through particular security problems. Exceptional governance, in other words, is something materially and legally assembled through a plethora of relatively banal programs and techniques and ‘little security nothings’. Humanitarians working on ‘smart sanctions’ and deflecting political critique of the regime (chapter 3); EU court officials developing procedures for judges to handle secret intelligence as evidence (chapter 4); security experts creating new techniques for translating ‘global terrorism’ into novel fields of intervention and global aviation officials trying to implement the list by forging new far-reaching techniques for pre-emptively targeting ‘inadmissible passengers’ (chapter 2). On their own, each of these examples may not amount to much. But when sutured together as an assemblage of co-functioning elements, I argue that we can see a variegated topology of global exceptional governance emerging. One that is provisional and diffuse yet dense, jurisgenerative and powerful.

This analytical move builds on a rich tradition of sociolegal research and critical security scholarship on this issue. It is an attempt to rethink problems of exceptional governance in empirical terms outside of the discourse of sovereignty. As Claudia Aradau argues, ‘what is important is not the distinction between exception and law, but what practices are deployed and how’. By studying the ‘novel recombination[s] of already existing ... mechanisms and modalities of power’ as practices of assemblage we can better grasp how exceptional rule is normalised and stretched through time.

110 Scheppele (n 13) 6.
116 Andrew Neal, Exceptionalism and the Politics of Counter-Terrorism: Liberty, Security and the War on Terror (Routledge, 2009) 124.
Notes on the Method Assemblage

(i) Performativity of Method and Situated Knowledges

In mainstream legal research, methodology is ordinarily disavowed as something that lawyers don’t particularly need. Law is imbued with an abstract normative quality and particular ‘pedigree’ that jurists can come to decipher through knowledge of legal doctrine. Reflecting on his own experiences in legal education, for example, Martti Koskenniemi remarked: ‘Either “method” equalled discussion about formal sources or it referred simply to techniques of finding the collections of documents from which authoritative statements about the law could be found’. Methodology, in other words, is shorthand for the techniques used by lawyers to ‘find the law’. When international law is studied empirically it is usually done so either to confirm the validity of a given legal theory or fine-tune policy-making in a particular functional domain. If methods are reflected on at all, they tend to be assessed instrumentally in terms of their ‘usefulness … to the practising lawyer … as opposed to the academic analyst’ and thereby reduced to a rather inert vocational service-delivery role.

Traditional social science does not so much disavow the methodological, as project ‘the social’ as a distinct realm discoverable by the researcher through the application of methodological tools. The job of the social scientist is to extract generalisable truths from empirical reality so as to ground universal claims. This approach to research assumes, as John Law and John Urry point out, that ‘there is a real world with real attributes, and that it is the job of social science to discover those of social and political significance’. In the social scientific tradition, therefore, methods are like ‘free-floating tools in conceptual space’. Different methodological techniques may produce different results and perspectives on reality. But they leave that reality fundamentally undisturbed.

The approach to methods deployed in this book depart from these positivist accounts in two crucial ways. First, following recent scholarship in critical security studies, sociology and Science and Technology studies (STS) I argue that methods are inherently performative: ‘they have effects, they make differences, they enact realities and they help to bring into being what they also discover’. Methods, in other words, are not only epistemological tools that enable researchers to know their research problems from different perspectives. They also operate in an ontological register to enact the different knowledge objects or realities that they describe. It is beyond the scope of this introduction to explore the philosophical implications of this reorientation in depth and, in any event, it is something we will be revisiting in later chapters. Suffice to say, this shift that comes with far-reaching consequences for how and why research is done. As John Law and John Urry explain:

123 Latour (n 64); Annemarie Mol, The Body Multiple: Ontology in Medical Practice (Duke University Press, 2002).
124 Law and Urry (n 119) 393
This shift from single to multiple worlds fundamentally shifts the focus of sociolegal research and takes us into more uncertain philosophical terrain. Rather than seeking to extract generalisable truths, methods need to be redone in ways that ‘no longer seek the definite, the repeatable, the more or less stable’.126 So this book focuses on what Foucault called the ‘flat and empirical little question’ of how rather than the usual what or ought questions that ground legal and political texts.127 As John Law argues, ‘if we want to understand how realities are done or to explore their politics, then we have to attend carefully to practices and ask how they work … [and] get assembled in particular locations’.128 Or, as I discuss below, we need to study the local sites producing the conditions for global security law and analyse listing practices as ‘assemblages of relations’.129 But this shift also means that when I am describing elements of the global listing assemblage throughout this book, my findings are both real and an effect of my frame and method. Once we move from a singular world to multiple and conflicting worlds, there is no getting around this. There is no ‘nowhere’ where I can analyse the workings of this security list to extract universal and generalisable truths for the reader. To pretend there is such a privileged space would be to try and pull what Donna Haraway has called the ‘god trick’.130 This is not to say that what is presented in this book is something arbitrary, imagined or fictional. Rather, it is to state clearly that the knowledge generated here is necessarily situated. As Rebecca Coleman and Jessica Ringrose point out: ‘taking seriously the idea that methodology is a way of relating to multiply assembled worlds suggests that social scientists are themselves entangled within the assemblages they seek to study’.131

The second related point is that if methods are performative practices, that help enact the knowledge objects that come about through their use, then they are also intensely political. The way we do research partakes in what Annemarie Mol calls ‘ontological politics’ because it enacts certain realities, and obstructs others.132 Our methods interfere with the world, rather than merely describe it.133 As discussed earlier in this introduction, I came to this research project as a practising lawyer representing individuals targeted by this global security list. So I have an intimate knowledge of the violence and injustices of this security regime because I know the experiences of my clients and just how little justification is needed to destroy their lives and the lives of their families. These were people targeted not for acts they have done but for what others think they might potentially do in the future. It was my knowledge of this violence, and of the real limits of human rights claims to speak to it, that first led me to question how the list works as a novel form of global exceptional governance. This positioning and sense of injustice doesn’t disappear as soon as I put on my professional or academic hat. It is what motivates my legal work in this area and shapes how I have conducted this research.

125 Ibid, 397.
126 Law (n 122) 6.
128 Law (n 67) 157.
129 Ibid.
133 Haraway (n 130); Mol ibid.
As a lawyer working in this field, for example, I was granted access to a range of interviewees that non-practitioners would have difficulty reaching. I could easily talk with legal professionals in this domain because I am a legal professional in this domain myself. Trying to grapple with the complexities of using intelligence-as-evidence (as discussed in chapter 4) emerged from my own difficulties in doing so as lawyer trying to represent the best interests of my clients. I could study the inner workings of the UN1267 Ombudsperson delisting process (as discussed in chapter 3) because I have been through it a number of times myself. And I was able to analyse the effects of the UN Special Rapporteur on Counterterrorism’s interventions in the General Assembly on this issue because I was directly involved in helping to draft his report (as discussed in Chapter 3). This involvement ended up facilitating numerous contacts in New York and elsewhere that led to more interviews and insights about the Al-Qaida listing regime that inform the observations now presented in this book.

My point in making these networks visible is not to lay claim to some special authenticity. But to acknowledge my partial positioning and complicity in this process of knowledge production and yet, at the same time, also make the claim that does not detract from its empirical veracity as a faithful ‘real world’ account. This is not just a disclaimer neatly inserted at the start of the book. But part of an ongoing reflexive process that has been continually revisited, taken into account and recalibrated throughout the five year course of this project and that has informed and, at times, rearranged its design. When the research process is reframed in this way, the operative logic becomes one of sustained engagement rather than dispassionate detachment. As Donna Haraway argues: ‘We do not seek partiality for its own sake, but for the sake of the connections and unexpected opening situated knowledges make possible. The only way to find a larger vision is to be somewhere in particular ... living within limits and contradictions’.  

(ii) Sites

If this global security list is a multiple, fragmented and unevenly distributed governance technology how can it best be studied as a research object? How might global security law be understood not merely as a series of all-encompassing, UN Charter Chapter VII decrees but productively reposed as something heterogeneous and very much under construction? What methodological tools can be used to analyse such emergent forms of exceptional governance in motion? How can we analyse something so seemingly big, expansive and global as UN Al-Qaida listing regime?

This book responds to these problems by studying global security law ethnographically as something produced and sustained from multiple localised sites. Studying ‘the global’ in this way may seem counterintuitive to those who assume that the global is a much larger research object, operating at an altogether grander scale. However, drawing from recent scholarship in anthropology, sociology, actor-network theory and international relations the approach adopted in this book is that global processes and things are always made in local ‘structure-making’ sites or ‘legal complexes’ whose effects can be studied empirically. Breaking ‘the global’ down in this way, as Bruno Latour points out, has the effect of modifying ‘the entire topography of the social world’ by performing what he calls a ‘flattening of the landscape’: wherein the ‘macro no longer describes a wider or larger site in which the micro would be embedded ... but another equally local, equally micro place, which is

134 Haraway (n 130) 196. I am not claiming the embodied feminist positioning advocated by Haraway here but rather drawing on her insights concerning situated knowledge production and partial objectivity to make a point about my reflexivity in this research.

135 Latour (n 64) 175 - 176; Rose and Valverde (n 71) 541. The term ‘legal complex’ is used instead ‘Law’ to refer to ‘the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgment’ (at 542).
connected to many others through some medium transporting specific types of traces'.\textsuperscript{136} Or as anthropologist George Marcus puts it: ‘The global is an emergent dimension of arguing about the connection among sites’.\textsuperscript{137} Not a pre-given governance scale securely positioned at the apex of the international order, as lawyers and globalisation theorists often suggest. But a contingent achievement, an effect of legal and political practices or empirical problem that needs investigation.

Ethnographers conventionally embed themselves in the cultural habits of a particular locale. But when the object of study is mobile and multiply situated, researchers and their methods must become mobile and multiply situated as well. This means using what Marcus has termed ‘multi-sited ethnography’, to follow the flows of people and things across local sites to map how relations are made and stabilised and the global is produced in practice. In Nancy Scheper-Hughes’ fascinating study, for example, the global market in human organs is studied from a multiplicity of different sites and scales - including interviews with ‘kidney patients in their homes’ and transplant specialists in their surgeries to meetings with organ brokers ‘in suburban shopping malls’ and local kidney sellers ‘in squatter camps in Manila’.\textsuperscript{138} Multi-sited methods are deployed to grasp how the human organs market functions in relation to organised crime and the illicit transplant economy. According to Scheper-Hughes, this project prompted ‘odd juxtapositions of ethnography, documentation, surveillance and human rights work’ that required her to deviate ‘from standard fieldwork practice and ethics’, go undercover and approach her research problems with a certain degree of experimentalism and militancy.\textsuperscript{139} The assumption underpinning multi-sited methodological approaches is that we live in a world ‘fundamentally characterized by objects in motion’ but these flows ‘are not coeval, convergent, isomorphic or spatially consistent’.\textsuperscript{140} They are heterogeneous, disjunctive and generative of conflict and ‘regulatory fractures’.\textsuperscript{141} The methodological task, according to Arjun Appadurai, ‘is to name and analyse these mobile … forms and to rethink the meaning of research styles and networks appropriate to this mobility’.\textsuperscript{142} Multi-sited ethnographies aim to address these dynamics by ‘following connections, associations and putative relationships’.\textsuperscript{143}

This book follows this methodological shift and analyses the list as a multi-sited research object. Multi-sited ethnographic methods are ideally suited to this project because the list is mobile and composed by a multiplicity of actors from different domains operating at different governance scales. To capture how the global listing assemblage works, each chapter travels to different empirical sites to examine how problems of the list are being negotiated and novel legal and political relations forged. We ‘follow the list’ to meetings of UN experts and North African security agencies, for example, and governance projects with the global aviation industry to enhance implementation (chapter 2). We revisit debates amongst scholars pushing for sanctions to be targeted for global humanitarian reform and trace how their revalorisation as counterterrorism experts has altered the list in significant ways (chapter 3). We hone in on the UN1267 Office of the Ombudsperson and the novel governance techniques, discourses and knowledge practices they are crafting to make the listing process ‘fair and clear’ (chapter 3). And we go inside the EU courts to explore how judges are dealing with the complexities of reviewing a security list founded on the use of intelligence-as-

\textsuperscript{136} Latour (n 64) 176.
\textsuperscript{138} Nancy Scheper-Hughes, The Last Commodity: Post-Human Ethics and the Global Traffic in “Fresh” Organs’ in Ong and Collier (n 60) 145, 147.
\textsuperscript{139} Ibid, 148. For example: ‘In Turkey in February 2002 I posed as a potential buyer desperately seeking a kidney in order to meet with kidney sellers at a “Russian suitcase market” in ... Istanbul’ (at 148). I use this as an example multi-sited methods. I did not pose as someone else when undertaking this research. I always explained that I was both a lawyer and researcher.
\textsuperscript{141} Saskia Sassen, ‘Spatialities and Temporalities of the Global: Elements for a Theorization’ - Appadurai ibid 266.
\textsuperscript{142} Appadurai (n 140) 7.
\textsuperscript{143} Marcus (n 137) 97.
evidence (chapter 4). There is no unifying methodology that is programmatically ‘applied’ in each chapter. Instead, different methods and theoretical lenses are used across the different sites depending on the particular problems under investigation. So whilst chapter 2 explores the politics of listing expertise using Actor-Network theory techniques, chapter 3 uses genealogical critique to present a counter-history of the Ombudsperson. My aim is to build a text that is generative and ‘engages intensively with the kinds of materials that it produces’.144 ‘What is needed’, says Marcus commenting on graduate dissertations, are not documentaries of the global that purport to be seamless, but rather ‘practices of composition somewhere between fieldnotes and finished texts’.145

Each foray to a particular site uses semi-structured interviews with key actors in the assemblage to gauge the effects of the list as a technology of pre-emptive security governance. More than 30 interviews were conducted in total, between 2012 and 2015, with a diverse array of participants - including UN diplomats and members of the Secretariat, security and intelligence experts, academics working on targeted sanctions, members of the Al-Qaida Monitoring Team, judges reviewing listing cases and lawyers representing listed individuals, sanctions officials in national states and EU institutions, members of the UN1267 Sanctions Committee and experts from other international organisations (like Interpol, ICAO and IATA) drawn into the listing assemblage. Some interviews were one-off encounters. Others were repeat affairs. My aim was to better understand how conflicts of the list were being negotiated and, in so doing, ‘how particular knowledge claims acquire the functions of expertise’.146 Not by simply describing ‘what is done’ but rather by studying ‘how it is done’ and providing an ant’s-eye view of the problems.147 All interviews took (at least in part) a critical approach and used dissenting questions to avoid the common problem of being drip-fed ‘public relations talking points’ by political professionals. All interviews except two were undertaken on a confidential basis.148 Interview dates and locational details have been kept to a bare minimum, or omitted in some cases, throughout the text to preserve the anonymity of the speakers.

The ‘field site’ of this book is therefore more fragmented than those of IR scholars asking whether UN sanctions are meeting their policy objectives149 or lawyers asking whether the EU courts were legally justified in acting the way they did in the Kadi case.150 ‘The difficulty’, as Boaventura de Sousa Santos notes, is that ‘socio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints’.151 Doing multi-sited ethnographic fieldwork seeks to methodologically grapple with this complexity. But as the following chapters show, this produces a picture of the list more akin to a Dziga Vertov constructivist montage than a classical ‘talking heads’ documentary on the topic.152 Yet it would be wrong to assume that this multi-sited approach to studying global law is somehow more ephemeral and superficial than conventional doctrinal accounts. Or that due to fragmentation, ‘everything is simply messy and featureless ... and that no generalisations are possible’.153 As the following chapters show, this method enables a much more situated and textured account - what Clifford Geertz would call a ‘thick description’154 - of the

145 Ibid.
147 Ibid.
148 These were the interviews with the former UN1267 Ombudsperson (Ms Kimberly Prost), elaborated upon in chapter 3. As there is only one Ombudsperson in this area it was impossible to interview her on condition of anonymity.
149 See for example: Francesco Giuricelli, Coercing, Constraining and Signalling: Explaining UN and EU sanctions after the Cold War (ECPR Press, 2011); Biersteker, Eckert and Tourinho (n 105).
150 See the debates between global constitutionalists and global legal pluralists discussed above.
152 The Vertov analogy is from George E. Marcus, see: Marcus (n 137) 106.
154 Clifford Geertz, ‘Thick description: Toward an interpretive theory of culture’ in Michael Martin and Lee C. McIntyre (eds.)
heterogeneous relations, technical artefacts and knowledge practices that are being assembled to produce this form of law as something powerful and global. Deploying methods more attentive to complexity will undoubtedly mute the immediate ‘policy relevance’ of this study and frustrate those seeking a comprehensive overview of what global security law is. But when we move beyond such instrumental concerns, the analytical gains are considerable. It is precisely ‘through the complexity of the empirical’, as Andrew Barry argues, ‘that one gets the sense of the irreducibility and contestability of the social, the disjunctions between the programmatic statement of policy and the messiness of actuality, the contingency of history and intersections of diverse historical and geographical movements’.

Studying the Law of the List as a multi-sited project also resonates with calls to bring empirical sociolegal methods to bear on contemporary problems of transnational governance. In a recent EJIL article, for example, Joost Pauwelyn, Ramses Wessel and Jan Wouters made the point that formal international lawmaking was rapidly being supplanted by more informal and heterogeneous arrangements of ‘new actors, new processes and new outputs’. Given this complexity, the authors conclude that ‘the conceptual boundaries of how international law may look in the future are [currently] wide open’. Understanding this complexity, according to Eve Darian Smith, demands a ‘global sociolegal perspective’ that ‘destabilizes our modern and linear understandings of what law is, where law appears and how law works’. Only approaches that show how the ‘lines of demarcation ... between and within local, regional, international, transnational and global legal arenas’ are ‘dynamic and porous’ are fit for the task of grappling with the dynamics of contemporary global legal ordering. Similarly, Sally Engle Merry calls for a ‘deterritorialized ethnography’ to ‘understand the space of law in the current transnational era’. For Merry, this means scaling sociolegal methods up to track ‘the flows of people, ideas, laws and institutions across national boundaries’, ethnographically examining ‘particular nodes ... within this field of transnational circulation’ and mapping how ‘emerging legal technologies ... construct and sediment forms of legal knowledge and practice’. In studying the Al-Qaeda list ethnographically as a multi-sited research object this book speaks to this shared concern for more dynamic forms of global sociolegal analysis. It is an experiment that has not been tried before with respect to global security law. The idea is to allow readers to experience the Law of the List as something emergent and very much in motion.

(iii) Practices

This emphasis on multiple sites resonates with recent scholarship reappraising the important role of epistemic techniques and practices in law and governance. Here I draw insights from a diverse array of scholarship - including governmentality and Science and Technology Studies (STS), assemblage research across different disciplines, the practice ‘turn’ in international relations and critical security studies and sociolegal studies- to study the UN Al-Qaeda listing regime from the vantage points of how it is practiced. The basic idea I take from each of these approaches is fairly straightforward: that governance unfolds through the techniques, materials and practices that are used to render particular problems knowable, stable and governable. But the implications of this approach can be

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155 Barry (n 153) 24.
157 Darian Smith (n 69) 12, 13.
158 Darian Smith (n 69) 8. On the limits of social science methods vis-à-vis the global, see: Law and Urry (n 119) 390.
159 Engle Merry (n 68) 993.
160 Ibid, 976.
profound. Instead of only seeing the world structured through powerful institutions and agency contained in the hands of powerful actors, things are ontologically reversed. Institutional formations and agency in legal governance are recast as effects of practice. Consider the question and shift in perspective posed by Foucault in his genealogical study of the modern European state:

What if the state were nothing more than a way of governing ... What if all these relations of power that gradually take shape on the basis of multiple and very diverse processes which gradually coagulate and form an effect, what if these practices of government were precisely the basis on which the state was constituted?\(^\text{162}\)

This book seeks to perform such a reversal in the domain global security law. What if instead of looking towards the binding legal authority and high politics of the UN Security Council to explain the origins and effects of the Al-Qaida listing regime, we shift our focus to the domain of technical expertise and examine how things are being materially rearranged in novel and far-reaching ways? What if new forms of legal ordering are emerging from the techniques being used to ‘know’ global terrorism, not just contained in Chapter VII decrees and their implementation by Member States?

Such a reorientation toward practice might enable us to see ‘inchoate geographies [for] a new type of ordering, a reality in the making’, as Saskia Sassen suggests.\(^\text{163}\) But it might also reveal flaws and contradictions in this global security project and show how efforts to ameliorate these problems are themselves productive of novel governance effects. ‘Government’, as Peter Miller and Nikolas Rose have pointed out, ‘is a congenitally failing operation’.\(^\text{164}\) Attending to how failures are ‘smoothed out’ to ‘seem superficial rather than fundamental’ or recombined with existing legal techniques to become something new is a key element of this kind of sociolegal research.\(^\text{165}\) Assemblage, in other words, is both a noun and a verb.\(^\text{166}\) We come to know assemblages by studying assemblage practices - or tracing the ‘hard work required to draw heterogeneous elements together, forge connections between them and sustain these connections in the face of tension’.\(^\text{167}\) When methods for studying the global are recalibrated toward ‘bundles of ideas and practices as realized in particular times and places’, as Anna Tsing suggests, they produce novel and surprising results.\(^\text{168}\)

In her ethnography of global financial governance, for example, Annelise Riles shows how seemingly mundane legal techniques and marginal market practices - what she calls ‘collateral knowledge’ - enables ‘thin but nevertheless robust sociotechnical relations among individuals and machines in different institutions cities and countries’ that makes global financial governance possible.\(^\text{169}\) Legal governance, argues Riles, ‘is ultimately not so much a matter of grand designs as it is a set of lived practices and techniques ... that are often disparaged or ignored’.\(^\text{170}\) Understanding it requires a revalorisation of ‘legal technicalities’ to examine how legal knowledges are actually formed.\(^\text{171}\) Anne Orford’s genealogy of the Responsibility to Protect (R2P) doctrine performs a similar methodological


\(^{163}\) Saskia Sassen (n 82) 64.

\(^{164}\) Miller and Rose (n 98) 10 – 11.

\(^{165}\) Law (n 122) 42. As Tania Murray Li notes: ‘assemblage links directly to a practice, to assemble – Li (n 75) 264.

\(^{166}\) Li (n 75) 265.

\(^{167}\) Law (n 122) 42. As Tania Murray Li notes: ‘assemblage links directly to a practice, to assemble – Li (n 75) 264.


\(^{170}\) Ibid, 246. See also: Mariana Valverde, ‘Authorizing the Production of Urban Moral Order: Appellate Courts and their Knowledge Games’ (2005) 39(2) *Law & Society Review* 419, 427 - who argues that ‘highlighting the dynamics of knowledge processes while backgrounding the content and the politics’ in sociolegal research ‘can lead to new insights about the taken-for-granted machinery of law’ that critical legal scholars routinely dismiss as ‘technical’.

\(^{171}\) Riles (n 169) 64 - 70. This revalorisation of the technical in law is discussed in more detail in the following chapter.
shift. Most accounts situate the emergence of R2P in the humanitarian global governance of the 1990s. But Orford shows how the doctrine was forged through the incremental consolidation of governmental practices aiming at "the maintenance of order" and "the protection of life" in the decolonised world.\footnote{Anne Orford, International Authority and the Responsibility to Protect. (Cambridge University Press, 2011) 1.}

These practices had been developed by the UN since the late 1950s and ‘transmitted through operationally orientated documents such as Security Council mandates, rules of engagement, instruction manuals, [and] reports and studies outlining lessons learned.’\footnote{Ibid, 5.}

‘International executive rule’, in Orford’s fascinating empirical account, ‘developed through the systematisation of practice rather than through the development of detailed doctrines or norms’.\footnote{Ibid, 6. For methodological parallels between Orford’s project and Foucault’s genealogy of the modern state, see: Anne Orford, ‘In Praise of Description’ (2012) 25(3) Leiden Journal of International Law 609, 616 - 618.}

This book seeks to build on these efforts to understand global law and governance through practice. In so doing it aims to contribute to methodological debates in sociolegal studies, international law, international relations and critical security studies. The chapters that follow provide a granular empirical account of how the UN Al-Qa’ida listing regime is sustained through knowledge practices and governance technologies aimed at pre-emptively countering the threats of global terrorism. Chapter 2 analyses the list itself as a crucially important agent of governance that conditions this form of global security law in crucially important ways. Chapter 3 pushes the practice focus in a more explicitly ontological direction. Drawing on the ‘praxiography’ of Annemarie Mol I analyse how the divergent practices of the actors across the assemblage enact the list as a multiple object and posits the Ombudsperson as a key figure holding this multiplicity together through recombinant legal practices and techniques.\footnote{Mol (n 123).}

Chapter 4 examines how the temporal complexities, spatial dynamics and mosaic epistemology of the list are being negotiated by judges seeking to perform judicial review and uphold the rule of law. My aims in studying the list through its practices are both forensic and political. Showing how small shifts in relatively mundane, knowledge techniques at a micro-level can provide important sources of legal change within powerful macro-organisations like the Security Council, transforms our understanding of global security law into something more partial, contingent and situated. It is an analytic tactic that Michel Callon and Bruno Latour evocatively refer to as ‘unscrewing the Big Leviathan’.\footnote{Callon and Latour (n 65) 277.}

This listing regime is a more difficult object to empirically study than many others. Because it targets people ‘associated with’ Al-Qa’ida using closed intelligence material, the inner workings of the list are opaque and shrouded in secrecy. Getting people to talk can be difficult and finding people to talk with even harder. This presents a methodological dilemma: how can we empirically study a domain of law from a global sociolegal perspective, map a particular research field or ‘follow the actors’ in a legal assemblage when it is obscured by secrecy on justified on security grounds?\footnote{William Walters. ‘Drone Strikes, Dingpolitik and Beyond’ (2014) 45(2) Security Dialogue 101, 105. On following the actors as a methodological strategy, see: Latour (n 64) 11 - 12.}


Others exploit the eroding public/private divide by interviewing programmers working for firms who build the algorithms that both help companies to identify...
potential new customers and states to target potentially risky travellers at the border.\textsuperscript{179} Swathes of seemingly mundane flight log data have been gathered and analysed to map networks of global rendition and torture.\textsuperscript{180} Others use high-powered telescopic photography to document secret military bases or forensic techniques to digitally reconstruct the human effects of drone strikes.\textsuperscript{181}

One technique used in this book to address this methodological problem is reliance on leaked classified documents. In November 2010 Wikileaks publicly released more than 250,000 confidential US Embassy Cables. Diplomatic cables have long been the preferred format of communication for sending messages between state departments (or foreign ministries) and their diplomatic posts around the world. They were historically transmitted via undersea telegraph cables (hence the name), but since the 1960s they have been sent electronically through computer networks and archived in digital repositories.\textsuperscript{182} In May 2010, a disaffected US soldier and intelligence analyst (Chelsea Manning) copied cables from a database used by US Department of Defense and passed them to Wikileaks for publication. Cablegate – as this leak came to be known - involved ‘the largest set of confidential documents ever to be released into the public domain’.\textsuperscript{183} Select cables were published by leading newspapers around the globe, leading to highly embarrassing stories for world leaders to explain. But they were also released online as a searchable database for journalists and academics.\textsuperscript{184} And it was this database that I used extensively to undertake this study.

These leaked cables are a veritable treasure trove for researchers seeking to investigate secret domains of governance. In this book I have used them in three ways. First, and most importantly, these cables have helped me to map what would otherwise be a secret research field and find out who and where the key nodes in the legal assemblage are. They allowed me to understand that the key agents of change in this global regime are not necessarily diplomats in UN missions in New York or the heads of government counterterrorism departments. Through the Cables one can see that functional experts, in-house lawyers, low-level security officials and otherwise faceless bureaucrats play a critical important role in assembling this form of law.

In chapter 2, for example, I investigate a series of consultation meetings between the UN 1267 Monitoring Team and the security agencies of key states in the global war against terror. Through the cables I was able to observe that certain intelligence officials were in conflict with the Security Council because they wanted greater access to US intelligence material and technical assistance (for example, to surveillance their populations) in exchange for their co-operation in implementing the list. The cables enabled me to identify who the key interlocutors in this conflict were, including one particular official in a North African state of key strategic interest. After further internet research, I tracked this official down to an embassy in central Europe. And following a few emails and calls, I was able to set

\textsuperscript{179} See, for example, Louise Amoore’s analyses of the UK ‘e-border’ program, which was studied in these terms: Louise Amoore, ‘Data Derivatives on the Emergence of a Security Risk Calculus for our Times’ (2011) 28(6) Theory, Culture & Society 24. According to Trevor Paglen state secrecy ‘can only be characterized by contradiction’ because ‘secret relations, programs, sites, and events have to be made out of the same ‘stuff ’ that everything else (ie the nonsecret world) is made of’ – see: Trevor Paglen, ‘Goatsucker: Toward a Spatial Theory of State Secrecy’ (2010) 28(5) Environment and Planning D: Society and Space 759, 760.


\textsuperscript{181} Trevor Paglen and Rebecca Solnit, Invisible: Covert Operations and Classified Landscapes (Aperture, 2010). For an overview of the Forensic Architecture project digitally reconstructing drone strikes, see: http://bit.ly/2a8E0mZ.

\textsuperscript{182} For a succinct history, see: Tobias Wille, ‘The Diplomatic Cable’ in Mark Salter (ed.) Making Things International II: Catalysts and Reactions (University of Minnesota Press, 2015).


\textsuperscript{184} Originally, the cables were made available in a searchable database called Cablesearch built by the European Center for Computer Assisted Reporting (ECCAR). But the site was subsequently taken down. The cables are now accessible online as the Wikileaks Public Library of US Diplomacy. Available at: http://bit.ly/29HT185.
up a meeting and fly in for an interview. This three-hour discussion not only provided crucial empirical material for understanding the problems in chapter 2. It also facilitated research access to other important actors in the listing assemblage who would otherwise have been invisible.

Earlier in this introduction I argued that methods are entangled in enacting the objects that they discover, and the above example neatly underscores this point. Following the associations drawn by the cables has allowed me to produce the very listing assemblage that my framework and method sought to help me know. As Evelyn Ruppert, John Law and Mike Savage have argued, methods are ‘simultaneously embedded in and shaped by social worlds, and can in turn become agents that act in and shape those worlds’ – a process that they describe as the ‘social life of methods’. Leaked documents, in other words, don’t just help me make the invisible world of global security law visible. They are not just about transparency and representation. In this study, they are also performative.

Second, these leaked cables also helped me to identify and better understand what the critical issues with the listing regime are for the key actors within it and to modify my research design accordingly. Whilst legal scholars were preoccupied debating the significance of the Kadi case, for example, the cables allowed me to see that powerful states had already got on with the task of trying to undercut the power of the courts by introducing new procedures empowering EU judges to use intelligence as evidence. This had the effect of re-orientating my listing research in a different direction. Whilst others were arguing about whether global constitutionalism or global legal pluralism offered the most appropriate frame for understanding the Kadi case, the cables helped me to organize interviews inside various institutions to explore how the macro-problems of the listing regime were being quietly negotiated outside of formal processes (like Court judgments and Security Council debates) without any debate through seemingly mundane micro-procedural adjustments. Insights gleaned from these interviews structures the analyses and arguments presented in chapter 4.

In my original research plan for this project I had hypothesised that executive access to intelligence might be a critically important catalyst for conflict in this domain because it allowed the executive to participate in accelerated global networks of information exchange. Globalisation, in other words, is about speed and affording executives relative temporal advantage vis-à-vis legislatures and courts, as advocated in diverse body of academic scholarship. But the cables quickly allowed me to see the glaring problems of this approach in relation to this particular area. Actors who should have had access to the material supposedly underlying the list were complaining that they had nothing and were effectively being kept out of the decision-making loop. What I had thought might be a relatively seamless world of accelerated global security networks, appeared as something far more fragmented and shaped by geopolitics of the Cold War and the ‘Five Eyes’ intelligence relationship. This cable-induced insight allowed me to revise my original plan and take the project in a different direction. Instead of a body of global security law driven by the transnational intelligence exchange and access to accelerated networks, a different problem emerged: how can this global regime persist when listing authorities are taking ‘decisions’ with such little consideration as to why and the information supposedly underneath the list is so ‘patchy’ and unevenly distributed? This shift prompted a rather different research agenda and set of findings, as chapter 4 plainly demonstrates.

185 Ruppert, Law and Savage (n 122) 31.
186 See, for example: William E. Scheuerman, Liberal Democracy and the Social Acceleration of Time (John Hopkins University Press, 2004); Hartmut Rosa and William E. Scheuerman (eds.) High Speed Society: Social Acceleration, Power and Modernity (Pennsylvania State University Press, 2009). Saskia Sassen also argues that global assemblages facilitate a redistribution of power within the nation-state towards those elements and agencies that are more directly connected with global structures (for example, in international finance), thus consolidating the power of the executive branch and weakening its overall accountability – Sassen (n 60) 384.
Finally, I used the cables as a kind of analytical crowbar during my interviews to prise open greater access to confidential empirical material. When I was researching the political background to the introduction of new procedural rules at the European General Court (as analysed in chapter 4), the cables gave me access to the minutes of key meetings between US and EU officials on this issue. And these minutes gave me both the names of the bureaucrats who were key players in the negotiations and a very frank account of what they had already said and done on the issue. Thereafter I wrote and set up various appointments for interviews. And as the interviews went on, I was able to quietly introduce the material from the Cables into my questions. This meant that instead of starting from a relatively uninformed position, my interview questions could be orientated towards the key conflicts in the listing assemblage and closely calibrated with my interviewees’ positions. This facilitated rapport-building, which in turn allowed me to elicit more meaningful, higher quality data and encourage participants to elaborate on the confidential material. This crowbar technique worked so well that one interviewee contacted me afterwards to insist that I could not use what we had discussed unless I agreed to have my research vetted by his country’s security services. In the end I decided not to rely on this material, rather than go through a protracted official approval process.

According to Bruno Latour and Michel Callon, actors become powerful by placing practices ‘in a hierarchy in such a way that some become stable and no longer need be considered ... An actor grows with the number of relations he or she can put ... in black boxes’ where black boxes contain ‘that which no longer needs to be reconsidered’. The task of the researcher is then to open up the particular black box of enquiry and trace the heterogeneous associations and relations it contains. This is how one undertakes a ‘sociology of associations’ and studies an assemblage in the Actor-Network tradition. But when ‘the blackbox is a locked box’, suggest William Walters and Jacqueline Best, the situation is dramatically altered. In such situations, they argue that ‘the researcher must now follow the trail of those mediators who have made it their task to name and open up worlds of secrecy’. When the field is covert, the differences between hackers, whistleblowers, investigative journalists and academic researchers are narrowed. Undertaking empirical research on secret governance requires a commitment to openness and certain methodological disobedience.

Structure of the Book

The book is structured around three empirical chapters that examine the listing assemblage from different sites. Each chapter engages with a particular problem and traces how it is negotiated by a range of different actors to help me address the key research questions. There is no overarching narrative linking the different parts into a coherent whole, but key concepts run transversally across the text are iterated at the different sites under study. This isn’t a thesis where the concepts are set out up front in the ‘theoretical chapter’ and then briefly revisited again in the end to tie everything together, sandwiching the empirics. The theoretical development rather takes place throughout the chapters as we analyse the empirical material. This is an approach that is prompted by the assemblage lens itself and the philosophy of what Deleuze calls ‘pragmatics’. According to Deleuze, in rationalist approaches ‘the abstract is given the task of explaining and it is the abstract that is realized in the concrete’. But with multiplicities, empiricism ‘starts with a completely

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189 Callon and Latour (n 60) 284 - 285.
190 Latour (n 64) 9.
192 Ibid.
193 Deleuze and Parnet (n 62) vii.
different evaluation: analyzing the states of things in such a way that non-pre-existent concepts can be extracted from them’ to ‘find the conditions under which something new is produced’.\textsuperscript{194}

The aim of this book then is to open up novel ways of thinking about global security law and governance by providing a detailed sociolegal account of the listing assemblage in motion. Because of the way the book is structured, the chapters need not be read in any particular order. Readers are encouraged to approach this text generatively, as a ‘box of tools’, appropriating the different ideas that are presented throughout in ways that resonate with their own particular research interests and problems.\textsuperscript{195} The book is primarily written as a global law text with a focus on the politics of counterterrorism. But it aims to have broader interdisciplinary appeal so other readers shouldn’t tune out just yet. As suggested in this introduction, different parts of this book will be of interest to those interested in sociolegal studies, global governance and human rights, STS and sociology of knowledge, the ‘practice turn’ in international relations, ethnographies of globalisation, humanitarian governance, international and transnational law, and critical security studies. If you don’t find something that resonates straight away, skip along or keep reading through the detail until you do.

Chapter 2 focuses on the UN1267 Al-Qaida Analytical Support and Sanctions Monitoring Team - an expert group supporting the Sanctions Committee (made up of the Security Council P5 states) to administer the list. This chapter engages with the practical problem of how to target ‘global terrorism’ - an issue that has eluded all earlier attempts at definition and that is shrouded in political and epistemic uncertainty. Drawing from actor-network theory and governmentality scholarship, I show how the technology of the list itself plays a crucial role in rendering this elusive problem governable – by building a ‘global optic’ for seeing dispersed terrorist networks and ordering an otherwise dis-organised global threat.

I analyse the practices of UN listing experts at two specific sites – (i) in ‘consultation meetings’ with national security and intelligence officials directed at populating the list with potential targets and (ii) in collaborations with experts from other IOs to make the list interoperable with global policing data (Interpol) and the passenger data held by the global aviation industry (ICAO and IATA). These seemingly innocuous technical practices that aim at better implementing the list have escaped academic attention. But this chapter shows how analysing expert knowledge practices can reveal important insights into how global security law is being made into something powerful, durable and global. If we are interested in understanding how new forms of global administrative violence are forged in the shadows of formal law and the Security Council’s Chapter VII authority, then empirically studying the techniques and practices of listing expertise is something critically important.

Chapter 3 shifts the focus to the enduring problem of accountability in global governance and follows what happens when UN sanctioning powers originally designed to discipline recalcitrant states deemed threats to international peace are recalibrated to directly target individuals suspected of being nodes in global terrorist networks. It provides a detailed genealogical account of the emergence of the UN1267 Office of the Ombudsperson - a novel procedural mechanism created by the Security Council in 2009 to provide redress to listed individuals who believe that they have been wrongly targeted. This conflict about ‘fair and clear procedures’ in Security Council sanctions has animated the

\textsuperscript{194} Ibid.

\textsuperscript{195} In conversation with Michel Foucault, Gilles Deleuze said that, ‘a theory is exactly like a box of tools ... It must be useful ... it is an instrument for multiplication’. Similarly, Foucault argued that ‘theory does not express, translate or serve to apply practice. It is practice’. See: Michel Foucault and Gilles Deleuze, ‘Intelectuals and power’ in Donald Bouchard (ed.) Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault (Cornell University Press, 1977) 205, 208. This idea of generative reading is discussed by Brian Massumi in his foreword to the English translation of A Thousand Plateaus – Deleuze and Guattari (n B1) xv.
Al-Qaida listing regime since its inception. All the key actors across the listing assemblage debated this critical issue for the better part of a decade. Whilst there is still disagreement as to whether the Ombudsperson goes far enough to protect due process rights, everyone tends to agree that it is an important step in the right direction towards greater human rights compliance.

My analysis challenges this narrative of global legal progress and complicates the claim that the Ombudsperson provides ‘fair and clear’ procedures. I show how the Ombudsperson is a composite figure of expertise born out of diverse institutional struggles under conditions of international legal fragmentation. My key argument is that different actors in the listing assemblage enact fundamentally different versions of the list through their practice - that is, that the Al-Qaida list is best thought of as what STS scholars call a ‘multiple object’. When the accountability problem is reposed in this way, we can see that Ombudsperson functions as a kind of institutional glue or ‘boundary object’ that helps to align the different actors, mute underlying political tensions and hold the different versions of the list together in a relatively stable yet uneasy relation. Drawing from interviews with the Ombudsperson and my own experiences representing individuals in UN delisting proceedings, I critique the claim that this innovation offers ‘de facto judicial review’. In my account, these unique delisting practices and techniques are concerned with embedding new forms of pre-emptive security and rendering the the list durable as a global exceptional governance device.

Chapter 4 follows the list into the EU courts and the practice of judicial review. It explores what happens when the pre-emptive security logics and governance of radical uncertainty embedded in the technology of the list meets the principles of judicial proof and evidence long used and protected by the courts. The chapter empirically examines the recent reform of the procedural rules of the General Court of the EU to allow judges to rely on intelligence material without disclosure for the first time. These reforms are explored as an attempt to resolve the complexities associated with judicially reviewing a list grounded in the use of intelligence-as-evidence and eliminate the kinds of norm conflicts one sees in the Kadi case.

Most global law scholarship disregards issues of time and space. Chapter 4 speaks to this problem by highlighting the spatiotemporal dynamics and epistemic qualities embedded in the list. I argue that the listing assemblage is driven by dynamics of ‘non-synchrony’ and ‘dis-location’ and animated by a mosaic epistemology wherein seemingly insignificant details are associated together to infer potential correlations and future threats. Non-synchronous law is legality ‘out of sync’, composed of divergent temporal logics. By using intelligence-as-evidence the list brings retrospective and pre-emptive logics together into productive relation, which is generating legal conflict. The EU procedural reforms aim to give judges the tools necessary to manage this problem, but they engender further complexity. Furthermore, judicial review is usually orientated towards a ‘decision’ that has taken place in the past. But my analysis shows how using intelligence-as-evidence defers this space of decision and confounds this judicial process because the decision that is supposed to be under review is not there. I use the term ‘dis-located law’ to capture this dynamic process of fracture and deferral and suggest that it is critical to how the Law of the List governs.

The conclusion of the book draws together the key findings of this project and points the way ahead toward global security problems that require further investigation and research. In my analysis pre-emptive security is not supplanting existing legal practices, but rather reorganising them in novel ways that demand empirical attention if we want to understand how global security law is governing the uncertain future threats of terrorism in the present. Global security law is not the brave new world that many lawyers claim it to be. It is something far more fragmented, heterogeneous and complex. Securing the world from trans-boundary terrorist threats is transforming domestic and international legal ordering in far-reaching ways and consolidating new forms of exceptional governance. This book maps these transformations and provides a detailed forensic account of global emergency law in
motion. It doesn’t end by spelling out a corrective program of legal or political reform. But showing how security problems are being governed and global legal regimes assembled through the list is an important critical project in its own right. It brings the economies of power and conditions of possibility of the list to the analytical surface, shows them as something historically situated and contingent and offers insights into how things might be made otherwise. It is an approach that aims to offer what Michel Foucault calls a ‘historical ontology of ourselves’ - where ‘the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them’. 196

2. Global Listing Technologies and the Politics of Counterterrorism Expertise*

Global counterterrorism emerged as a distinct policy domain after the 9/11 attacks in 2001. New Security Council measures and institutions were introduced, existing laws and security practices were reorganised and both were brought into relation within a novel semantic field directed towards countering the dangers of transnational terrorism. Although global security law is now considered a mainstream phenomenon, little has been written about how these new legal relations were forged or the kinds of practices and techniques that enabled such profound political shifts to unfold. How was something that had long been the subject of heated conflict by states and international organisations (‘terrorism’) not only rendered knowable, but rapidly turned into an object of legal intervention on a global scale?

This chapter addresses this question by analysing UN security listing as a novel form of global security law and governance. It focuses on the crucial assemblage work performed by the UN1267 Analytical Support and Sanctions Monitoring Team - a small group of technical experts responsible for advising the UN1267 Sanctions Committee and keeping the list effectively calibrated. There are no existing empirical studies of the UN Al-Qaida Monitoring Team. The little material that does exist, as detailed below, is drawn almost entirely from their own published reports and suggests that they are unduly constrained by Security Council politics and disconnected from the evolving Al Qaida threat picture. This chapter challenges this narrative by ‘following the list’ to two different sites where the team are negotiating seemingly mundane problems of list implementation. First, we examine ‘consultation meetings’ between the UN team and national intelligence agencies. Second, we analyse a collaborative governance project between the team and the global aviation industry to enhance enforcement of the list travel ban. I argue that the work of these global listing experts is far more wide ranging, legally productive and politically significant than existing material suggests. But these effects go unnoticed because they are considered as technical background work and enabled through the simple ordering technology of a list.

The chapter builds on currents of academic literature introduced in the last chapter – such as scholarship on governance practices and global sociolegal research. My aim is to open up novel ways of approaching global security law by reframing the Al-Qaida list as a global governance technology and inscription device. This analytical move allows more dynamic conceptions of power and agency to be used in the study of global security governance and helps us understand how critical the work of listing expertise is in this domain. Drawing from diverse strands of governmentality scholarship, Science and Technology (STS) studies and postnational legal theory I highlight how this list (as artefact) and its expertise (as knowledge practice) are entangled in ways that render the uncertain threats of global terrorism calculable and amenable to pre-emptive legal intervention. ¹

Lists have long been deployed as technologies of power and administrative rule. According to Cornelia Vismann, for example, the imperial registries developed in thirteenth century Europe

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'were more than nifty administrative techniques designed to economize on reading and writing; they were nothing less than the media technology for a state as a permanent entity’. ‘Registration lists also played a crucial role delineating ‘healthy’ and ‘diseased’ elements of the population in Nazi Germany, enabling the deportation of the latter to death camps as part of the Third Reich’s ‘Final Solution’. Listing is an operational form of writing that often prefigures new forms of political organisation, regimes of administrative violence and ways of seeing and acting upon the world. So it is unsurprising that we find this simple ordering technique at the core of the Security Council’s ambitious global ‘anti-terrorism campaign’ performing crucial assemblage work.

When the list is analytically reframed as a technology or device, the question of listing expertise becomes especially important. If global security law is a project of knowing and countering ‘global terrorism’ before it materialises, then mapping its assemblage requires close analysis of the expert-object relations it puts into effect. But the relation between global law, expertise and governance remains markedly understudied. Existing scholarship provides powerful normative critiques of international law’s deferral to ‘the politics of expertise’. But it is insufficiently attentive to how techniques and practices of expertise actually assemble global relations and tends to be empirically disinterested in understanding the specific sites where such global legal ordering is taking place.

Studying the list as a technology advances this discussion by opening up a broader set of research questions than those usually pursued by counterterrorism and international legal scholars: How does this list, and the expert knowledge its administration demands, link ‘calculations of rule at one place with action at another’ to allow ‘government at a distance’? What kinds of calculative practices and techniques do listing experts produce under the mandate of effective monitoring and implementation? How do problems of the list enrol different actors into security networks? How does listing enable the uncertainties of ‘global terrorism’ to be rendered knowable and amenable to pre-emptive intervention by the Security Council? In sum, how are knowledge practices, technical artefacts and forms of expertise materially assembled together to constitute and condition global security law?

This chapter addresses these questions by analysing the Monitoring Team’s listing expertise as a local production site of global law, using the analytical framework of assemblage and methodology of multi-sited ethnography introduced in the previous chapter. My main

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4 Cornelia Vismann, *Files: Law and Media Technology* (Stanford University Press, 2008) 81-82.
9 Miller and Rose (n 3) 9.
10 Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005). Here Latour calls for sociological analysis of ‘local sites that manufacture global structures’ and speaks of the need to ‘re-describe them as some disheveled array of connections through which vehicles (carrying types of documents, inscriptions, and materials) are travelling via some sort of conduit’ (176 - 177). See also Sally Engle Merry, ‘New Legal Realism and the Ethnography of Transnational Law’ (2006) 31(4) *Law & Social Inquiry* 975. Merry argues that global sociolegal research must be grounded in ‘ethnographic analysis of global sites of legal production’ (980).
argument is that the list formats and conditions this domain of law in discrete yet crucially important ways. Analysing the technicalities of listing practice is integral to the core concern of this book - that is, to understand how this form of global security law and exceptional governance is created, sustained and stretched. As I demonstrate below, the Al-Qaida list is much more than mere legal instrument or means to an end. It is a performative technology or ‘actant’\(^{11}\) that helps constitute the very problem of ‘global terrorism’ it seeks to target.

To develop these arguments, the chapter is divided into four sections. The first section critically engages with the relevant academic literature, frames global security listing as a technology of governance and inscription and elaborates on some of the advantages of this analytical approach. The second section examines the origins of the Al-Qaida sanctions regime in detail, building on the introductory discussion presented in previous chapter. My main focus is on tracing the radical repurposing of the regime after 9/11 and providing an overview of its changing relationship with various forms of UN counterterrorism expertise.

The chapter then provides detailed site-specific analyses of the Monitoring Team’s global listing practices. The third section focuses on ‘consultation meetings’ that bring security and intelligence officials from around the world together with the Monitoring Team to try and build a comprehensive Al-Qaida threat picture. The initiative is publicly justified as a means of keeping the list calibrated and up-to-date. But its aims are far more ambitious and its effects are more far-reaching. These meetings bring security experts and the technology of the list together to construct a global optic for seeing global terrorism. The list is not an inert object here but an active agent that performs important assemblage work. It helps to bypass the problem of defining terrorism, render disparate localised threats commensurable, enrol diverse actors into new pre-emptive security networks and quantify potential future threats into something governable in the present. For Ulrich Beck, expertise is confounded in the ‘world risk society’ when faced with incalculable and catastrophic threat of terrorism.\(^{12}\) Yet here the Al-Qaida list and its expertise work together to form what I call a Global Optic or ‘centre of calculation’,\(^{13}\) precisely aimed at seeing and governing the uncertain threats of global terrorism before they materialise. Security expertise doesn’t retreat in the face of uncertainty. It governs through it.\(^{14}\) I argue that understanding how global security law is made expansively ‘global’ demands analysis of these techniques and knowledge practices.

The fourth section further develops these claims by analysing current efforts to make the UN Al-Qaida list interoperable with Interpol biometric databases and Advanced Passenger Information (API) data managed by the global airline industry (IATA). This initiative is part of a broader attempt to re-orientate this body of global security law from its post-9/11 focus on Al-Qaida toward the new threat of ISIL and ‘foreign terrorist fighters’. This project tends to be overlooked by outsiders for turning on seemingly mundane questions of reformatting and data management. Yet I argue that it is precisely through such technical problems - and the forms of commensurability and interoperability they generate - that the scope, potential and power of this global list is being stretched and transformed in practice. The politics of formatting, in other words, is crucially important. Expertise is neither merely ‘implementing’ the list here nor operating ancillary to the international law and politics of the Council. It is forging new forms of global legal ordering and exceptional governance in its own right.


The List as a Technology

In the previous chapter we observed how most literature on UN Al-Qaida sanctions is overwhelmingly positivist in focus. Legal scholars tend to posit an international normative pyramid - with the Security Council P5 at the top (as primary agents), regional bodies and national states in the middle (as implementing intermediaries) and sanctioned parties located on the bottom - as the implicit framework of analysis.\(^\text{15}\) Sanctions scholars tends to use theoretical models of ‘senders’ (principal authors) and ‘receivers’ (targets) to assess whether these measures achieve their intended political objectives.\(^\text{16}\) Both approaches conceptualise power as a unidirectional application of force moving from point of origin to point of destination. If the list features at all in this material, it is relegated to the status of legal tool akin to a statutory instrument or executive order, inertly placed in the background.

As Nico Krisch points out, thinking about global authority as ‘solid’ in this way is problematic because it obscures the more ‘liquid’ forms of authority shaping global regulatory space. Global indicators, for example, produce powerful effects even though they ‘do not operate through formal legal tools’ or conform with conventional accounts of how international decision-making is done.\(^\text{17}\) By creating commensurable relations between heterogeneous elements and simplifying complex phenomena through quantification, such technologies create ‘novel epistemic objects of regulation, domination, experimentation and critique’ - they do much more than present ‘taken-for-granted facts’.\(^\text{18}\) But these effects go unnoticed if we assume international authority rests in the hands of states and IOs and that governance technologies (like indicators or lists) are merely conduits for their power.

The Al-Qaida list is much more than the intergovernmental deliberations of the Security Council and Chapter VII UN Charter resolutions that provide the formal legal source of its authority. It is also a highly mobile and diffuse global norm and novel legal format that exceeds the ‘shackles’ of formal international law from which it was created.\(^\text{19}\) Yet to grasp the more generative dimensions of this regime we have to actually examine what the list and its expertise does using analytical tactics fit for the task of global sociolegal enquiry.

To that end, this chapter analyses the Al-Qaida list as a technology of government and inscription. My key point of departure from the positivists is that legal technologies (such as lists) are not neutral instruments or inert regulatory tools, but creative processes that do important things in the world. Technologies emerge ‘to overcome the political and epistemological limits of existing knowledge’ and, in so doing, they remain intimately entangled within the knowledge objects that come into being through their use.\(^\text{20}\) The microbe, for example, is not simply discovered by the microscope but in important ways is

\(^{15}\) Whilst global constitutionalists might complicate this model - by arguing for the primacy of jus cogens norms and the placement of rights-bearing individuals at the top and not the bottom of the pyramid – they nonetheless remain wedded to structures of normative hierarchy in international law. See, for example, Erika de Wet and Jure Vidmar (eds.) Hierarchy in International Law: the place of human rights (Oxford University Press, 2012).

\(^{16}\) Francesco Giumelli, Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War (ECPR Press, 2011).


constituted by it.\textsuperscript{21} Statistics are not just an effect of the modern state but a means by which the state and the population it governs has come to be created.\textsuperscript{22} Economics ‘performs shapes and formats the economy rather than observing how it functions’.\textsuperscript{23} Similarly, objects of political rule and legal governance are effects of the particular techniques and knowledge practices that calculate, classify, regulate and/or target them. As David Kennedy puts it, in global governance ‘the identification of the problem and the selection of tools arise together’ - that is, they are co-constitutive in practice.\textsuperscript{24} My point here is not to claim that acts of terrorist violence do not exist outside the law - they obviously do. But that showing how ‘global terrorism’ is made actionable through the technology of the list allows us to better understand how this domain of security law is being assembled and made powerful.

This approach to security listing builds on a rich tradition of sociolegal and ethnographic research reappraising the instrumentality of legal instruments\textsuperscript{25} - work that ‘brings the technical into view not as an effect or a by-product, a tool of more important agents and forces, but as the protagonist of its own account’.\textsuperscript{26} It also aims to contribute to current debates on the power of quantification technologies and epistemic practices in global governance.\textsuperscript{27} To speak of government and inscription together means bringing two key strands of academic literature into relation - ‘governmentality’ scholarship of Michel Foucault and those who have developed his work and Science and Technology Studies (STS) scholarship on ‘inscription’ devices by Bruno Latour and others.\textsuperscript{28}

\textsuperscript{24} Kennedy (n 8) 96.
\textsuperscript{26} Riles (n 20) 985.
\textsuperscript{28} Despite their slightly different connotations and literatures, I use ‘technology’ and ‘device’ interchangeably in this chapter when talking about the list. ‘Technologies’ is the preferred term in Foucauldian scholarship, ‘device’ in
For Foucault, modern politics is grounded in a particular rationality of ‘governmentality’ - that is to say, an ‘ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics, that allow the exercise of [a] very specific albeit complex form of power’, aimed at diffusing modes of economic administration into political practice. Government is not merely made possible through norms and sovereign relations, but is enabled through heterogeneous practices and ‘apparatuses’ - that is, the ‘actual instruments that form and accumulate knowledge, the observational methods, the recording techniques, the investigative research procedures, the verification mechanisms’ that are ‘formed, organized and put into circulation’. Put differently, ‘government is … a function of technology’, because ‘it is through technologies that political rationalities and the programs of government they articulate become capable of deployment’.

Understanding problems of global governance in technological terms requires sovereignty and law to be analytically repositioned. Because ‘with government it is a question not of imposing law on men but … of employing tactics … [- or] using laws themselves as tactics - to arrange things in such a way that, through a certain number of means, such and such ends may be achieved’. Studying governmental technologies also prompts a shift in where we look to see power unfolding. For Foucault, governmental power must be analysed at the points where ‘it is in immediate relationship with … its object, its target, its field of application’ because it is there that new ‘methods of subjugation’ and ‘tactics of domination’ are formed before being ‘invested or annexed by global phenomena’.

The ability of macro-actors to ‘dominate on a large scale’ or effect ‘action at a distance’, according to Bruno Latour, is only possible through what he terms devices of ‘inscription’ – that is ‘item[s] of apparatus or particular configuration of such items which can transform a material substance into a figure or diagram which is directly usable’. In his study of the interrelation between visualisation and cognition, for example, Latour presents us a puzzle: Why do important figures in the history of scientific innovation always ‘work on two-dimensional inscriptions instead of the sky, the air, health, or the brain? What can they do with the first, that you cannot do with the second?’ The answer lies in the fact that inscription technologies provide advantage to those who use them and create asymmetries with those who do not. Inscriptions are characteristically mobile, immutable, flat,

STS scholarship and actor-network theory. But both highlight the same effect, vis-à-vis the performativity of instruments and governance techniques. For a good example combining these approaches this way, see: Miller and Rose (n 3). For recent scholarship on the device as an analytical frame, see: John Law and Evelyn Ruppert, ‘The social life of methods: Devices’ (2013) 6(3) Journal of Cultural Economy 229; and Anthony Amicelle, Claudia Aradav and Julien Jeandesboz, ‘Questioning security devices: Performativity, resistance, politics’ (2015) 46(4) Security Dialogue 293. It is outside the scope of this chapter, moreover, to review the body of governmentality and STS scholarship relevant to global law and governance. Instead here I concentrate on briefly outlining the key elements from Foucault and Latour’s work and highlighting some important secondary literature to develop these ideas more concretely through the empirical material presented later in the chapter.


Michel Foucault, ‘Space, Knowledge and Power’ in Paul Rabinow (ed.) The Foucault Reader (Pantheon, 1984) 256.

Miller and Rose (n 3) 8; Pat O’Malley, ‘Risk, Power and Crime Prevention’, (1992) 21(3) Economy and Society 252.

Foucault (n 29) 95.

Foucault (n 30) 31.


Latour (n 13) 223.


Latour (n 35) 18.
reproducible, multi-scalar, readily recombinable and geometrically measurable. By allowing heterogeneous items to be rendered ‘optically consistent’, commensurability can be established: ‘Realms of reality that seem far apart ... are inches apart, once flattened out on the same surface’.

In another example Latour examines eighteenth century French navigation in the East Pacific and asks: ‘How is it possible to act on events, places and people that are unfamiliar and a long way away?’. The answer, he suggests, is by ‘somehow bringing home these events, places and people’ to ‘centres of calculation’ through the use of inscription techniques - that (a) render them mobile ... (b) keep them stable ..., and (c) are combinable so that whatever stuff they are made of, they can be cumulated, aggregated, or shuffled like a pack of cards’. In this way economies of equivalence, ‘cycles of accumulation’ and commensurable relations can emerge that enable ‘a point to become a centre by acting at a distance on many other points’. Centres of calculation are thus sites ‘where information is being created, collected, assembled, transcribed, transported to, simplified and juxtaposed in a single location ... where everything that is relevant can be seen’.

These scientific innovation examples may seem tangential to the more urgent problems of global terrorism law and security governance. But there is something very valuable in these analyses for the purposes of our present enquiry. For Latour, the scale of an actor and their ability to govern is not given a priori. Rather it is contingent upon the technologies of inscription at their disposal at any given moment and ‘varies with the[ir] ability to produce, capture, sum up and interpret information about other places and times’. This approach opens ‘a new topographical relationship’ between macro and micro with potentially far-reaching implications for the ways that processes of global ordering are framed:

The ‘macro’ no longer describes a wider or larger site in which the micro would be embedded ... but another equally local, equally micro place, which is connected to many others through some medium transporting specific types of traces. No place can be said to be bigger than any other place, but some can be said to benefit from far safer connections with many more places than others.

The broader analytical advantages of the assemblage frame were discussed in the previous chapter. So here I briefly highlight three features of the ‘list as technology’ approach that resonate with that frame and provide greater purchase on the particular problems explored in this chapter. First, bringing Foucault and Latour together this way helps us to think about law in material, rather than simply normative, terms. Governance technologies and inscription devices draw empirical attention to the practices and sites enabling global legal processes to unfold. Instead of asking ‘what is law’ within relatively bounded contexts like courts, this approach enables us to ask: ‘How is global security law’ produced within complex and shifting transnational environments? Second, framing the list as a technology provides a useful conceptual lens for reappraising the understudied nexus between global law and...
expertise. As noted above, there is little research shedding empirical light on the ways expertise assembles and sustains global legal relations. This chapter shows how expert knowledge practices and the technical artefacts sustaining them are centrally important to the production of global security law and thus need to be made visible and subjected to critical scrutiny.

Finally, analysing the Al-Qaida list as a technology helps ‘flatten the landscape’ of global security law, enabling more granular analysis of problems of scale. The key insight of Latour’s work here is that ‘global’ actors are not necessarily ‘bigger’ than any other, but are made more powerful by their relative connectedness and the inscription technologies they use. Instead of assuming a priori the supranational power of this regime by reference to its legal foundations (Chapter VII of the UN Charter, UN Security Council Resolution) or its position in the international normative hierarchy, this approach helps problematise the ‘global’ in global security law by reframing it as an emergent process of ordering. As discussed in the last chapter, global security law is produced through ordering practices emanating ‘from local sites that manufacture global structures’. This approach opens an important space for empirically investigating how listing works as a ‘structure- making site’ and understanding how small shifts in knowledge practices can provide important sources of legal change within large international organisations that generate powerful global effects.

The Technics of Global Counterterrorism and the Politics of Rendering Technical

‘Terrorism’ has long defied international attempts to transform it into a stable and knowable object. Despite the increasing array of global security laws, there is still no international...
agreement on what constitutes ‘terrorism’. The problem has been an incessant source of international conflict between states for almost 80 years. More than 60 proposed definitions were put forward for agreement between 1936 and 1981 without success.\textsuperscript{54} An ad hoc committee convened by the UN General Assembly in 1972 to draft a convention on international terrorism was divided and failed to agree on the core issues to be prohibited. Another committee was convened in 1996 to again try and build an international convention on terrorism and resolve the vexing definitional issue. Yet despite twenty years of debate, this committee has failed to reach agreement on what ‘terrorism’ is and is not. A plethora of international conventions prohibiting particular aspects of ‘terrorism’ all bypass this definitional issue by adopting an act-specific focus. The Security Council has previously adopted resolutions in response to specific acts of terrorism.\textsuperscript{55} But due to ‘cold war deadlock’ in the Council they preferred to defer this issue to the General Assembly.\textsuperscript{56}

Three elements underpin this unruliness. Until recently terrorism was framed in both law and politics as something that unfolded within a local or regional, rather than global, terrain of conflict.\textsuperscript{57} There are also deep and persistent disagreements on the appropriate status to be accorded to ‘state terrorism’ or violence by state-sponsored forces. Finally, there is no consensus on whether the use of violence by national liberation and self-determination movements should be considered as terrorism or lawful resistance. As Schmitt argued, the distinctions between friends and enemies that animate politics ultimately remain arbitrary.\textsuperscript{58} The problem with trying to reach agreement on what terrorism is, according to Koskenniemi, is that ‘everybody participates with two concerns in mind: to agree on nothing that might prejudice the future interests of my country, but to try as hard as possible to attain a definition that will strike at every conceivable future adversary’.\textsuperscript{59} When the definitional debate transpires in this way, ‘the result can only be inconclusive’.\textsuperscript{60}

Yet as detailed in this chapter, these conflicts on the nature of ‘terrorism’ that characterised late twentieth century world politics have now been effectively eclipsed by the technology of the Al-Qaida list. Most scholars point towards changing Security Council dynamics or the emergence of transnational security threats by non-state actors to explain the proliferation of global security governance after the Cold War. But it is the legal technologies and expert practices translating threats into new forms of pre-emptive security intervention that must be examined if we are to account for the astonishing rise of global security law.

In the context of the Al-Qaida listing regime, ‘law defers to the politics of expertise’ because UN sanctions are administered by committees of diplomats from Security Council states ‘who have neither the interest, time or resources to do the job properly’.\textsuperscript{52} The UN1267 Sanctions Committee is composed of mid-level P5 diplomats of First Secretary or Counsellor level who generally have no prior experience of working on counterterrorism issues domestically, let alone on a global scale. As such, it has ‘tended to become unnecessarily consumed in negotiating process-orientated papers and focusing on the political rather than technical
aspects’ of the issue. Because these diplomats regularly move onto other assignments in different areas, there is a high turnover of staff within the Committee and a lack of accumulated organisational knowledge. Therefore, as with other functionally-differentiated regimes seeking to manage global problems, the Al-Qaida list is crucially dependent upon the technical knowledge-work and ongoing administration of experts. As one former US sanctions official and independent UN monitor put it:

While the UN Security Council is well placed to design and impose sanctions, and can draw on necessary expertise for this purpose, it is not well placed to verse and monitor actual implementation and enforcement of the sanctions. That function must be assigned to an independent group, which, in turn, can make its findings known to the Security Council.

When the scope of the 1267 regime was first extended to include Bin Laden and Al-Qaida in 2000, the Security Council called for an expert committee to be set up to advise how the arms embargo and closing down of terrorist training camps could best be monitored. In July 2001, following a recommendation made by this Committee of Experts on Afghanistan, the Council called for a new Monitoring Group to be created consisting of five independent experts based in New York. The group was initially tasked with monitoring implementation of measures that were, at that time, limited to the Taliban-controlled areas of Afghanistan. But when the regime was radically modified following 9/11 to target potential terrorist threats worldwide, the mandate of the Monitoring Group was dramatically altered to suit. Now they had to monitor a unique set of sanctions targeting ‘an amorphous, highly mobile, and expanding global terrorist network with no fixed address’.

Independent expert teams had long been valued within the UN system for their ability to criticise and/or legitimise the acts and omissions of states in ways that diplomats and UN Secretariat staff could not. Because Security Council politics were consensus-based, it was difficult for them ‘to identify non-performers (‘name and shame’) or even agree on a set of standards against which to measure performance’. The UN1267 Monitoring Group took this non-compliance aspect of their mandate very seriously. They issued six robust reports that identified non-compliance by states and criticised the ineffectiveness of the regime before they were disbanded in 2004 for politically overstepping their mark.

Rather than rely on formal government reports made through diplomatic channels, the group made country visits (some of which were unannounced) to assess the actual extent of sanctions implementation. Because of the sensitive nature of information in this domain, the group relied on ‘private contact with counter-terrorism investigators and researchers, former intelligence officers, ... experts in universities and ... the private sector ... [and] former government colleagues’ to undertake their enquiries. Numerous states were identified for acting in ways that undermined the sanctions effort. Russia and China were criticised for allowing the flow of arms to the Taliban. Saudi Arabia was singled out for allowing suspected terrorist financiers to continue operating in their territory. Italy, Liechtenstein and Switzerland were criticised for allowing targeted individuals to travel and operate businesses in their countries. Their reports found that the Al-Qaida travel ban and arms embargo were mostly symbolic in nature and that the asset freeze was poorly and partially implemented. Unless ‘a much tougher and more comprehensive resolution’ was introduced, the group concluded, ‘little or no progress will be achieved’. Because they used unorthodox methods,
asserted an unusually high degree of political independence and made frank assessments of non-compliance by states, the Group was heavily criticised for exceeding the scope of its mandate. After publicly stating that it had ‘never had information presented … which would indicate … a direct link68 between Saddam Hussein and Al-Qaida’ - in direct contrast to the arguments being made at that time to justify the Iraq war - the US finally withdrew their political support and let the group’s time-limited mandate expire.

It was from this high political drama that the UN1267 Analytical Support and Sanctions Monitoring Team (hereafter, the ‘Monitoring Team’) was born. From the outset the Security Council strictly curtailed the independence of the new team – which consisted of eight counterterrorism experts, with administrative support provided from the Security Council Affairs Division (SCAD) of the UN Secretariat.69 It was expressly required ‘to operate under the direction of the Committee’ and ‘submit a comprehensive programme of work to the Committee for its approval and review’.70 All proposed travel was to be disclosed and discussed with the Committee and relevant states in advance.71 Draft reports were to be presented to relevant states for review prior to publication and their comments were to be taken into account before circulation to the Committee for final approval.72 The previous Monitoring Group had been granted relative autonomy so they could effectively perform their ‘naming and shaming’ functions. But this freedom was withdrawn from the Monitoring Team, with non-compliance and implementation assessment tasks effectively brought back under direct Sanctions Committee control.73

These changes - and the shift from Monitoring Group to Monitoring Team - have been variously criticised in the academic literature on this issue for diminishing the independence of Monitoring Team’s expertise; reducing their ability to cultivate and rely on closed material and thus provide frank assessments of the mismatch between list and threat; subjecting their work to excessive political scrutiny and findings to overt political calculations and undermining the UN’s capacity to hold recalcitrant countries accountable, thus eroding their newly asserted Chapter VII authority in this domain.74 Whilst these critiques are undoubtedly correct in pointing out the Command and Control conditions in which the expert Monitoring Team was formed, I suggest that they either miss (or misconstrue) what is arguably the most important effect of this process. Rather than issuing high-profile public reports and criticising states for their intransigence within an intergovernmental domain, the Monitoring Team came to develop a focus on technical issues and deficiencies of process perceived as less politically contentious.

The technical and procedural ‘turn’ of UN counterterrorism expertise is crucially important to the global assemblage of the Al-Qaida listing regime for two reasons. First, it enables the expert knowledge work of the Monitoring Team to unfold as something unseen and inconsequential, composed of relatively mundane technical processes or ‘little security nothings’.75 The literature frames the shift from Monitoring Group to Monitoring Team

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68 Rosand (n 56).
69 Ibid
71 Ibid
72 Ibid
73 Comras (n 63) 126.
74 See principally: Rosand (n 56); Comras (n 63); Barak Mendelsohn, ‘Threat Analysis and the UN’s 1267 Sanctions Committee’, (2015) 27(4) Terrorism and Political Violence 609; Barak Mendelsohn, Combating Jihadism: American Hegemony and Interstate Cooperation in the War on Terrorism (University of Chicago Press, 2009).
negatively - as a diminutive retreat of expertise from its compliance function as an intergovernmental appendage in a forum of UN high politics to the politically safe and relatively marginal terrain of internal processes and technicalities. But I argue that this shift also needs to be grasped positively in terms of what it produces or enables - namely, banal processes of ‘associating, assembling and dispersing security practices’ that operate at a more granular level, underneath the radar of legal and political visibility.\textsuperscript{76} The power of security expertise in this domain has been reorganised, not diminished, by retreating from the more confrontational ‘solid authority’ of Security Council intergovernmental politics. It now develops with ‘greater liquidity’\textsuperscript{77} across a diverse array of capillary points where it more effectively ‘invests itself in institutions, becomes embodied in techniques, and equips itself with instruments’.\textsuperscript{78} As analyses of the Security Council’s parallel creation (the Counter-Terrorism Committee) have shown, the movement towards such mundane sites and the increasing use of informal security governance techniques are far from inconsequential and, therefore, need to be analytically reappraised.\textsuperscript{79} Because it is from there that new global security practices and powers are created and concretely put into circulation.

The redefinition of global security problems in technical terms also allows counterterrorism experts to exert greater control over them and bolster their authority. The greater the focus on technical questions of list administration, the more pre-empting global terrorism comes to rely on relevant security expertise. As Foucault and many others have noted, ‘problematisation’ and ‘rendering technical’ are co-constitutive processes. On the one hand, this produces depoliticising effects as complex political problems are reposed in technical terms. ‘Questions that are rendered technical’, writes Tania Murray Li, ‘are simultaneously rendered nonpolitical’.\textsuperscript{80} Yet, on the other hand, it opens up new terrains where ‘politics of redefinition’ unfold - that is, ‘the strategic definition of a situation or problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias’.\textsuperscript{81} For Koskenniemi the process of rendering technical is the main driving force behind the fragmentation of international law. With specialisation, ‘legal vocabular[ies] of rules and principles, precedents or institutions’ increasingly have little purchase. Instead, ‘relevant calculations always seem to require technical expertise’ couched in ‘technical vocabularies of ad hoc accommodation, coordination and optimal effect’.\textsuperscript{82} Yet there is no empirical research on how the politics of expertise is shaping global security law. As Kennedy notes, ‘we need better maps of expertise’ but ‘mapping the knowledge of experts is complex and technical work’.\textsuperscript{83}

The following section of this chapter takes this mapping project seriously by analysing two specific sites where global security listing expertise is currently unfolding in response to seemingly mundane problems of list implementation. These sites and problems concern

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\item Committee’s Consolidated list [and] the need to ... strengthen contacts with ... international and regional law enforcement bodies - Comras (n 63) 129. By ‘unseen’ I do not mean ‘concealed’ or ‘secret’ - even though much of the Monitoring Team’s expert work is opaque. Rather, following Annelise Riles, I mean that it enabled counterterrorism expertise to exist ‘on the surface, in plain view, and yet precisely for this reason [remain] unseen’: Annelise Riles, cited in Nigel Thrift, ‘Movement-space: the changing domain of thinking resulting from the development of new kinds of spatial awareness’ (2004) 33(4) \textit{Economy and Society} 582, at 585.
\item Huysmans \textit{Ibid}, 379
\item Michel Foucault \textit{Power/Knowledge: Selected interviews and other writings, 1972-1977} (Pantheon, 1980) 96.
\item See, for example: Isobel Roele, ‘Disciplinary Power and the UN Security Council Counter Terrorism Committee’, (2014) 19(1) \textit{Journal of Conflict and Security Law} 49.
\item Tania Murray Li, \textit{The Will to Improve: Governmentality, Development and the Practice of Politics} (Duke University Press, 2007) 7.
\item Koskenniemi (n 8) 67.
\item \textit{Ibid}, 340, 359
\item Kennedy 2005 (n 48) 14.
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technical projects being developed by the Monitoring Team that have received no academic attention and are only marginally discussed in the team’s public reports to the Council. Yet I argue that both highlight crucial elements of the politics of security expertise and suggest novel ways of understanding how global security law and governance is made expansive, powerful and durable. Foregrounding the technology of the list allows us to see how the Council governs complex global problems through knowledge production activities as much as through Chapter VII resolutions and the global legislative programs they put into play.

**Threat Emergence and the Global Optic**

My first ethnographic site of enquiry involves a series of regional meetings undertaken between the Al-Qa’ida Monitoring Team and national security and intelligence officials. In 2006, as part of their mandate to ensure the effective implementation of this list, the Monitoring Team were granted additional powers to, ‘consult with Member States’ intelligence and security services, including through regional fora, in order to facilitate the sharing of information and to strengthen enforcement of the measures’.84 These consultation meetings actually began shortly after the Monitoring Team’s formation in 200485 and have continued each year, every four months, since that time.86 Other than occasional updates in the Monitoring Team’s biannual reports to the Security Council, nothing has been written to date about either their purpose or results.

The Security Council comprises of states with the most powerful and best-resourced intelligence services in the world. What added value could a small team of UN counterterrorism experts possibly bring that is not already available to their own national security services? The use of intelligence within the Security Council, moreover, has long been controversial. Doesn’t intelligence-sharing facilitated by experts with delegated authority from the Council take the UN back into such politically contested territory? And how might bringing national intelligence officials together serve to ‘strengthen enforcement’ of global sanctions, when asset freezes are ordinarily enforced by banks and Treasury departments and travel bans enforced by border guards? What other purposes and effects could these meetings serve or enable?

The following paragraphs explore three interrelated aims that these consultation meetings seek to address, in my analysis - first, constructing a ‘global optic’ for seeing global terrorism, second, enabling uncertain future threats to be countered before they emerge, and third, enlisting security actors into new pre-emptive governance networks with potential for intelligence exchange. Each of these aims are concerned with producing and stabilising global terrorism as an object of political and legal intervention through the Al-Qaida list. They reveal, in other words, how the list works as a performative technology to constitute and condition the very problem of global terrorism that it nominally seeks to target.

This analysis supports my argument that the Al-Qaida list is not an inert object but an active agent that undertakes crucially important global legal assemblage work. It quantifies and orders an otherwise diffuse threat, it bypasses the definitional problems (‘what is terrorism?’) and self-determination debates that constrained counterterrorism throughout much of the twentieth century and it aligns diverse actors in ways that enable them to ‘see the threat in the same way’.87 As I have argued throughout this book, understanding global security law

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85 Interview with former member of the 1267 Monitoring Team, New York, November 2012 (Interview A’).
86 Interview with current member of the 1267 Monitoring Team, New York, June 2014, (’Interview B’). This chapter is primarily based on this one particular lengthy and detailed discussion.
87 Interview A.
works means grappling with its conditions of possibility. Empirically analysing how the list and listing expertise are entangled and co-produced through problems of list administration shows us these conditions as they emerge and are put into global circulation.

(i) **Building a Global Optic through the Technology of the List**

The first and primary objective of these meetings, according to one former member of the Monitoring Team, is to build a new ‘global perspective’ for seeing and countering ‘global terrorism’. Because officials from national states are primarily concerned with issues of national security, the transnational threats posed by global terrorist networks often fall outside the scope of their analysis:

... The analysis that [Member States] have domestically is really based on a domestic assessment and may not see lots of other things in the world. And they will see everything through the optic of that, that country - you know, ... the security services, law enforcement agencies are considering national security. So Member State A will assess its security in isolation to a certain extent from Member States B, C, D and E ... They [may say] ... ‘Our national security is affected by member state B, because people may come from there to commit attacks’.... But that's still seeing it from that optic of Member State A.  

But because the Al-Qaida list pre-emptively targets the uncertain threats of ‘global terrorism’ rather than reacts to localised ‘terrorist acts’, it requires a ‘global’ analytical perspective or optic that exceeds the sum of the discrete individual parts that compose it:

What we do is say: ‘This is how Members State A sees it; this is how Member State B sees it; this is how Member State A sees Members State B and Member State B sees Members State A’. Now you are seeing everything on a broad and analytical objective approach, rather than on the very subjective approach [that] the member state might have. And that’s because that's their job. And that's our job. And that's where we bring considerable added value.  

Constructing a new lens to see the problem of global terrorism is not merely an effect of expert know-how. It is crucially an ability and governance effect that the technology of the Al-Qaida list enables. First, it is the everyday task of list administration that brings the disparate actors together with UN counterterrorism experts and gives them the reason to try to work together in the first place. As one team member explained in interview, the list ‘gives you the mandate to collect information ... You need to be on the list to devote travel time, hotel costs and the time of the officials of the other country to justify working on this intensively’. In this sense, and as discussed in more detail later in this chapter - the list works as a translation device, helping to align a broad range of different security actors into a common pre-emptive security project.

The format of the list also allows for the emergence of a new kind of ‘optical consistency’ in relation to problem of global terrorism, as Latour describes it. As discussed at the chapter’s outset, defining ‘terrorism’ and making it an object of international prohibition was the source of protracted political debate for much of the twentieth century. But the Al-Qaida list bypasses this definitional problem and pushes the epistemological question of terrorism to one side by providing a legal technology for knowing and countering global terrorism (listing) without ever having the need to define it. As one Monitoring Team member put it:

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88 Ibid
89 Ibid
90 Ibid
91 Latour (n 35) 7.
The 1267 regime covers specific individuals and groups who are considered terrorist by their actions, but not because they conform to a definition. And that lack of definition is very important, of course. Insofar as the General Assembly is prepared to allow the Security Council to take over the issue of counterterrorism, they do so on the basis that the definition issue remains with the General Assembly and the six committees ... lets be clear about that.  

Global security law is often criticised on the grounds that it fails define its object, but this criticism overlooks two crucially important points. As suggested above, the failure to define terrorism is a fundamental condition of possibility for global security law and not a source of lack. Leaving the definitional problem open is a political prerequisite for Security Council action in this domain. Moreover, for the counterterrorism experts interviewed for this research project the vexing definitional issue of ‘what is terrorism?’ is beside the point. Because these sanctions operationalise ‘global terrorism’ as a technical problem of effective list administration and security practice that demands ongoing expert calibration. In the contemporary global legal landscape, in other words, terrorism is something that is listed rather than defined. Or more accurately, it is a security problem rendered visible and actionable through the legal technology of the list. As one Monitoring Team member explained, Security Council efforts to counter terrorism by listing arose from their practical inability to take any other forms of tangible intervention against Al-Qaida after 9/11:  

Al-Qaida was this threat that no one could easily quantify. It was thought to be this big active threat that might launch attacks on the same scale as 9/11. And the only international tool that the Security Council could grasp was really the sanctions regime. You know, there is nothing else they could do. Make statements about the horrors of terrorism? ... But [that] doesn’t actually do much more than offer political support, does it? [The Security Council] is not operational, obviously. And they couldn’t authorise force, because who are you going to fight? So really the sanctions regime was the only option.  

The list’s capacity to quantify ‘global terrorism’ and produce it as a specific object of intervention provides the key to explaining its remarkable uptake and success as a security governance technology. As scholars like Jack Goody have shown, the power of the list as an inscription device lies precisely in its ability to decontextualize and order hitherto discrete and diversely distributed pieces of information within newly simplified and ‘overgeneralised’ semantic fields where it can then be made ‘subject to possible rearrangement’. Lists are thus simple but powerful technologies because they contain significant ‘generative possibilities’. As with governance technologies such as indicators, lists produce commensurable relations between remote things that were not equivalent before. With the Al-Qaida list this constitutive power is firstly grounded in the exceptionally broad criteria for list inclusion, namely:  

(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;  

(b) Supplying, selling or transferring arms and related material to;  

(c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof;  

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92 Interview A.  
93 Ibid  
95 Ibid  
96 Goody notes that lists can be used ‘to develop a generalised system of equivalences even in the absence of a generalised medium of exchange’: Ibid, 88  
97 S/RES/2161 (2014), para.2
In 2012, these criteria were stretched even further to include ‘association with’ anyone already on the Al-Qaida list - effectively making the targeting threshold one of being ‘associated with anyone associated with’ Al-Qaida or any cell, affiliate, splinter group or derivative. The rationale for this radical extension of the list’s targeting standard, according to one Monitoring Team member, was ‘the changing nature of the threat’:

If you need to show that apart from the general declaration of Boko Haram, that Boko Haram is closely associated with Ayman al-Zawahiri in Pakistan or Afghanistan, you’ve got a very tall order on your hands. So the changing nature of the threat that diversifies Al-Qaida made it necessary to say ‘Not every buddy of Zawahiri is only Al-Qaida’. There are also people who have never met Zawahiri, never will meet Zawahiri and who will never talk to Zawahiri, who nevertheless sign on to Al-Qaida as a branch, franchise, idea, ideology or whatever you want to call it and therefore constitute a threat to international peace and security.

Because of its breadth and scope, the list provides a legal mechanism for rather disparate individuals and groups around the world to be collated, connected together and targeted in new ways. Diverse forms of political Islam are conflated together - from Palestine, Somalia, Russia, the Philippines, Tunisia, China and Nigeria - as equivalent nodes of the same global terrorist network even though they may have no actual association outside of the list. ISIL and Al-Nusrah Front, for example, are both listed as commensurable affiliates or splinter groups of Al-Qaida, even though they are actively in armed conflict with each other for control of Syria and Iraq. As one Monitoring Team member explained, ‘What is on the list is not necessarily ... an academic definition of Al-Qaida’. It is rather ‘what a varying composition of Security Council memberships since 1999 have perceived as the main threats’. According to this expert, one of the key functions of the list is that it ‘clarifies for the expert team what Al-Qaida is’.

When ‘association with’ Al-Qaida is reduced to a legal common denominator so low the actual connections between different list entries becomes increasingly thin and difficult to sustain outside of the particular economy of the list. As one former Team member explained, with the dissipation of the ‘Al-Qaida central’ threat and its replacement with much more localised episodes of political violence, what gets listed for being ‘associated with’ Al-Qaida has increasingly become an unending question of ideological affinity:

Al-Qaida is no longer the sort of threat that it was - if it ever was, but it’s certainly no longer. It's regional bits that maybe share something with Al-Qaida in an overarching philosophy. But in practice, in their activities, it's something completely different.

So you say we've done our job. This worked. Al-Qaida is beaten. It's no longer the threat that it was. But we still have these little remnants around the place, which have some sort of

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98 S/RES/2083 (2012)
99 Interview B.
101 Interview B.
association and now represent a different sort of threat which requires national or local action. To stop it being a further threat, to international peace and security.

So as this one [ie, the Al-Qaida regime] comes down, these ones [ie, more regionally focused regimes] can come up. That’s really the model. Because otherwise, you know, when are you going to stop? When can you say Al-Qaida is defeated? It’s not. You can’t defeat an idea. [So] when can you say therefore it’s no longer a threat to international peace and security?106

Just as ‘the act of measurement can produce … the supposedly pre-existing phenomena being measured’,107 here the list works as an inscription device to create and sustain the very object of ‘global terrorism’ that it purportedly represents and seeks to target.104 Effective list calibration firstly requires UN listing expertise to extract ‘global’ threat information from a diverse array of bilaterally filtered localised intelligence material:

Let’s [take] the United States as an example … If we provide a report on what’s happening in Algeria or Yemen or something, that will be very different from the reports they’re getting from the field. Because when they deal with the Algerian services or the Algerian Government all that analysis is, and their presentation is, coloured by bilateral issues - there’s a hundred and one bilateral issues which come into that. When we talk to Algeria or Yemen or whatever, it’s just about this - the international dimensions of the local threat.105

Once the ‘global’ dimension of local threat information has been identified and extracted by UN counterterrorism experts, it is invariably listed - either by updating existing list entries with additional derogatory information or indirectly generating possibilities for new list entries via Member State nomination. Listing expertise thus helps enable a diverse array of localised threat traces to be identified, stripped of their specificity and re-scaled without modification of their internal properties. Security services of national states, for example, still retain their ability to disrupt the lives of terrorist suspects in their jurisdictions using whatever national tools are at their disposal. If there are or have been domestic judicial proceedings against terrorism suspects these are left undisturbed because the list is ‘preventative in nature and … not reliant upon criminal standards set out under national law’. Similarly, as one Team Member explained, ‘if someone gets off our list, no Member State is required to cease any of the measures they have put in place – eg, watching [them], restricting their movements inside the country – just because they got off the sanctions list. The domestic threat is different from what the Security Council thinks’.106 What counts here is the ‘global threat information - that is, potential association with Al-Qaida or any cell, affiliate, splinter

102 Interview A. In 2012 the Monitoring Team noted that the threat posed by ‘Al-Qaida central’ had declined following the death of bin Laden and drone warfare in Pakistan and Afghanistan. Whilst other groups – like Boko Haram or the Islamic Movement of Uzbekistan - professed nominal support for ‘global terrorism’, the Team noted that they ‘focus primarily on local or regional targets’. And whilst individuals or small cells ‘may keep the idea of Al-Qaida alive’, the Al-Qaida ‘sanctions regime is not well suited to deal with that threat’. Accordingly, the team recommended ‘revising the narrative’ of the Al-Qaida regime and pare the global regime down by adopting a more regional, risk-based approach. However, this suggestion was firmly rejected by the Sanctions Committee and the Monitoring Team tacitly rebuked. In response, the Committee ‘emphasize[d] its mandate as a global sanctions regime aimed at countering the threat posed by Al-Qaida and associated individuals and entities’ and that ‘the Monitoring Team’s mandate is global … [and] should focus on all areas where the threat exists and where the Committee might consider focusing future designations’. See, respectively: UN Doc. S/2012/729, paras. 3 – 29; and UN Doc. S/2012/730, paras. 4 - 5.
103 Merry and Coutin (n 27) 1. On the performativity of calculative practices see: Porter (n 22); Callon (n 23); Desrosières (n 19); Nikolas Rose, Powers of Freedom: Reframing Political Thought (Cambridge University Press, 1999); Wendy N. Espeland and Mitchell L. Stevens, ‘Commensuration as a social process’, (1998) 24 Annual Review of Sociology 313; Geoffrey Bowker and Susan Leigh Star, Sorting Things Out: Classification and its Consequences (MIT Press, 1999).
104 On producing terrorism as an object of governance through the technology of the list, see also: de Goede and Sullivan (n 11).
105 Interview A.
106 Interview B.
group or derivative thereof or anyone deemed ‘associated with’ them in turn - and how, once extracted, this material can be aggregated, interconnected and arranged alongside existing list entries in an optically consistent and standardised format.


Whilst the Monitoring Team do not formally recommend the listing of individuals (a process that still ultimately takes place via Member State nomination in the Sanctions Committee), the consultations meetings they convene nonetheless perform an essential and invaluable function in enacting the listing procedure (by bringing security and intelligence actors together to identify and share information about those to be targeted and those who already are). The process of moving diverse local threat traces onto a visually ordered global list also an editing process of ‘uncertainty absorption’ that works by removing the contingencies of how listing produces knowledge of global terrorism in the first place. Speculative intelligence or allegations are rescaled and reformatted into a more stable knowledge form that appears to carry a higher degree of objectivity, authority and certainty.

To give but one concrete example: one of my clients had been tried and acquitted in court of the charge of membership in an international terrorist organisation. He was then placed on the Al-Qaida list as an individual who ‘has belonged to a terrorist organization .... that has been involved in criminal activity on behalf of the Salafist Group for Call and Combat, listed as the Organization of al-Qaida in the Islamic Maghreb (QE.T.14.01), and other Al-Qaida-related

107 ‘Uncertainty absorption’ is a process that ‘takes place when inferences are drawn from a body of evidence, and the inferences instead of the evidence itself, are then communicated’: James G. March and Herbert A. Simon Organizations (Wiley, 1958) 165, cited in Espeland and Stevens (n 27) 421 - 422. Latour describes the process as the cascading effect of ‘ever simplified inscriptions that allow[ing] harder facts to be produced at greater cost’ - Latour (n 35) 16.
(QE.A.4.01) terrorist groups’. The legal proceedings that had tested and refuted this allegation (albeit to the criminal standards of the court rather than the speculative standards of the list) had simply been edited out of his list entry. The point I am making is that reformatting diverse entries together in an optically consistent list absorbs uncertainty by presenting speculative inferences or allegations as more factually solid forms of evidence, discarding potentially exculpatory material in the process.

For the Security Council to counter global terrorism it must first come to know it. Yet knowledge is not a sudden revelation of truth or an effect of the wisdom of experts. It is created through knowledge practices and the ‘whole cycle of accumulations’ involved in gathering traces from dispersed sites and bringing them back to ‘centres of calculation’ where they can be ‘cumulated, aggregated, or shuffled’. As Latour points out, it is such processes that enable a centre to become ‘familiar with things, peoples and events which are distant’ and so able to act as a centre on many distant places at the same time. And it is this asymmetry that must be accounted for if we are to empirically understand the construction of ‘the global’. Knowledge, in other words, is not so much discovered as produced. And power is made powerful through techniques of visual mastery and scale production that catalyse shifts ‘in what counts as centre and what counts as periphery’.

I argue that this is precisely what these consultation meetings, UN listing expertise and the format of the list are co-producing. They create a ‘structure making site’ for identifying, calculating and stabilising ‘global terrorism’ as a novel field of intervention by the Security Council, whilst avoiding the critical twentieth-century problem of having to actually define what terrorism is. The Al-Qaida list is the inscription technology that makes this governance move possible - by transforming complex, diffuse and localised threats into a simplified, optically consistent and commensurable set of individual list entries that can be readily manipulated by the Council and implemented with worldwide effect. Framing the list as a global optic and studying the inscription practices of listing expertise shows us how, empirically and materially, global security law is enabled to govern the global present.

(ii) **Equilibrium of Possibilities: Countering Potential Threats Before they Emerge**

Rendering global terrorism amenable to intervention is not only a question of extracting, decontextualizing and spatially reordering heterogeneous elements through a list. It is also a temporal problem: how can radically uncertain potential threats be made knowable and countered before they materialise? The second aim of these consultation meetings explored below engages with this temporal problem of pre-emption: How can the ‘horizon of possible futures [be] arrayed in such a way as to govern, to decide, or to act in the present’? How can the Monitoring Team experts, in collaboration with national security actors, best work together through these meetings to pre-empt the threats posed by ‘global terrorism’?

The listing regime is equipped with a number of features that enable it to intervene early and tame uncertain futures. Sanction Committee Guidelines expressly state that the list is intended to be ‘preventative in nature’ – which means that individuals and groups are targeted not because of what they have done but rather because of what they might
potentially do at some point in the future. As one team member put it: ‘Our Security Council list ... is only [about] what is in the future, not what was in the past’. Designation is not based upon evidence of wrongdoing but on secret material that purportedly allows inferences to be drawn suggesting that the target is either ‘associated with’ Al-Qaida or affiliated groups or someone deemed ‘associated with’ them in turn.

Yet whilst this targeting criteria significantly broadens the scope of the net that can be cast and the range of people who can be designated, the list’s potential for pre-emptive intervention can only be realised if states have the political will and legal capacity to implement and use the list. ‘The sanctions regime’, as one former team member explained, ‘is of course an obligation on Member States, not on the people under sanction - an obvious point but [one that’s] worth making’. And many states where global terrorism is deemed most threatening by the Council lack the requisite experience of using intelligence-based administrative asset-freezing measures as pre-emptive security technologies. As one team member put it: ‘This is not an issue of people having, or lacking, a political commitment to apply the sanctions. But ... an issue of member states not understanding what they should do to apply the sanctions, ... lacking the capacity to do so and also, not really understanding why they should bother’. The key problem to overcome, according to one Committee member, is the misapprehension by states about the differences between pre-emptive and criminal justice based techniques for countering terrorism:

I’ve just been involved in discussions with West African states about implementation. Last year, I was in discussions in Dar El Salaam with East African states. And my colleague ... was just recently in Tunis to discuss with the North African states. Their implementation problems stem from a fundamental misunderstanding about what sanctions are versus what anti-money laundering asset restraining measures are. And it’s that basic misunderstanding that we need to overcome to make the sanctions regime more effective.

If ‘effective implementation’ is about remedying these ‘fundamental misunderstandings’, then the Monitoring Team’s technical work at these consultation meetings is aimed at fostering conditions conducive for pre-emptive security to develop. The emergence of new security mechanisms, as Foucault reminds us, does not simply arise by replacing earlier forms with new ones but rather by changing the ‘dominant characteristic, or more exactly, the system of correlation between juridico-legal mechanisms, disciplinary mechanisms and mechanisms of security’. How then do these meetings between national counterterrorism officials and UN listing experts allow new ‘systems of correlation’ to be drawn for potential global threats to be countered before they emerge? I want to explore this problem by analysing a diagram provided by one Team expert when asked what purpose these list consultation meetings served:

Interviewee: I once made a very nice graph on how you become an Al-Qaida terrorist and what the possibilities of the state are and the risks of the state to counter it. Have you got a pen? ... It’s basically a pyramid with revolving circles and inverted possibilities of states (so it needs to be in a box).

Down here, at the base, you have lots of people who are semi-radicalized (as far as terrorism is concerned) and ... very big issues (like the Palestinian conflict). If you solve the Palestinian conflict, you cut off half of the people.

115 UN1267 Sanctions Committee, ‘Guidelines for the Committee for the Conduct of its Work’ (15 April 2013).
116 Interview B.
117 Interview A.
118 Ibid
119 Interview with former member of the UN1267 Sanctions Committee, New York, June 2014 (‘Interview C’).
Up here [at the top], you’ve got your Al-Qaida terrorist. And he goes through trainings, and madrasas, and radicalisation and joins different groups before he becomes an Al-Qaida terrorist. Up here, you have absolutely everything in your statecraft at your disposal. However, you’re only reaching that particular individual. If you fail, you’ve got a terror attack.

So the decreasing possibilities of states to have a large-scale effect is the problem. Because ... at the time when the guy is already a terrorist you need to be one hundred percent successful. One attack is enough and things are going to politically change in your country. Here [at the top] you have all these instruments, but you have massive risk. Here [at the bottom] you have massive issues with political problems, but with potentially massive impact.

So what we are doing is we’re cutting the threat here, in the middle. Where you (i) have an equilibrium of possibilities of what you can do and political difficulties connected with this and (ii) you’re already achieving a much more selective group of individuals than you would down here [at the bottom], because most of them are never going to go here [at the top]. Most of these [in the middle] are going to end up here [at the top], eventually.

Figure 4: ‘Equilibrium of Possibilities’ diagram provided by Monitoring Team member in interview, June 2014.
GS: So [the aim is] to target that middle area?

Interviewee: This is what the meetings are doing. Not the Security Council. The Security Council is part of the instrumentarium up here [at the top]. What these meetings and [our] analytical capability is doing is to raise the recognition of threat - and the possibility of countering it and of the information that is necessary to counter it - at this middle level. Where you don’t wait until the guy is at your airport and you need to prevent him from entering your country because he wants to blow up your building. But [where] already, much further ahead, you are aware of what the potential threat is.

GS: So it’s [about] seeing threats as they emerge .... and becoming more dynamic in identifying them?

Interviewee: Yes. 121

What are we to make of this model of the ‘equilibrium of possibilities’ and the explanation provided by its author? What can it tell us about how UN expertise modulates and enacts political rationalities of pre-emption and makes the threats of global terrorism knowable and legally targetable – that is, the relation between expertise and global security law? If it is a map, what kind of topography or threat environment does it help us navigate? Rather than look behind the diagram to elucidate some hidden explanation I want to start from the surface of the drawing by highlighting two of its most salient features.

The first notable thing about this model is its simplicity. It sees radically uncertain future threats posed by transnational terrorism in terms of a simple geometric form shaped by a very basic and relatively stable set of variables and forces. The pyramid is radically reductionist. Yet that is the source of its power. 122 It works by stripping back and discarding the complexities of political violence and recasting unknowable futures as stable epistemic objects with an identifiable trajectory. We are told that most people at the middle of this pyramid will move to the apex eventually. In this model individuals are inexorably pulled from political grievance towards terrorist violence. Yet it remains unclear how listing experts could conceivably operate with such certainty when their knowledge-practices are grounded in the speculative inference of intelligence material. 123 We are also told that the pyramid ‘needs to be in a box’ but are never actually told why. The ‘box’ works here as a border for framing the target population of the list. It distinguishes ‘semi-radicalised’ Muslim populations (who are politically concerned about issues ‘like the Palestinian conflict’ yet harbour potential Al-Qaida terrorists) from other populations (who are not).

This diagram of listing expertise in action is an analogue of the ‘staircase to terrorism’ threat pyramid widely deployed as an analytical model for countering terrorist radicalisation, as depicted in Figure 5 below. According to Fathali Moghaddam, the US psychologist who popularised the ‘staircase’ approach, terrorism is best conceptualised as a multi-storey building. The ground floor represents broader populations where perceptions of justice and injustice are important and top floor represents the ultimate terrorist act. The middle floors are the domains where potential terrorists ‘become disengaged from morality as it defined by governmental authorities (and often by the majority in society) and morally engaged in the way[s] ... constructed by the terrorist organization’. The middle floors are a tipping point,

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121 Interview B.
122 The power of inscriptions lies in their simplicity and capacity to make diverse phenomena commensurable. See: Latour (n 13 and 35); Timothy Mitchell, Rule of Experts: Egypt, Techno-Politics, Modernity (University of California Press, 2002).
123 See Chapter 4 for a more detailed discussion of the use of intelligence-as-evidence in the listing assemblage.
where potential terrorists begin to see ‘terrorism as a justified strategy’. The movement from disaffected individual to terrorist (or radicalisation process) is shown as a narrowing staircase. As an individual moves up, ‘they see fewer and fewer choices, until the only possible outcome is the destruction of others, or oneself, or both’.  

![Diagram of the 'Staircase to Terrorism' model used by the Belgian government’s Community Policing Preventing Radicalisation and Terrorism initiative.](image)

Figure 5: The ‘Staircase to Terrorism’ model used by the Belgian government’s Community Policing Preventing Radicalisation and Terrorism initiative.

Such counter radicalisation models stretch notions of terrorist risk and threat and thus broaden the field of anticipatory governance. Placing those considered ‘risky’ and ‘at risk of becoming risky’ together on a common terrorist trajectory, for example, extends the operative notion of threat that justifies security action. As Charlotte Heath-Kelly notes in her study of the UK government’s PREVENT strategy, ‘the at-risk subject of radicalisation is vulnerable to developing a propensity of dangerousness – meaning that they are always already rendered as dangerous’. By fusing a ‘relationship of equivalence between particular indicators of social dislocation and the potential for violence’, De Goede and Simon argue that such models work to reframe individual events otherwise considered unproblematic as something ‘potentially worthy of pre-emptive intervention’.

That counter-radicalisation models inform global security listing practices demonstrates the mobility of anticipatory governance techniques across fields. Such movement is unsurprising given the extremely broad scope of the targeting criteria of this listing regime. The individual potentially ‘at risk of becoming risky’ and the individual potentially ‘associated with someone associated with’ Al-Qaida are similarly expansive and elastic categories.

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125 *Ibid*, 161
126 For analysis of this ‘staircase model’ as threat representation in counter-radicalisation policy, see: Marieke de Goede and Stephanie Simon, ‘Governing future radicals in Europe’, (2013) 45(2) *Antipode* 315, 321 - 323. This picture of the model is taken from that article.
128 De Goede and Simon (n 124) 322 - 323.
But this convergence draws into stark relief just how far removed we are from conventional understandings of what it is thought that the Security Council is authorised to do counter threats to international peace and security. This is a crucial point that runs against the grain of how UN sanctions are usually discussed and studied. As detailed earlier in the introductory chapter, Chapter VII of the UN Charter grants the Council exceptional powers solely ‘to take measures deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security.’ Legal scholars tend to take the view that Chapter VII action requires threats to have a degree of particularity and concreteness before the Council can move to counter them. The Monitoring Team’s powers are delegated and formally cannot exceed those of the delegating authority (the Security Council). Yet as this diagram shows, with the Al-Qaeda sanctions regime, global listing expertise is aimed at apprehending and averting uncertain potential dangers well in advance of any concrete manifestation of threat – where ‘already, much further ahead, you are aware of the potential threat is’, Here counterterrorism expertise is not only ‘effectively implementing’ the list, but significantly stretching the scope of what the Council can govern and target through the list in practice.

The second key feature of this diagram and explanation is the way that listing is aimed at cutting the threat of global terrorism ‘in the middle’ and establishing an ‘equilibrium of possibilities’. What might this equilibrium mean and how can the uncertainties of a threat generally thought to be globally diffuse ever possibly be governed in an equilibrium state? To address such questions it is helpful to briefly revisit the work of Michel Foucault. From the second half of the eighteenth century onwards, Foucault observed the emergence of a new technology of power that was not disciplinary but rather something he termed ‘biopolitical’. Whilst disciplinary power ‘concentrates, focuses and encloses’ the bodies of individuals to exert control over them and produce ‘individualizing effects’, biopolitics is directed at the population as a political problem and:

... introduce[s] mechanisms that are very different from the functions of disciplinary mechanisms .... Their purpose is not to modify ... a given individual insofar as he is an individual but essentially, to intervene at the level at which these general phenomena are determined .... Most important of all, regulatory mechanisms must be established to establish an equilibrium, maintain an average, establish a sort of homeostasis, and compensate for variations within this general population and its aleatory field. In a word, security mechanisms have to be installed around the random element inherent in a population of a living beings so as to ... achieve overall states of equilibration or regularity ... [and] protect the security of the whole from internal dangers.

Though they are distinct forms of power and reliant upon different instruments, discipline and biopolitics ‘are not mutually exclusive and can be articulated with each other’. Indeed, one way they are linked and mutually reinforced is through the increasing circulation of mobile norms ‘that can be applied to both a body one wishes to discipline and a population one wishes to regularise.’ For Foucault, norms ‘emerge out of the very nature of that which is governed’ in contrast to legal rules which ‘are external to that which is being governed’.  

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129 UN Doc. A/65/258 (6 August 2010) 11.  
130 Interview B.  
131 Koskenniemi (n 8) 338.  
132 Foucault (n 30) 246. It is beyond the scope of this chapter to analyse Foucault’s thinking on biopolitics and security in detail. My analysis here is limited to introducing this material for the purposes of thinking through specific problems presented by the empirical material at hand.  
133 Ibid, 250  
134 Ibid, 253  
With the emergence of security, norms work through ‘the plotting of differential curves of normality’ and ‘differential risks’ rather than by trying ‘to get people, movements and actions to conform’ to the normal as with disciplinary modes of power.\textsuperscript{136} The key point I want to make here is that with the expansion of biopolitics ‘law operates more and more as a norm’\textsuperscript{137} or ‘an interplay of differential normalities’\textsuperscript{138} that works to ‘break subjects and objects into elemental degrees of risk’, sift good from bad and generate some kind of overall homeostasis through the increasing use of security mechanisms.\textsuperscript{139}

When this Monitoring Team member explains the rationale for these expert meetings in terms of establishing ‘an equilibrium of possibilities’ we can see this mobile norm and the interplay of differential normalities being put into circulation.\textsuperscript{140} The main story is that this regime targets specific individuals as threats to international peace and security under Chapter VII of the UN Charter. But I argue there are also governmental rationalities and techniques conditioning this regime and authorising new forms of security expertise that are pushing the envelope of what global listing can secure in practice. In this sense, listing works as a hybrid legal form - part Chapter VII sovereign measure and part biopolitical norm. It creates a broad field of intervention stretching from the apex of the pyramid where the Council’s formal instrumentarium is situated to the informal middle area or ‘heterogeneous transactional zone’\textsuperscript{141} where global listing expertise intervenes and performs its work.

Highlighting this hybridity is neither to suggest that sovereignty (or UN Chapter VII power) is somehow on the wane and being eclipsed by global biopolitics or to claim that this fusion is unique to the global security domain. As Nikolas Rose and Marianna Valverde observe, legal mechanisms have long ‘played a key role in the authorization of disciplinary and bio-political authority’ and thus laws and norms have long been mutually interdependent.\textsuperscript{142} Others have analysed collective security reform efforts to demonstrate that UN ‘sovereignty itself has become infused with a biopolitical program’ of what is termed ‘global governmentality’.\textsuperscript{143} But this hybridity underscores the importance of technical expertise in global security law and has important consequences for how the regime is sustained, legitimised and contested.

The main justification for targeted sanctions, for example, is that they offer a more precise and calibrated form of governance. Yet the explanation provided here renders this ‘smart sanction’ rationale problematic by showing how global listing also aims at modulating a much broader population and potential threat environment. Legal challenges in this area understandably highlight the Council’s formal UN Charter powers against the fundamental rights of targeted individuals. But the listing process outlined here works through new forms of security expertise disaggregating individuals into ‘measurable risk factors’\textsuperscript{144} that are then targeted at a far more generic level for the purposes of ‘maintaining an average’.\textsuperscript{145} This isn’t so much an exercise in targeted governance as a novel program of biopolitical management.

(iii) Enlistment: Connecting Networks to Networks and Assembling Global Security

\textsuperscript{136} Foucault (n 120) 63, 61, 57.
\textsuperscript{137} Michel Foucault, \textit{The History of Sexuality Vol. 1}, (Pantheon, 1978) 144.
\textsuperscript{138} Foucault (n 120) 63.
\textsuperscript{139} Amoore (n 114) 65.
\textsuperscript{140} My use of the term ‘mobile norm’ here is taken from Louise Amoore - Amoore \textit{Ibid} 17- 18.
\textsuperscript{141} Rose and Valverde (n 135) 549.
\textsuperscript{142} \textit{Ibid}, 550
\textsuperscript{144} Mariana Valverde and Michael Mopas, ‘insecurity and the dream of targeted governance’ in Larner and Walters (n 27) 240.
\textsuperscript{145} Foucault (n 30) 246.
The third and final aim of these consultation meetings analysed in this chapter is that of enrolment or enlistment. That is, the assemblage of a diverse array of security actors into new preemptive global security networks built around the administration of this list, the construction of a ‘global optic’ and the potential for intelligence exchange. As one Monitoring Team expert explained, it is the creation of new multilateral intelligence exchange networks that is perhaps the most important effect of these meetings:

We are the only team in the entire UN Council sanctions structure [that] have a mandate to convene Intelligence Service conferences. We just had one in Vienna last week where twelve ... heads of Intelligence Services from very diverse countries came to talk about the threat of Al-Qaida in Africa ... That’s something that [just] doesn’t happen ... [where] you have twelve different intelligence services sharing information with the team, but also with each other, and connecting networks with each other ...

Multilateral [sharing] is very unique to the ‘five eyes’ community – so Britain, Canada, Australia, UK and US. Other than that, multilateral intelligence sharing inside the EU is already a big problem. [But] if you talk about multilateral intelligence sharing between a European country, an African country and a central Asian country, it’s just not happening except for us.146

The idea of UN experts forging new forms of multilateral intelligence sharing is contentious. When US Secretary of State Colin Powell made his infamous public presentation before the Security Council in 2003 seeking for authorisation of military force against Iraq he claimed that each statement he made was ‘backed up by ... solid sources. These are not assertions. What we are giving you are facts and conclusions based on solid intelligence’.147 Yet ultimately his claims that Iraq possessed Weapons of Mass Destruction were found to be unsubstantiated. Consequently, the use of intelligence by the Security Council has long been fraught with political controversy.148 In his study on this issue Simon Chesterman acknowledged that whilst UN programs on counter proliferation and counterterrorism increasingly required intelligence material, ‘international organisations are ... [still] forced to draw upon national agencies’. As a result, inside the UN there ‘is not multilateral intelligence per se, but applications of national intelligence to serve national interests that happen to correspond to international security’.149 Yet multilateral intelligence sharing is precisely what these UN expert meetings appear to be stimulating as part of building an optic for seeing ‘global terrorism’. Whilst this development might be novel in the context of the UN Security Council, it is consistent with broader post 9-11/ shifts to better ‘connect the dots’150 and transform intelligence gathering into more of an adaptive learning process to better understand transnational threat complexities.151

UN counterterrorism expertise is the crucial conduit for these meetings to take place and networks to emerge because of its perceived objectivity and political neutrality. As the same Monitoring Team member put it, ‘we have not met a state that does not talk to us ... If you

146 Interview B.
147 Text of Colin Powell’s Speech to the UN Security Council, BBC News, 5 February 2003. Available at http://bbc.in/1GXm9pF.
151 See, for example: Gregory F. Treverton, Intelligence for an Age of Terror (Cambridge University Press, 2009). Treverton, Director of the RAND Corporation’s Center for Global Risk and Security, argues that intelligence analysis needs to transform into more fluid forms of ‘organizational sensemaking’ if it is to generate effective products in relation to global terrorism.
think about the world, certain member states don’t talk to each other. We bring analytical expertise with us’ which allows the team to, ‘have a much better spread in [state X] than any other Member State save the Americans’. It is the purportedly ‘apolitical’ nature of their expertise that enables the team to gain a deeper rapport with, and ‘better spread’ amongst, intelligence services strategically important in the fight against global terrorism. According to one member the key is that ‘we don’t have a political role. We are this neutral convening factor that allows them to come. Its not a conference of Russia or America, it’s not a NATO ally conference ... [We provide] a very neutral territory to convene’.

For this listing expert ‘politics’ is something contained in the intergovernmental forum of the Security Council and so the ‘technical’ and the ‘political’ are delineated as very different domains. But when we understand the list as a technology of governance and inscription the analytical focus and terrain of politics is broadened. Reframed this way, the ‘political’ precisely lies in the ability of listing expertise to provide ‘a neutral territory to convene’. Because it enables a network to be established for localised threat traces to be collected, rescaled, taken back to a central point (the Security Council core) and linked to pre-emptive security intervention at many other sites. It is security expertise driven by problems of list administration that allows for ‘government at a distance’ to take place. In this way, the ability of counterterrorism experts to convene and connect networks with networks through the mediating device of the list is one of the most powerful political processes of all.

The fact that perceived expert neutrality ‘allows them to come’, as this Monitoring Team member put it, points to another important element of listing expertise in this context - which has little to do with the ‘objectivity’ of their expert knowledge and more to do with institutional power that authorises it. That these listing experts carry the delegated authority of the United Nations is also crucial in this setting. One US Embassy Cable, for example, recounts confidential discussions held between the Team’s former co-ordinator (Richard Barrett, ex-head of MI6 counterterrorism) and USUN officials concerning a meeting the team convened ‘with heads of intelligence and security services from Algeria, Libya, Morocco, Pakistan, Saudi Arabia, UAE and Yemen on January 23-24 [2008] in Vienna’:

Barrett further emphasized that these officials viewed the 1267 Committee and the Monitoring Team as a neutral interlocutor that could facilitate U.S. and EU assistance to them under multilateral cover. Many of these officials believe it is easier for their governments to be seen cooperating with the UN than to be accused of responding to the bilateral demands of the U.S. or other western countries.

Here it is the fact that the team’s expertise is housed within the UN that is the critically important factor at play, for reasons that have little to do with expert ability to syncretise global analysis. The neutrality of the team’s expertise is only important insofar as it can provide ‘multilateral cover’ for national security actors to gain greater operational access to US and EU intelligence. ‘These officials’, the Cable continues ‘want to be treated as equals by their U.S. and EU counterparts’. They ‘see the UN as an actor that could convince the U.S. and Europe to agree to greater operational cooperation with them’. These meetings are

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152 Interview B.
153 Ibid
154 See, for example: Bruce Braun and Sarah J. Whatmore, ‘The Stuff of Politics: An Introduction’ in Bruce Braun and Sarah J. Whatmore (eds.), Political Matter: Technoscience, Democracy and Public Life (University of Minnesota Press, 2010).
155 Miller and Rose (n 3) 9; Latour (n 10) 176.
156 US Embassy Cable 08USUNNEWYORK313 (dated 7 April 2008), para. 7.
157 Ibid
158 Ibid
thus valued for their potential to bypass established cold-war intelligence ties and create new transnational security and intelligence exchange networks:

In a separate conversation with USUN, Barrett described the type of assistance sought, which includes: cooperation on intelligence sharing, including on intelligence that supports listing requests; technical help with intercepts; and more action from EU countries in response to the threat posed by persons located in Europe -- including those under asylum -- who incite terrorism in the region, but whose freedom of speech is nonetheless protected.159

According to Kim Lane Scheppelle the rapid uptake of global security law by states in the post-9/11 period can be explained precisely by such political motivations. That is, national executive security actors have pushed the implementation of new Security Council measures because they have ‘a strong interest in gaining the power that [these] new legal regime[s] gives them relative to the other players in their own domestic space’.160 This thesis is important, but I want to qualify it in two ways that help us make sense of the empirical material under analysis. First, the dynamics of global exception are not just a question of formally extending security powers through the promulgation of broad legal measures. That is the first legal step - a necessary, but in itself insufficient, condition to account for global security law. Expert practices and networks stimulated by the resolution of seemingly mundane technical problems enabled by these laws also provide the driving force for new vectors for global securitisation.

There is also an implicit assumption that an expansion of draconian domestic security powers flows unproblematically from the creation of new UN global security regimes and the convergence of shared executive interests they enable. But when the exception is analysed as a process of legal assemblage rather than as a ‘state’ of emergency its contingency, heterogeneity and failure can more readily be drawn into view.

During an interview with one former Monitoring Team member, for example, I asked about their ‘creative work linking together the security and intelligence services in North Africa and the Middle East with the aim of bringing them in closer proximity to the P5 states’. In response, I was told this rationale was ‘Bullshit ... that was not what we were doing. That’s what we said we were doing to justify to the Council the expenditure of the whole thing’.161 According to this expert, a central figure organising the first meetings, their original aim was:

... to bring the countries together to be able to give the reviews to the Security Council on intelligence, because the intelligence was not reaching the Council ... That is why I have suggested this idea and talked to all intelligence services through my national contacts to make it happen ... I wanted to make the list ... more vibrant. I wanted to make the list reflect the real threat.’162

But this process failed, according to this expert, because the views of regional intelligence services ‘were being censored before [they] reached the Council’. On further probing I was told this was due to the Council’s reluctance to act outside established bilateral relations:

It was basically the P5. The other member states, not the P5, they would bring the experts on counterterrorism to the table. And they would want to make a deal. The P5 always wanted to have the deal done outside the Council. On bilateral ties ... ‘It’s a matter of superpower

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159 ibid
160 Scheppelle (n 6) 5.
161 Interview with former member of the UN 1267 Monitoring Team, 2013 (‘Interview D’).
162 ibid
relations. It’s the way its done’ ... They wanted to have the decisions done in capitals. Not with the UN.  

Leaked US Embassy Cables corroborate the view that this attempt to build an optic for seeing ‘global terrorism’ has been plagued with problems, because the P5 states have failed to take the operational concerns of North African, Middle Eastern and South Asian intelligence services seriously. In one Cable - entitled, ‘UN/1267 Sanctions: Arab and Pakistani Security Officials Complain Security Council Slow to Sanction Al-Qaeda’ - the former Monitoring Team coordinator updates the Sanctions Committee and US officials on a 2008 ‘consultation meeting’ that took place in Vienna: ‘These [intelligence] officials are frustrated that their requests to recommend specific individuals affiliated with al-Qaeda or the Taliban for sanctions by the Security Council are frequently put on hold, either temporarily or for long periods of time’.  

The Cable tells of how 12 Libyan list nominations and 32 Moroccan list nominations had been placed on hold by the US, UK, France, Russia and Belgium for up to 4 years and goes on to warn the Sanctions Committee that this inaction ‘will discourage [these states] from proposing additional subjects for sanctions in the future’.  

So the three key Monitoring Team experts interviewed about these consultation meetings provided somewhat divergent views on their purposes, merits and effects. For some, the meetings constitute successful experiments in building a new optic for seeing ‘global terrorism’ and building new networks of intelligence exchange. For others, the meetings have been a resounding failure and simply reasserted established superpower relations.  

Irrespective of the substance of these meetings and whether new intelligence flows are being created or established bilateral ties reaffirmed, I argue that the power of this experiment lies in its ongoing capacity for enrolment or, more accurately, enlistment. The problems of the list, and the opportunities for intelligence and analytical exchange that its effective implementation affords, serves to arrange a diverse array of security actors into new pre-emptive global security networks. To explore this point is to unpack the capacity of UN security expertise ‘to connect networks with networks’ suggested by one of the listing experts interviewed above. As one former member explained, implicitly distinguishing the politics of the Monitoring Team from the Monitoring Group:  

The Sanctions regime, of course, is an obligation on Member States, not on the people who are under sanction – an obvious point but one that worth making. So this is [about] getting Member States to really see the threat in the same way, co-ordinate their activities and pull together to ensure that the chain had no weak links ... [its] a question really of explaining that Member State’s obligations weren’t just obligations they had to conform with but also that there were reason behind that - [that] these were the reasons why it was important to have a global regime ... The Monitoring Team of eight experts really took that job on.  

Getting people to ‘see the threat in the same way’ means enrolling diverse actors to see terrorism through the ‘global optic’ of the list and to govern it pre-emptively. In this process, the power of expertise does not lie in ‘naming and shaming’ states or enforcing implementation but ‘[forging] a shared understanding and shared approach’ that enables states ‘more importantly, to feel that they were part of ... the international effort’.  

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163 Ibid  
164 US Embassy Cable (n 156).  
165 Ibid  
166 Interview A.  
167 Ibid
This wasn’t just some group of … five permanent members, just ordering the world to do things which the world might not think were particularly useful … But saying to the states, you know, ‘What is the threat as you see it? What could the international community be doing to help you?’ … So we went around to a lot of those countries talking about what they thought, and what the Security Council thought and trying to mix that operational aspect with the political aspects. And then, beyond that grouping the countries together so that they would have a joint view – which is obviously much more powerful when expressed to the Security Council than if they have got independent and slightly conflicting views.  

The Team’s expertise and the ‘consultation meetings’ they have convened have thus been crucially important means of establishing new economies of equivalence in this domain:

It was important to [say to] states, ‘Ok. What are you doing on counterterrorism; what are you doing about the Al-Qaida threat? How do you assess that threat and how does this international activity support what you’re doing and fit in with what you’re doing?’ And that allowed Member States to adapt their counterterrorism measures, if you like, in a sort of coherent way globally. And it also allowed us to tell the Security Council, you know, where this regime might work but [also] where it might not work and so where they’d like to sort of maybe amend it a little bit. Whether the people who are subject to sanctions were appropriate, according to some of the key Member States who knew them better than some of the members of the Security Council. And so we built up a relationship with mainly, you know, Middle Eastern, North African and South Asian countries.  

It is by convincing national security actors of the benefits of pre-emptive targeting through listing - and showing them what this list can do - that UN listing experts build institutional rapport, stimulate a ‘shared feeling’ and enlist broader political and operational support. One of the main benefits highlighted during country visits, according to one former Committee member, is how the list can act as an intelligence generator and be used as a source of ‘leverage’:

Once an individual or entity is placed on the sanctions list … [it] will yield its own additional flow of information or intelligence … There will be suspicious transaction reports … [and] chatter on the wires that wasn’t there before. And the hope is that … [they] will seek to distance themselves from their previous involvement by coming to cooperate with law enforcement in order to demonstrate that they have severed the relevant ties … So the critical thing about the Al-Qaida sanctions regime … [is] the follow up to a listing – what … benefit[s] both the Council and the relevant Member State from that listing.  

Such co-operation can also be a valuable way of generating potential informants from amongst the broad pool of perceived ‘material supporters at the periphery’. Targeting people on the periphery is useful because it will often ‘create the leverage [for them] to say: ‘Get me off this list. I will help you with information. I know about the tiers that are more difficult for you to trace.’ The idea of counterterrorism officials using listing techniques for generating informants amongst targeted communities has long been the source of speculation, but has rarely been acknowledged. Litigation currently afoot in the US, for example, alleges that the FBI placed people on the US No-Fly list as a means of trying either to coerce them into becoming informants in their local communities or punish them for

168 Ibid
169 Ibid
170 Interview C.
171 Ibid. This argument is examined in more detail in the next chapter when discussing the Monitoring Team’s reasons for supporting list accountability reforms.
172 Ibid
refusing to do so.\textsuperscript{173} So it is unsurprising that similar motives might motivate other security actors to use the Al-Qaeda list to target peripheral persons of interest in their territories and be a means of ‘persuading them that there is a strategic benefit to them of making better use of the list’.\textsuperscript{174}

Even listing individuals from the periphery, where security officials may have very little information to infer association with Al-Qaeda, can serve to either generate intelligence and/or help transform speculative security material into more solid forms of evidence. According to one expert the critical step is to list individuals first and then ‘get that listed person right into making their contrary claims’. Through this process ‘their contrary claims can be followed up, can be discredited, and can actually form further grounds for the listing’. According to this interviewee, this is one ‘positive way in which you can move a closed information situation into an open information situation’.\textsuperscript{175} Thus listing can be used in conditions of uncertainty to absorb some of the uncertainties involved with listing.

Finally, listing can also help by providing a powerful means of stigmatising those that it targets: ‘In Africa we have discovered that there is a genuine fear of being put on a sanctions list. Not because assets will get frozen or travel will be denied but because of social and familial stigma. We think that that could be used significantly more in a context like with Boko Haram ... to [help] tip the balance towards the good guys’.\textsuperscript{176}

A key impetus for this enlistment process is the perceived impotence of the Security Council to enforce its own decisions in spite of the supreme nature of its Chapter VII powers:

UN Security Council Resolutions are binding decisions under Chapter 7. When they are done under Chapter 7, it’s no option. However, there are de facto options. How many states might have violated the Security Councils [sanctions] in the past ... [and] what is the punishment? What is the punishment for North Korea or someone helping North Korea ... or someone helping Iran from the UN Security Council’s perspective? You’ve got the punishment by ... stakeholders who have their own, much harsher, sanction regimes against violators. But the UN Security Council has no mechanism to enforce its decisions. It is an intergovernmental organization. That means, theoretically, that everyone is of the same weight ... If you violate [sanctions, the] ... maximum of what happens to you is you get bad press for few days and then no one cares afterwards.\textsuperscript{177}

Another former member of the Team framed this problem in similar terms as a part of a dilemma of the Security Council to try and reinforce its authority under the UN Charter:

Some permanent members would say, ‘Well, you know, damn it. This is what we want to do and that’s what we’re going to do ... and] Member States have to comply because they signed the Charter and they’ve signed up to be members of the UN so, end of story’. But clearly ... what are you going to do if someone doesn’t implement your sanctions? What options have you got? You’re not going to impose secondary sanctions on them - very, very unlikely and even if you did who would comply with that? It would be sort of an abuse of power almost ... You’re not going to go to war over it ... You’re just going to make political statements saying, ‘Well we think you should comply’. But ... if nothing changes as a result, [then] you’ve lost it [ie, your authority] haven’t you?\textsuperscript{178}

\textsuperscript{173} For details see: Ramzi Kassem and Baher Azmy, ‘Spying or No Flying’ Al Jazeera (7 May 2014). Available at: http://bit.ly/1hxQWZj. For background on the ACLU’s litigation on this issue, see: http://bit.ly/1BsHBuA.

\textsuperscript{174} Interview C.

\textsuperscript{175} Ibid

\textsuperscript{176} Ibid

\textsuperscript{177} Interview B.

\textsuperscript{178} Interview A.
It is enlistment that provides the answer to this strategic problem, enabling global security laws to exert greater control over the problems of global terrorism they seek to counter. It allows the Monitoring Team to achieve through technical means what had eluded the more confrontational efforts of earlier Monitoring Group. It provides a conduit for translating direct legal commands into more indirect mechanisms of rule – creating a ‘shared feeling’ that enables disparate security officials to feel that ‘obligations weren’t just obligations’.

The effects of global listing expertise thus bear certain similarities with the ‘soft power’ initiatives used by bodies such as the UN Counter Terrorism Committee (CTC). In her study of the CTC Isobel Roele observes how seemingly innocuous and technical practices such as ‘implementation assessments’, ‘guiding principles’ and UN workshops for ‘enhancing dialogue’ embed asymmetrical power relations between core and periphery and discipline recalcitrant states into participating in the Security Council’s counterterrorism agenda.\textsuperscript{179} For Roele such effects can be adequately explained through the framework of disciplinary power: ‘Global counter-terrorism is only as strong … as its weakest link. Consequently, the normalization of all states is vital to the success of the counter-terrorism project’.\textsuperscript{180}

Similarly, for Kim Lane Scheppele the rapid uptake of global security law can be explained through the ways it combines both disciplinary and renewed imperial logics of control. For Scheppele, in global security law as with colonial empires, ‘the center gets from the periphery what the center needs [\textit{i.e.}, ‘terrorists’]. In exchange, the peripheral states, and especially their leaders, get powerful protection and approval from the center’.\textsuperscript{181} Here global security law is presented an effect of the interests of the actors involved and their respective ‘strategies of legitimation’ – ‘leaders in the periphery use their backing from the center to enhance their local power while leaders at the core use the control they exercise over the periphery to shore up their power at the core’.\textsuperscript{182}

Both of these approaches offer valuable insights into how this emergent field of law is unfolding. Yet I argue that understanding the uptake and spread of global security law also requires close analysis of the specific governance technologies and forms of security expertise that are being forged and put into circulation. The ‘consultation meetings’ examined in this chapter do enable novel relations between periphery and core and renew imperial relations. But as Geoffrey Bowker and Susan Leigh Star remind us, ‘the material culture of … empire is not found in pomp and circumstance, nor even in the first instance at the point of a gun, but \textit{rather at the point of a list}’.\textsuperscript{183} It is the technology of the list and its expertise that does much of the ‘hard work’\textsuperscript{184} to enrol the different actors and sustain the knowledge-practices that cohere this form of law. Global security law is not only a body of imperial decrees. It is also a ‘legal complex’\textsuperscript{185} of quasi-legal interventions, expert techniques, dispersed forms of authority and pre-emptive security practices produced through novel knowledge objects – or, as argued in this book, a global legal assemblage.

\textsuperscript{179} Roele (n 79).
\textsuperscript{180} \textit{Ibid}, 50
\textsuperscript{181} Scheppele 2013 (n 2) 250.
\textsuperscript{182} \textit{Ibid}, 249, 251.
\textsuperscript{183} Bowker and Star (n 103) 137. See also: de Goede and Sullivan (n 11). On the materiality of empire see: Daniel R. Headrick, \textit{The Tools of Empire: Technology and European Imperialism in the Nineteenth Century} (Oxford University Press, 1981).
\textsuperscript{184} Tania Murray Li, ‘Practices of assemblage and community forest management’, (2007) 36(2) \textit{Economy and Society} 263, 264.
\textsuperscript{185} Rose and Valverde use the idea of the ‘legal complex’ to refer ‘to the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgement’ - (n 135) 542. For Valverde, the advantage of legal complexes is that they can be empirically investigated – Valverde 2003 (n 25) 10.
Interoperability and the Politics of Formatting

In the previous section we examined how counterterrorism works, through the technology of the list, to create a new optic for seeing ‘global terrorism’. By closely examining how listing expertise works we observed how seemingly innocuous technical problems of list administration assemble this domain of global security law and stretch what it is capable of doing in practice. In this section I examine another specific site and mundane technical problem that the Monitoring Team are addressing as part of their mandate for effectively implementing the list: the problem of formatting. That is, rendering the information aggregated through the Al-Qaeda list interoperable with data standards and methods of information processing and analysis. The list is currently being reformatted into a variety of different information packages to extend its reach and improve its application. In this section I examine the Monitoring Team’s implementation efforts in relation to two interrelated formats – (i) Biometric information and (ii) Advanced Passenger Information (API) and Passenger Name Record (PNR) data - drawing out its political and legal effects. According to the experts involved, reformating is a technically complex but relatively minor issue far removed from the more pressing political concerns of the Security Council. As one team member described it: ‘This is basically the list, with the information on the list, in a different format. So the substantive information is the same’. In this formulation, the list is an inert object or instrument first applied in context A and then simply reapplied in context B.

However, as I show in this section, technical reformatting is a creative, jurisgenerative and profoundly political governance move. Reformating the list performs what is called in actor-network theory a ‘translation’. It doesn’t simply move the list from context A to context B - it changes the list in accordance with the new criteria, ordering practices and spatio-temporal dynamics that condition the different formats. Translation, in other words, is a productive process or ‘form of modification’. I argue that examining list reformating is critically important because it shows us how global security law is embedded and stretched through listing practice. It generates new global security governance terrain but is obscured through functional expertise as mere technical background work. As with our earlier discussion of the ‘global optic’, the Al-Qaeda list emerges from this analysis of reformating as a crucial actant in the global security domain. It exerts agency in its own right, performs important legal assemblage work, builds new ensembles of relations and helps to produce global terrorism as an expansive object of political and legal intervention.

(i) Reformating the List and Building the ‘Third Hurdle’

Most discussion about the Al-Qaeda list focuses on its coercive asset-freezing powers. But the asset-freeze is only one component of the sanctions. Those listed are also subjected to an arms embargo and a global travel ban. The travel ban - which requires states to ‘prevent the entry into or the transit through their territories’ of all individuals on the Al-Qaeda list – has been poorly enforced for many years. The Security Council tried to close the gaps in 2004 by ensuring that amendments to the list were automatically sent ‘to all States, regional and subregional organizations for inclusion, to the extent possible, of listed names in their respective electronic databases and relevant border enforcement and entry/exit tracking systems’. Yet this call largely went unnoticd and - as the Monitoring team candidly acknowledged in their fourth public report - ‘Listed persons continue to travel, despite the

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186 Interview B.
187 On translation, see, for example: Callon and Latour (n 45) 279.
mandatory language of the travel ban, whether via the use of stolen, lost or fraudulent travel documents or through the inattention/disregard of the sanction by Member States’.  

In 2005 the Security Council (through the Monitoring Team) began two initiatives to ameliorate this situation. In collaboration with the International Police Organization (INTERPOL), they launched the Interpol – United Nations Security Council Special Notice system for locating and preventing the movement of listed persons. Special notices exist in two versions. The public version is available on the Interpol website. Its original format, as shown below, was ‘in essence, a kind of ‘wanted’ poster’, containing photographs, aliases, physical descriptors and known travel documents associated with each Al-Qaeda list entry. Its appearance has since been modified to mimic the ‘Narrative Summary of Reasons for Listing’ maintained by the Sanctions Committee. The restricted version is only available to Interpol license holders – including most national police and border agencies around the world but also, anomalously, the SCAD administrators supporting the Monitoring Team inside the UN Secretariat. The closed version ‘adds value’ by containing additional ‘law enforcement-confidential information, such as fingerprints and details of relevant national investigations and operations under way’. By 2013 Interpol Special Notices had been created for almost all Al-Qaeda list entries, with 20 percent including photo identifiers.

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191 Ibid, para. 92.
193 Interview B.
194 S/2006/154 (n 190) para. 93.
In 2005, Monitoring Team counterterrorism experts also met with officials from the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA). ICAO is the UN agency responsible for setting global aviation standards and IATA is the trade association representing the global airline industry. These meetings identified ‘several areas of convergence’. As discussed in more detail below, these convergences soon translated into co-operative working projects in relation to both travel documentation standards and passenger screening practices. To that end, the Monitoring Team have been working intensively with ICAO and IATA since 2013 with a view to delivering practical results on improved aviation industry implementation of the ban by 2016.

For listing experts, these initiatives with Interpol and ICAO/IATA are driven by two primary aims - interoperability and pre-emption. Both technical processes aim at ‘enhancing’ the implementation of the Al-Qaida list by rendering it interoperable - with the biometric platforms increasingly used by border security agencies and the API/PNR datasets used in the aviation industry. The problem, as one ICAO official explained, is that the Al-Qaida list currently exists in a format that renders it effectively unusable in the global transport environment: ‘Although it’s available online through the website, it’s not known in any system that automatically checks against it’. To resolve this issue the Monitoring Team are reformatting the list in ways that police, border agencies, the financial sector and the airline industry are already familiar working with. Chapter VII UN Charter measure or not, making global security law go global requires technical interoperability. As one team member put it: ‘If [the list] is not interoperable, you simply cannot implement it. Because [what] we are looking at is global implementation’.

These technical initiatives are also directed at transforming the pre-emptive bordering capabilities of the travel ban. The aim is to make the ban better able to intervene in the middle zone of the ‘equilibrium of possibilities’ shown earlier in Figure 4 – where ‘you don’t wait until the guy is at your airport and you need to prevent him from entering your country ... but [where] already, much further ahead, you are aware of what the potential threat is ...’ The travel ban has historically been concerned with preventing listed individuals from entering into or transiting through a particular territory. In their 2006 report the Monitoring Team raised the question of whether the formal prohibition on transit might also be read as imposing additional obligations on states ‘to prevent the departure of listed persons from their territories’. At that time, the team concluded that ‘the resolution may not prohibit all “departures from” a territory, because the Council could easily have said so’ if that is what they intended. Yet beyond the formality of state obligations, using the list to target ‘much further ahead’ in time has been the prime rationale for the Monitoring Team’s technical collaborations with Interpol, ICAO and IATA. The aim has been to re-orientate the focus of the ban from entry and transit towards pre-screening and ‘exit control’. As one ICAO expert put it, the travel ban is ‘no longer about stopping people at borders. It’s about stopping people before they even think about crossing borders and that’s a little bit

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196 S/2006/154 (n 190) para. 97.
197 Interview B.
198 Interview with ICAO official, Montreal (via Skype), March 2014 (‘Interview E’). The availability of the list in .xml format is specifically designed to facilitate interoperability with the banking and financial industries.
199 Interview B.
200 Ibid
201 I say ‘historically’ because the situation has shifted dramatically following the introduction of S/RES/2178 (2014) against ‘foreign terrorist fighters. The significance of the Resolution 2178 and its relation to these technical reform processes is explored later in this chapter and in the conclusion of this book.
202 S/2006/154 (n 190) para. 85.


different’. 203 One Monitoring Team member described this process as part of the task of building, what he termed, a new ‘third hurdle’:

First of all, you have to get an identity document and/or a visa to travel. Hurdle one. That was addressed years ago - partially with the Interpol databases but [also] with strengthening our relationship with the foreign … and interior ministries. Hurdle one … can be overcome by the individual if he simply forges his identity.

The second hurdle usually was the arrival at the border and the entry in the country. Now you have countries without borders. You have border controls that may not be as strict. You may have a legal problem that the police guy cannot access directly Interpol data [so] … it also has [its] problems. And that was the last hurdle. If the guy could get a visa and a passport and if he could get across the border, then he was in.

But we want to have now a third hurdle. Which means: in the electronic process of getting your means to travel - your airline ticket and your boarding on the airplane – you have a third hurdle. A third possibility … where your identity is checked against the United Nations Security Council list.

The more hurdles you erect for listed individuals, the more difficult it is for them to subvert the travel ban. 204

When framed this way as a question of implementation the process seems reasonably straightforward. The Security Council creates global law over here and it is then the task of technical expertise to try and ensure that body of law is properly applied over there. But when this project of ‘the third hurdle’ is disaggregated and examined more closely the global law making/global law implementing distinction becomes much more difficult to sustain. If the list is a governing technology and form of productive power as argued in this chapter, then these interoperability projects do much more than simply implement. They transform the list and help to forge new governance possibilities that alter, at a quite fundamental level, what this form of global law is, what it can do and how it performs its security work.

(ii) Translation, Scale and the List as a Hybrid Norm

Interoperability is more than a technical move that broadens the implementation of the list through convergence of context A into context B. It is also a process that makes security listing much more dynamic and heterogeneous. As Annemarie Mol has said, ‘objects come into being … with the practices in which they are manipulated. And since the object of manipulation tends to differ from one practice to another, reality multiplies’. 205 Making the Al-Qaida list interoperable similarly does more than enhance its application. It also performs a ‘translation’ 206 that serves to render security listing multiple. Biometric and API/PNR interoperability effectively create other kinds of Al-Qaida lists with different spatiotemporal dynamics and governance effects as the one maintained on the Sanctions Committee website and incorporated, via implementing regulations, in the legal orders of Member States.

The technical process of PNR interoperability starts by unbundling targeted individuals on the Al-Qaida list into a more diverse array of associated PNR-compatible data packets. One member of the Monitoring Team, differentiating the list interoperability process required in

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203 Interview E.  
204 Interview B.  
206 As de Goede and Sullivan argue: ‘Moving records from one list/database to another … does not just change the “context” in which the information is used. It changes the information itself: its technical appearance, the meaning it is inscribed with, the elements it is associated with, and the effects it is able to have’ - (n 11) 79.
the financial and aviation industries, explained this disaggregation process as follows:

The PNR packaging is different from the XML packaging so the data is in different format because ICAO assumes rightfully that you are one individual, one name, one passport ... However on our list we have multiple names, multiple aka’s, multiple passports from different countries. So we need to package the data in a way that you have a headline, maybe a number and then underneath that number, individual identities. This aka is connected to this birth date is connected to this passport number is connected to this address. This aka is connected to only this address. This aka is connected to this passport.207

The rationale for slicing individual targets up into sets of sub-individual identifiers in this way is that of faster and more efficient global circulation. It is anticipated that the travel banning process can accelerate as a result - by reducing the risk of ‘false positives’ and better synchronising the list with the transactional speed of the global aviation marketplace:

With the banking industry ... we’re talking a billions of transactions a day. So everything has to be machines ... [and] in a data format, that they can feed into their software programs ... Otherwise, the entire financial system grinds to a halt. Same thing will need to be for air travel. Where you cannot grind to a halt international air travel because you have ten thousand matching, or partially matching hits. So you need to make sure that you provide data in a form that is usable with the information that is necessary so that airlines can check and reduce the amount of partial or false leads that they have in order to ensure that air travel is no longer interrupted by this.208

The technical aim is therefore to reformat the Al-Qaeda list into ‘individual packages that mesh with the way that the airline industry sells tickets’.209 Once ‘the data transfer is engineered – between us, the Security Council, IATA and ICAO – we will then also have a list checking when the data of the individual passengers is created whether these individuals are on the United Nations Security Council list’.210 This new list, however, is not simply a one-to-one copy of the list on the Sanctions Committee’s website. Splitting individuals (with ‘one name, one passport’) into different information packages changes the targets on the list into a much more mobile and dynamic set of associated data elements. Once disaggregated and rendered PNR interoperable, these packages can then circulate with all passenger data collected from the three main Global Distribution Systems (GDS) used by air carriers and ‘pushed’ toward databases operated by national agencies for PNR travel data risk analysis.211 Meshing listed individuals into data packages formatted to global aviation industry standards significantly alters the spatial and temporal scope of the list implementation process, enabling circulation at a greater velocity and over far more extensive terrain.

Translating the list into travel data is part of a much broader shift from state-centred border control towards new bordering capabilities and dynamics that are simultaneously both subnational and globally scaled. When the travel ban is mediated through travel data ‘national borders and bordering capabilities’ are ‘uncoupled’.212 Once uncoupled, the ban is no longer reliant on national states for its enforcement - which, as I have shown, is the one of the key rationales for the Monitoring Team’s engagement on this issue. The list can then be

207 Interview B.
208 Ibid
209 Ibid
210 Ibid
211 For an overview of the data workflow process envisaged by the 2011 EU PNR proposal, see: Rocco Bellanova and Denis Duez, ‘A different view on the ‘making’ of European security: The EU Passenger Name Record System as a socio-technical assemblage’, (2012) 17(2) European Foreign Affairs Review 109, 115.
enacted at subnational local sites (when someone tries to buy an airline ticket) that are interconnected via global electronic networks and databases. So again we can see the technology of the list deeply imbricated in the production of ‘the global’ by enacting a relatively novel, accelerated and dynamic form of transnational legal ordering. 213 This isn’t a form of ‘global law beyond the state’214 as Gunther Teubner might describe it because national security agencies remain closely involved in the travel data assessment and electronic bordering process. Yet it is more than something ‘constituted largely out of a competition among national approaches’ as sociological scholars like Yves Dezalay and Bryant Garth might suggest.215 It is a multi-scalar legal process enacted through a ‘list-plus-algorithm’ format that creates new forms of global authority and ‘alignments of people, places and things - or fragmented approximations of the same - on the global plane’. 216 Reformatting doesn’t just better implement the list. It translates it into something else.

This process also works to create new security mechanisms. Making the list interoperable with travel data dramatically broadens its field of application and alters what it is capable of doing as a pre-emptive security technology. In the scenario outlined by the UN listing expert above, it is envisaged that making the list interoperable with travel data merely enables another list to be created to check ‘when the data of the individual passengers is created whether these individuals are on the United Nations Security Council list’. 217 Here the list still works in what Foucault calls a disciplinary mode to identify known listed individuals and interdict their travel. But travel data is not only collected and used by states to identify known threats and individuals. It is also analysed using different algorithmic data mining techniques and social network analytics to identify unknown threats, unusual patterns and persons who might potentially be of interest. 218

When an Al-Qaida list entry is disaggregated into multiple data packages that vary associate different names, passports, dates of birth, akas and addresses then these elements can also be used algorithmically to help draw inferences and possible links to the travel records, names and addresses, credit card details of new, and as yet unknown, individuals. People who may have lived in the same town, have a similar name to one of the akas, be of the same religion and/or age range, used a credit card with an address proximate to the address of someone listed might now be identified as someone of interest at the border or someone to prevent from travelling. When the list works in this way it is not only performing the disciplinary function of banning travel for known individuals, but it is also working as a security mechanism for identifying unknown individuals who might pose a potential threat. Just as with the ‘equilibrium of possibilities’ discussed earlier we once more see the list working as a hybrid legal form - part sovereign ban and part biopolitical norm - and broadening its field of intervention.

Using travel records to implement the list and ban the travel of targeted individuals can only adequately work, however, if the passenger data of all travellers can be collected and

217 Interview B.
218 As the ICAO/IATA Guidelines on API state: ‘while advance information of a passenger’s biographic data is useful, the added value of advanced passenger information in its broadest context comes from the ability to access carrier’s information for analysis and research on arriving passengers’ – WCO/IATA/ICAO, Guidelines on Advanced Passenger Information (API), March 2003, para. 1.7. Available at: http://bit.ly/29izx1. For an excellent analysis of the use of PNR to identify unknown terrorists, see Amoore (n 114).
analysed. The use of travel data for security purposes has been a hugely controversial issue. Yet following the Monitoring Team’s technical work on these matters, in September 2014 the Security Council adopted a new Chapter VII measure: Resolution 2178. This resolution compels states to require airlines to provide them with API data precisely for detecting attempted travel of individuals on the Al-Qaida list and encourages states to ‘employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data’ to ‘prevent the movement of terrorists’ – that is, PNR data analytics. Furthermore, in 2013 - following a direct recommendation from the Monitoring Team - the Sanctions Committee determined that ‘not being subject to the Al-Qaida sanctions regime travel ban is a requirement for individuals seeking entry into the national territories of Member States’ and set out to formally notify all states to change their national guidelines accordingly. Whilst the Monitoring Team’s efforts on biometrics have so far focused on gathering biometric material on listed individuals, reformatting the list via the Special Notice system and encouraging greater use of Interpol databases at the border, they have already acknowledged that:

Although biometric data are an effective tool for checking the identity of a listed individual, many countries have not yet introduced this technology. Consequently, the use of a combination of false, forged and stolen documents by listed individuals to conceal their identity and/or profile presents a hurdle to the application of sanctions.

So effective list implementation is already becoming tied (technically and discursively) to greater use of biometrics technologies at the border. Or as the Monitoring Team have put it, ‘the potential disruptive capability of the travel ban ... depends also on adequate implementation through border control mechanisms’. It is arguably only a matter of time before the Security Council uses its Chapter VII authority to compel states to use biometric systems for effectively implementing the list or preventing the movement of potential terrorists. When they do, it won’t simply be a decree of global sovereign power deciding upon the exception. But rather something enabled, at a very granular level, by the reformatting initiatives currently being developed by UN security listing experts and extended by a plethora of guidelines, technical standards and security laws. As one Monitoring Team member described their longer-term strategic thinking on this issue:

The technical development [ie, for biometric facial recognition] is not yet global. But what is exceptional today is global in ten years. And this is the UN (nothing happens in six months) and this is the UN then dealing with ICAO (an equally big organisation) ... What is more or less

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219 In 2006, for example, the ECJ held that the EU-US PNR sharing agreement violated fundamental rights. A new agreement was agreed and put in place in 2012. In 2013 the European Parliament’s Civil Liberties Committee (LIBE) rejected the European Commission’s EU PNR proposal on human rights grounds. But a provisional deal was reached between the EU Parliament and Council of Ministers in December 2015 and the EU PNR Directive finally came into effect on 21 April 2016. The global aviation industry has long opposed the increased cost burden associated with capturing, formatting and transmitting travel data for border control and security purposes on the grounds that ‘passenger data is a border security requirement. States should not charge airlines (or passengers) in a bid to subsidize their own development costs’. Industry costs for restructuring how PNR data is collected, stored or exchanged have been estimated to be in excess of US$2 billion. See, respectively: Joined Cases C-317/04 and C-318/04, European Parliament v Council [2006] ECR I 4721; European Parliament News, EU Passenger Name Record (PNR) Directive: An Overview (1 June 2016). Available at: http://bit.ly/29zjszm.


221 UN Doc. S/2013/467 (2 August 2013) para. 58.

222 UN Doc. S/2014/41 (23 January 2014) para. 40. The problem with PNR and API data, according to experts interviewed for this research is that it remains inherently unreliable. In contrast to biometrics, data entry errors by airline staff can result in incorrect information being used as the basis for security decisions.

223 The reference here is to Schmitt’s definition of the sovereign as ‘he who decides upon the exception’ (n 58).
exceptional now - India, UAE, Thailand, Indonesia, America, Europe, face recognition by entry - will be the norm by the time that we get there.\footnote{Interview B.} In each of the examples outlined above - API/PNR data exchange, changing entry conditions for all travellers and the use of biometric identifiers - we see individual restrictive measures against 233 listed individuals being practically extended in ways that enable new security mechanisms to be applied to the global population of 3.6 billion airline passengers.\footnote{See: IATA, ‘Airlines to Welcome 3.6 billion Passengers in 2016’, Press Release No. 50 (6 December 2012). Available at: \url{http://bit.ly/10mS57v}.} We can also observe some of the interplay between the more mundane technical work of listing expertise and the ‘solid authority’ of the Security Council’s Chapter VII powers. Each example helps to show how relatively minor technical shifts concerning problems of list administration can help generate global securitisation effects. Here listing expertise can be seen as something quasi-legal and jurisgenerative: it both stretches what existing global security laws can secure in practice and creates the material foundations for new global security laws to be formally adopted. As one Monitoring Team member described it:

I think ... where we can be useful is actually advancing an agenda - for example, ... [with] biometrics. Who is actually going to go and talk to airlines to understand what they do on it? Who is going to go to talk to Interpol to figure out how they can transmit biometrics? Who is going to say, ‘Here is the list, Here is how biometrics can work and here is how it can’t? ... It’s a bit techy and a bit dull on one level. But it is actually \textit{incredibly} important in advancing the actual efficacy of a regime.\footnote{Interview with former member of the 1267 Monitoring Team, New York (via Skype), June 2014 (‘Interview F).}\footnote{Amoore (n 114) 89 – 90.}\footnote{\textit{Ibid}, 61}\footnote{Sassen (n 212) 383. On the co-presence of discipline and biopower in security mechanisms, see: Foucault (n 120) 8.}

Critical security scholars tend to represent security listing as a relatively simple technology quite distinct from the more dynamic and processual security techniques grounded in algorithmic data mining processes. According to Louise Amoore, ‘so overwhelming is the pursuit of the as yet unknown future risk’ in technologies such as biometric and PNR profiling ‘that the sounding alert of the watch list - a disciplinary form of security risk management ... - is rarely heard’.\footnote{Ibid, 61} Because listing is said to use ‘fixed disciplinary criteria’ it is positioned as markedly distinct from algorithmic techniques that deploy ‘possibilistic logics’ to ‘infer possible futures on the basis of underlying fragmented elements of data’.\footnote{Ibid, 61} Yet the examples analysed above show a more interdependent and hybridised relation between fixed and dynamic security mechanisms. In my analysis listing technology (and the need to effectively implement it against targeted individuals) also functions as an important catalyst for more wide-ranging and ‘possibilistic’ forms of pre-emptive security governance to develop. This suggests that dynamics of mobility and fixity, and discipline and biopower are not mutually exclusive but rather co-present in assemblages of global security law.\footnote{According to Saskia Sassen: ‘the spatiality/temporality of globalization itself contains dynamics of mobility and fixity. While mobility and fixity may easily be classified as two mutually types of dynamics ... they are not necessarily so ... [and] under some conditions one presupposes the other’ – Sassen 2006, (n 212) 383. On the co-presence of discipline and biopower in security mechanisms, see: Foucault (n 120) 8.} Precisely how they interrelate in a given domain is an empirical question that requires practice orientated and site-specific analysis.

(iii) Standards, Audits, Inadmissible Passengers and the Politics of Redefinition

Building a third hurdle for travellers is not only a question of reformatting and technical interoperability. It is a project that necessarily engages with, and requires modification of, international standards, best practices and regulatory guidelines. Historically, ICAO and IATA
have primarily been concerned with transport, rather than border and security functions. When the Monitoring Team first sought to work with IATA to have airlines check passengers against the Al-Qaida list, for example, they were rebuffed on the grounds that ‘airlines [did] not see it as their responsibility to go further than checking that a passenger has a valid travel document’.\(^{230}\) In addition, aviation standards on passenger facilitation have been geared towards efficiently boarding and disembarkation from point of departure. What happened once passengers left the airplane and headed for immigration arrivals has largely been something that the airlines have left for national border security agencies to handle.

However, one anomalous area where the concerns of aviation and border security intersect is in the category of ‘inadmissible persons’ - defined by the Convention on International Civil Aviation (hereafter, the ‘Chicago Convention’) as ‘a person who is or will be refused admission to a State by its authorities’.\(^{231}\) Airlines are bound to adhere to the immigration laws of the states that afford them landing rights\(^{232}\) and are legally responsible for passengers up until the point they reach the arrivals terminal of the receiving state.\(^{233}\) If a passenger is found to be inadmissible by immigration authorities, then it is the airline’s responsibility to either take them back to the country the flight departed from or to another country that accepts them.\(^{234}\) If the airline acted negligently or failed to apply due diligence in assessing the relevant travel documentation or entry requirements of the receiving state, they can be subjected to fines. In 2010, 80 per cent of airlines worldwide each paid fines of on average US$286,000 for carrying inadmissible passengers, most of whom were asylum seekers turned back by border officials at entry.\(^{235}\) Historically, inadmissible passengers have fallen into one of three categories: either individuals who are (i) without proper travel documentation for entry and transit; (ii) carrying fraudulent documents or undocumented; or (iii) others who fail to meet entry (for example, because of lack the requisite funds or for security reasons).\(^{236}\) Although this legal framework only imposes obligations on airlines to check that their passengers meet the entry requirements of the states they are travelling towards, this checking process actually takes place before departure – when passengers either buy their tickets (and create PNR data) or check in (and create API data). As such, the category of ‘inadmissible passenger’ provides a valuable opportunity to bring the border forward in time and use travel data analytics to create a form of exit control enabled by states but enforced through everyday commercial aviation transactions.

One of the key tasks that the Monitoring Team are currently engaged in involves extending the definition of ‘inadmissible persons’ to specifically include individuals designated on UN sanctions lists.\(^{237}\) As one Monitoring Team member explained:

> With the term ‘Inadmissible Passengers’ ICAO has created a legal case where the state now has the right to say, ‘This guy - because his passport is no longer valid, he doesn’t have the visa, in some countries because he doesn’t have the necessary vaccinations - is not getting into my country’. But the ‘Inadmissible Passenger’ case addresses only the point of entry in the country ... We thought there is an opening here – where we now have the technical capabilities of the airlines [and] we have states already demanding such [travel] data from the airlines. We might as well just tell the airlines: ‘Look - there are a thousand UN sanctioned individuals ... These one thousand individuals: don’t even bother trying to transport them

\(^{231}\) Convention on International Civil Aviation (hereafter, ‘Chicago Convention’), Annex 9 (Facilitation).
\(^{232}\) Chicago Convention ibid Article 13
\(^{233}\) Chicago Convention ibid Chapter 3, Section K, Standard 3.43
\(^{234}\) Chicago Convention ibid Chapter 5, Standard 5.11
\(^{237}\) UN Doc. S/2014/888 (11 December 2014) para. 52.
because by law they will have to be transported back and you will be fined’... And that’s why we are working with ICAO on changing the rules.  

The impetus for changing the rules on international air travel is therefore twofold. First, there is the critical temporal problem. As it stands, the rules of global aviation carriage impose duties on airlines in relation to conditions of entry, as outlined above. If they are to enhance the implementation of the list and build a third hurdle, then airlines must be able to intervene before passengers depart – that is, either at, or before, the time of exit. Doing so on the basis of travel data, however, presents all kinds of novel liability risks. So the second rationale for changing global standards is to provide the legal cover for mitigating liability risks that airlines will increasingly face as they become more actively involved in pre-emptive security and border policing processes:  

Data protection, false matches. You don’t want innocent people not being able to travel. It’s litigation potential for airlines. That’s why at the end of the day there needs to be some ICAO regulation which demands that airlines do that. Because then the airlines can say: ‘I’m sorry, I’m not doing this because I don’t like you. I’m doing this because the Annex to the Chicago Convention, the highest legal document on air travel, tells me to do it’. That’s why it’s crucial.  

Yet global regulatory change in the aviation domain is not something that readily falls within the Security Council’s jurisdiction to counter threats to international peace and security. Changing the definition of ‘inadmissible passengers’ to include listed individuals requires amendments to the Annexes of the Chicago Convention, which set global aviation standards and recommended practices (SARPs). And only the ICAO Council (or executive branch of 36 Member States) can amend these standards on a two-thirds majority vote during a meeting expressly called for that purpose.  

Given the degree of ICAO multilateral deliberation involved, one team member interviewed described this initiative as ‘very much a political issue’. But what is markedly political here is not so much the bureaucratic wrangling but rather what Koskenniemi calls ‘the politics of redefinition’ - that is, ‘the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom together with the attendant structural bias’. The travel ban is a constituent element of a sanction adopted by the Security Council under its Chapter VII mandate to counter threats to international peace and security. Redefining targeted individuals as ‘inadmissible passengers’ provokes a legal-discursive shift from the vocabularies of public international law and collective security to that of global aviation standards and recommended best practices for airlines. Redefinition of this sort generates ‘shifts in the production of types of outcomes within international institutions’. But what is novel, according to Koskenniemi, is how such changes are now ‘described in the neutral language of expertise’, thus ‘obscur[ing] the contingent nature of the choices made, the fact that at issue is structural bias and not the application of some neutral ... security reason’.  

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238 Interview B.  
239 ibid  
240 Chicago Convention (n 231) Article 90.  
241 Interview B. For an overview of the procedures involved in creating and/or amending SARPs, see: ICAO, Making an ICAO Standard. Available at: http://bit.ly/1pmY2sl.  
242 Koskenniemi (n 8) 67.  
243 ibid, 68  
244 ibid. As a result, for Koskenniemi, ‘political conflict will often take the form of a conflict of jurisdictions’ (335). On this point, see also: Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge, 2015). According to Valverde, ‘by deciding the ‘who governs’ question, the game of jurisdiction simultaneously but implicitly determines how something is to be governed’ (84).
A hypothetical example from the not-too-distant future helps to show some of what might be at stake. The technical project of constructing a third hurdle examined in this chapter is part of a broader initiative to pre-emptively counter the threat of ‘foreign terrorist fighters’ (FTFs). Recent Security Council resolutions impose obligations on all states to prevent the movement of suspected FTFs and anyone else about whom they have ‘credible information that provides reasonable grounds to believe’ may be ‘associated with’ Al-Qaida. As people are stopped from travelling according to such far-reaching speculative criteria, legal challenges will be initiated for violating the fundamental right to freedom of movement, legal scholars will write articles about these cases and there will be broader public debate about the appropriate balance between liberty and security in times of crisis. Yet what might have been framed as a normative clash between collective security and human rights can now readily be reframed as a foreseeable consequence of global aviation standards applicable to all airline passengers as part of the very condition of their carriage. Technical reframing takes this juridical and political conflict toward a very different and specialised institutional space with its own functional interests, distinct expert vocabularies, structural biases and set of patterned institutional practices.\(^{245}\) What would otherwise have been the main normative frame is thus rendered contingent and weakened, presented as merely one approach amongst many for potentially resolving this problem.\(^{246}\) It is in these ways, according to Koskenniemi, that international law becomes increasingly fragmented and marginalised, ‘pushed aside by a mosaic of particular rules and institutions, each following its embedded preferences’.\(^{247}\)

However, what is even more striking about the politics of redefining inadmissible passengers is what it shows us about the relation between listing expertise and global security law. Here we can observe counterterrorism experts with a mandate to effectively implement the list openly pushing forward an international legal change agenda to pursue their strategic aims under technical cover. Just as corporate lawyers engage in regulatory reform to transform the legal system in ways that strategically advance the best interests of their corporate clients, here the Monitoring Team (a) have a clear objective (enhanced list implementation); (b) have identified the key risks and obstacles impeding the realisation of that objective, and (c) are actively engaged in a long-term law reform process directed at overcoming those challenges by changing the rules of the game. If global law is defined through its practice - as ‘a group of people pursuing projects in a common professional language’\(^{248}\) or ‘what legal professionals say and do in the course ... of governing, or seeking to govern, globally’\(^{249}\) - then this specific example of listing expertise reformatting the list highlights a process of global security law making in motion.

As with the other expert initiatives analysed in this chapter, we are well beyond the point where technical expertise simply implements the list whilst global security law is properly made elsewhere, in the formal deliberations and resolutions of the Security Council. Yet for the experts whom I interviewed it was precisely this displacement - i.e., that global law making was something happening elsewhere - and the process of disavowal that allowed them to work on this issue as a technical, rather than a legal, problem. Formally speaking, they might be right. ICAO rules and standards are technically ‘soft law’. They can be disapproved by a majority of states;\(^{250}\) states retain the right to formally notify ICAO of differences between their national practices and international standards, and SARPs don’t have the legal force of

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\(^{245}\) Koskenniemi (n 8).
\(^{246}\) Ibid, 67.
\(^{247}\) Ibid, 339.
\(^{249}\) Johns (n 25) 12
\(^{250}\) Chicago Convention (n 231) Article 90.
the Chicago Convention, which is subject to the international law of treaties. That is, they are not strictly a source of ‘solid authority’ in Krisch’s terms. But if no ‘filing of differences’ are submitted within 60 days of amendments being made by the ICAO Council, these standards do have binding effect on all Member States worldwide. As Kirchner points out, ‘although they do not yet cross the threshold from inter- to supra-national law, the international standards go far beyond the average power enjoyed by the executive body of an international organization’.

But what makes these ICAO standards so powerful a form of global security law is the way they can leverage technologies of audit and the power of the market to coerce states and airlines into compliance and compel them to more extensively securitise their practices. After the 9/11 attacks the ICAO Council adopted the Aviation Security Plan of Action (AVSEC). AVSEC enacted a comprehensive programme of regular, mandatory, systematic and harmonized audits to be conducted by ICAO in all Contracting States’ and launched a new oversight process - the ICAO Universal Security Audit Programme (USAP). In 2007 the ICAO Council determined that USAP should be specifically extended to include the security-related provisions of Annex 9, where the standards on inadmissible passengers and API/PNR data handling are contained. When ICAO auditors identify deficiencies, states must submit a corrective plan within 60 days setting out what steps they will take to rectify the problems. Whilst information about non-compliance is not openly disclosed for security purposes, it is shared securely with ICAO members and subjected to ‘a limited level of transparency’.

As listing experts are acutely aware, this new auditing process can be used and modified to produce very powerful effects. It opens up new vectors for creating and enforcing global security law outside of the Security Council in ways that enrol different actors (public-private) at different governance scales more fully into the global listing assemblage:

My argument always is: ... let’s not fight the fight of making the world a better place. We, as the Committee or the expert team cannot ensure that Chad - or any other African country, or any other country in the world - has stringent border controls on its land ports. However, airports in Chad … [and] airports in America are vetted security wise exactly the same by ICAO. So on air travel, we have already an agreed minimum standard. If we can implement and influence the minimum standard that ICAO gives for security by these changes in the regulations, then we can address everyone globally. Because, if you’re not up to ICAO standards, ICAO simply sends out a warning to airlines. And no one flies to your airport. And they do an audit of your airport every five years. And if there is something lacking there again [there’s] not only a warning to all member states … There’s also a warning to all airlines. And then 99 per cent of airlines will not feel comfortable to fly to [that] airport.

The strength of this pre-emptive bordering capability therefore lies not only in the technology of the audit and its disciplining effects. But how this audit process intersects with and harnesses the power of the market to incentivise change and penalise recalcitrance:

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252 Krisch (n 17).
253 Chicago Convention (n 231) Article 38.
256 ICAO Resolution A36-20, A36-WP/336 and Plenary Action Sheet No. 3.
257 Interview B.
So you have, like with FATF, an outside motivator for states to do this. Because with FATF, it costs a lot of money [i.e., for non-compliance]. And with ICAO as the auditor of security standards, it would cost also a lot of money - because airlines would no longer fly there and because reputation is damaged to [both] your airport [and] to your country ... With these technical instruments one can incentivize and coerce. And increase the motivation ... These motivating factors are very, very crucial in implementation. If you don’t have them, then it [i.e., implementing the travel ban] is still a choice.258

It would therefore be a mistake to read this shift toward technical standardisation as move from the ‘hard’ to the ‘soft’. As global governance scholars have argued, the effects of soft law mechanisms like indicators and best practices are often ‘unlikely to be weaker than they would be in a coercive frame’.259 Auditing is a technology of governance that enables a practice of ‘control of control’.260 It produces ‘enforced self-regulation’261 and thus works to ‘shape the beliefs and conduct of others in desired directions by acting on their will, their circumstances or their environment’ without unduly ‘encroaching on their “freedom”’.262 When list and audit are used in combination with the threat of financial damage they therefore stand to become a very powerful governmental ensemble indeed. This ‘soft’ and technical arrangement ‘may well be more effective in “disciplining” and “normalizing” states than more visible, confrontational exercises of authority’263 that once marked the non-compliance debates of Security Council high politics.

What’s in a List? Inscription, Translation and Pre-emptive Security Governance

When the Monitoring Team were created out of the demise of the Monitoring Group, confrontational techniques of ‘naming and shaming’ states to enforce sanctions fell by the wayside. Global listing expertise thereafter adopted an overtly technical focus and concentrated on list administration issues perceived as being less politically contentious. Most literature frames this ‘technical turn’ as something that led UN counterterrorism expertise to be weakened. Yet in this Chapter I have reread this shift and the technicalities of listing expertise that ensued as something profoundly political and legally productive. Doing so required departing from instrumentalist sanctions scholarship and reframing the list as a novel governance technology and important protagonist that assembles this legal domain. This allowed us to take listing expertise out from the shadows cast by the Security Council’s solid authority and revalorise it as a crucially important conduit that creates and extends this form of global security law in practice.

The first site examined how the list and listing expertise are entangled through the project of seeking to know and counter the problem of ‘global terrorism’. We examined how the administration of the list enables a ‘global optic’ to be built and also works to constitute and condition the very object it seeks to target. The ‘consultation meetings’ between UN listing experts and security officials of national states were studied ethnographically as ‘structure-making’ sites that produce the global through the technology of the list. By using the ‘equilibrium of possibilities’ diagram as a heuristic device, listing was reappraised as a vector of counter-radicalisation directed towards a far broader threat population than the 257 individuals it targets.264 My analysis shows the list to be both a more hybrid form of law and norm than usually suggested and a powerful device for enrolling a diverse array of actors into

258 Ibid
259 Krisch [n 17] 15.
263 Krisch [n 17] 15, citing Roele’s work on the CTC [n 79].
264 Correct as of 6 July 2016.
new pre-emptive global security networks. The list is therefore much more than mere instrument and the expertise that administers is anything but insignificant. Showing precisely how - through detailed sociolegal empirical analysis - is crucial if we are to grasp what is novel and powerful about this form of global legal ordering.

The second site of listing expertise examined in this chapter unpacked the seemingly mundane process of list reformatting and interoperability. This is technical work of the kind that ordinarily goes underneath the radar of global governance and legal scholarship. Yet when upon close analysis - without a priori conceptions of global scale, how threats to international security may be legitimately countered or what ‘law’ properly is or ought to be - such processes can be seen as both politically significant and legally productive. According to the common sense view, list reformatting involves taking information from context A and putting into context B - ‘the substantive information is the same’. But my analysis shows that reformatting is a generative process of translation that produces other modes of security listing with quite different spatiotemporal dynamics and governance effects. Rendering the list interoperable with travel data, for example, dramatically broadens its field of intervention. It decouples the travel ban from territorial state borders and enables it to circulate electronically as a deterritorialised bordering capability. This process expands and stretches what the travel ban can do and enables new security mechanisms to be introduced - not only for individuals on the list but also potentially for the global travelling population as a whole. Transforming listed individuals into ‘inadmissible passengers’ is presented as a relatively minor technical tweak. But building a ‘third hurdle’ is much more than just enhanced list implementation. It is an ambitious and far-reaching global reform project that harnesses technologies of standard setting, auditing and the powers of the market to produce novel coercive effects.

The previous chapter introduced the framework of assemblage, but this chapter has shown some of what it can do when deployed as an analytical tool. Most scholarship on Al-Qaida sanctions takes hierarchical scales of governance for granted - with the global at the top, the regional in the middle and the national and local down below. This chapter has unsettled this assumption by analysing how localised expert practices are mediated through the governing technology of the list in ways that produce large-scale effects and forms of global ordering. That is, by studying ‘the global’ in global security law as an emergent property assembled in different sites connected through listing practices. This has meant adopting a mobile and multi-sited methodology, following the list as an ethnographic object to consultation meetings in North Africa and technical discussions taking place inside ICAO. As Michel Callon and Bruno Latour point out: ‘There are of course macro-actors and micro-actors, but the difference between them is brought about by power relations and the constructions of networks that will elude analysis if we presume a priori that macro-actors are bigger than or superior to micro-actors’.

I have argued in this Chapter that listing technology is a ‘crucial container of practice’ that forges connections and formats relations in particular ways that make global security law powerful and durable. Showing how listing expertise creates a ‘centre of calculation’, however, is not the same as claiming that the Security Council is an all-powerful agent of global control. Because centres are always multiple and contingent upon the ability of powerful actors ‘to successfully enrol and mobilise persons, procedures and artefacts in the

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265 Interview B.
267 Callon and Latour (n 45) 280.
268 Bueger 2014 (n 27) 397.
pursuit of its goals'. Studying the list as an assemblage helps to reveal the strengths, but also the weaknesses, of global security law. For as Latour notes, ‘If you cut some underlying structure from its local application, nothing happens … [But] if you cut a structure-making site from its connections, it simply stops being able to structure anything’.270

The relation between counterterrorism expertise and global listing analysed throughout this chapter is something that has been insufficiently studied to date. Whilst scholars like Kennedy and Koskenniemi offer powerful normative critiques of law’s increasing deferral to expertise there remains very little sociolegal empirical research on how expertise actually works to enact and sustain global legal relations. Whilst this chapter has highlighted some of the powerful effects of the Monitoring Team’s everyday technical work, this isn’t easily reducible to a narrative of technocrats seeking to rule the world. As Nikolas Rose and Peter Miller argue, ‘government is a congenitally failing operation: the sublime image of a perfect regulatory machine is internal to the mind of the programmers. The world of programmes is heterogeneous and … complexifies the real, so solutions for one programme tend to be the problems for another’.271

The Monitoring Team are, of course, only one of many bodies assembling this legal domain. The following two chapters continue to explore this theme by examining how divergent forms and figures of expertise are enrolled through problems of the list. And as we will see, these experts also enact novel knowledge practices and forge connections that extend this body of global security law in important ways and do the hard work of holding it stable. Listing expertise is not something that the Monitoring Team retains some monopoly over. Because government is always ‘inextricably linked to the problems around which it circulates’, listing expertise is as multiple as the tensions and conflicts of the list itself.272

269 Rose and Miller (n 262) 183, 185.
270 Latour (n 10) 176.
271 Ibid, 190
272 Rose and Miller (n 262) 181.
3. The List as Multiple Object: A Critical Genealogy of the UN1267 Ombudsperson*

The previous chapter analysed sites of UN listing expertise to examine how global terrorism is governed through the technology of the list. We saw how problematisation - and the problem-management techniques it stimulates - makes global security law and governance possible at a granular level. This chapter extends this insight to the problem of accountability in global security governance and analyses the listing assemblage from the vantage point of another crucial empirical site: the UN1267 Office of the Ombudsperson.

The UN was originally afforded sanctioning powers to avert the threat of inter-state war. But the Al-Qaida list aims at individuals suspected of being nodes in global terrorist networks. This radical reorientation in targeting - from states to individuals – produces profound effects. It expands the scope of Council’s powers to counter threats to peace under Chapter VII of the UN Charter. It shrinks the ‘distance between national and international law in this domain’, facilitating ‘an increasing enmeshment’ between these layers of governance. It allows the Council to exercise novel jurisdiction over matters previously thought to be the exclusive preserve of states. And by enabling action outside the collective security system envisaged in the Charter, it opens a vexing accountability problem: can the Security Council legitimately exercise governmental powers over individuals on a world-wide scale without those targeted being able to challenge their decisions or otherwise hold them to account?

This chapter examines the productive effects of this list accountability problem, culminating in the emergence of the UN1267 Office of the Ombudsperson. The Ombudsperson was created by the Council in 2009 to provide listed parties with a procedure for redress. For the first time, targeted individuals could submit ‘delisting’ applications to an independent legal expert asking to be taken off the Al-Qaida list. After gathering information from targeted persons and states, and engaging in ‘dialogue meetings’ with listed individuals, the Ombudsperson compiles a ‘comprehensive report’ recommending that the person either stay on, or be removed from, the list. This report is then sent to the Sanctions Committee to assist them in taking their decision on delisting. In 2011 a ‘reverse presumption’ procedure was introduced to strengthen the Ombudsperson’s powers. Under this presumption, listings automatically terminate 60 days after a delisting recommendation by the Ombudsperson unless the Council decides by consensus that they should remain in place.

This review mechanism has been widely celebrated as a fairness and accountability success story. By early 2016, 63 delisting requests had been made to the the Ombudsperson and only 11 had been subsequently refused by the Security Council. Some commentators have concluded that with the Ombudsperson ‘the rights of individuals to be informed, have access

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3 See, for example, the discussion on ‘stretching the international peace and security envelope’ in the Credibility List section below.

4 S/RES/1904 (2009)

5 The post was held by Ms. Kimberly Prost from 2010 - 2015. It is currently held by Ms. Catherine Marchi-Uhel.


7 UN Doc. S/2016/96 (2 February 2016), para.9.
to, and be heard, appear to have [now] been addressed.8 Others are more circumspect and highlight the mechanism’s persistent due process problems. Yet almost everyone agrees that the Ombudsperson is a procedural ‘improvement’ and an important step in the right direction. Part of law’s progressive movement to regulate the spaces of ‘non- legality’ that escape it.9 And that with some extra procedural adjustments here and greater institutional learning there the Ombudsperson could evolve into a shining example of international accountability and ‘global administrative law’ in action.10

This chapter challenges this dominant teleological narrative of global legal progress by providing a critical genealogical account of the Ombudsperson’s emergence. Genealogy is a Foucauldian means of ‘studying the “how of power”’.11 Unlike conventional historiography, genealogy ‘aims at the construction of intelligible trajectories of events, discourses and practices with neither a determinative source nor an unfolding toward finality’.12 It is a methodological tool that emphasises contingency, heterogeneity and traces the generative effects of material practices. It prompts an avowedly critical stance that destabilises the present and ‘open[s] it to the possibility of ... being otherwise’.13 This genealogical approach allows us to analyse the creation of the Ombudsperson as a productive process deeply entangled in questions of power and the ‘politics of redefinition’, rather than an incremental legal step towards some as-yet-to-be realised better normative end.14

I argue that the Ombudsperson is better thought of as a governance effect arising from multiple conflicts between different actors across the listing assemblage: a composite figure of expertise born out of diverse institutional struggles under conditions of international legal fragmentation. This heterogeneity is important because it continues to shape what this experiment is and delimit what it is capable and not capable of doing. Existing accounts tend to describe the origins of the Ombudsperson from the Security Council’s perspective. Different actors may have diverging perspectives on how best to solve list accountability problems. But ultimately these perspectives are only valued insofar as they either influence the principal agent and are institutionalised as norms or allow forms of accountability to emerge that comply with prevailing procedural fairness and human rights standards.

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14 As Martti Koskenniemi notes, ‘Political intervention is today often a politics of redefinition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.’ - Martti Koskenniemi, The Politics of International Law (Hart Publishing, 2011) 67.

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This chapter departs from these accounts in two important ways. First, I suggest that the divergences between actors here are much deeper than usually suggested. This list accountability conflict isn’t just about different perspectives being brought to bear on the same problem, all ultimately mediated and resolved through the authority of the Security Council. Rather, I argue that different actors across the listing assemblage enact multiple realities of what the list is and how its accountability problems should best be dealt with. Objects, as Annemarie Mol suggests, aren’t passive and ‘waiting to be seen from the point of view of seemingly endless series of perspectives. Instead, objects come into being ... with the practices in which they are manipulated ... [and] are not the same from one site to another’. Shifting the focus from norms to situated practices allows me to analyse the list as a multiple object and provide a thick descriptive account of its ontological politics. Following Mol I argue that praxiographic analyses - which ethnographically studies practices and ‘locates knowledge primarily in activities ... instruments and procedures’ - allow us to better grasp how the list works and changes as a global legal assemblage.

Second, the story of the Ombudsperson provided here isn’t purely about how human rights norms do or don’t come to be institutionally embedded. I do not try to normatively assess how this accountability mechanism measures against existing legal standards - there are already more than enough articles in legal journals that do just that. Instead, drawing on empirical insights from interviews with various listing experts, leaked US Embassy Cables and my own professional experience as a lawyer engaged in this field I reframe the Office of the Ombudsperson as a contingent achievement - or ‘miracle’, as one Cable described it. Highlighting contingency is important in a domain where the final word usually rests with the UN Security Council. As this chapter shows, developing the argument of the previous chapter, global security law is much more than the Chapter VII UN Charter edicts issued by the Security Council from high above. It is something enabled and sustained through diverse epistemic and governance practices and novel forms of expertise that demand close empirical analysis. So whilst the Ombudsperson is often advanced as an ideal accountability solution, this chapter resituates this mechanism as an ongoing political and legal problem.

17 Mol (n 15). For Mol, praxiography ‘does not search for knowledge in subjects who have it in their minds’ but rather ‘locates knowledge primarily in activities, events ... instruments and procedures’ (at 32). The analytical advantage of praxiography, as opposed the IR practice theory literature, is that it ‘takes up the argument that the turn to practice is not primarily about theory, but about the practice of doing research’ – Christian Bueger, ‘Pathways to Practice: Praxiography and International Politics’ (2014) 6(3) European Political Science Review 383, 385. For a critical analysis of the ontological politics of ‘enactment’, see: Steve Woolgar and Javier Lezaun, ‘The Wrong Bin Bag: A Turn to Ontology in Science and Technology Studies?’ (2013) 43(3) Social Studies of Science 321.
18 See, for example: Lisa Ginsborg and Martin Scheinin. ‘You can’t always get what you want: the Kadi II conundrum and the security council 1267 terrorist sanctions regime’ (2011) 8(1) Essex Human Rights Review 7;
19 US Embassy Cable 10USEUFRUSSELS212, (dated 24 February 2010).
The chapter is divided into six sections. Each section focuses on a specific actor within the listing assemblage and highlights the particular idiom and type of list that they enact. My narrative is polycentric, rather than chronological, to better get at the divergent interests, frames and objectives at stake in these conflicts. National and EU courts; academic experts and think tanks; ‘Like-Minded’ reformist states; listing officials; UN Special Rapporteurs, the Security Council P5, legal scholars and human rights NGOs all bring their own discourses, practices and expertise to bear in shaping the accountability problems of the list. My analysis aims to highlight this complexity to provide a detailed documentary account of the Ombudsperson’s conditions of emergence. One that draws out the unresolved tensions that animate this novel institutional body and that enact the Al-Qaida list as a multiple object.

My analysis highlights five different versions of the list that are enacted through this accountability conflict: a Legal List grounded in the critique of national and regional courts; a Humanitarian List enacted by academic-experts wholeheartedly committed to targeted sanctions as a global governance project; the dynamic Living List of the Al-Qaida Monitoring Team that evolves to counter new obstacles and threats; the Compliant List of the UN Special Rapporteur on Counter-Terrorism defined by strict adherence to human rights norms, and the Credible List of the Security Council P5 aiming at ensuring state compliance with Chapter VII UNSC counterterrorism resolutions. I argue that these versions of the list are distinct and heterogeneous. They are not different perspectives on the same list, but different enactments of the list in friction with each other – that is, the differences here are not just epistemological, but also ontological as well. The Legal List, the Humanitarian List, the Living List, the Compliant List and the Credibility List are all vying to resolve an accountability problem framed in their own terms and bring it within their remit and control.

The final section turns to the Ombudsperson herself as a unique figure of global legal expertise. It draws from interviews undertaken with the former position holder (Kimberly Prost) between 2012 and 2015 and my own professional experiences - both as a lawyer representing targeted individuals in Ombudsperson delisting proceedings and an assistant in the UN Special Rapporteur on Counterterrorism’s report to the UN General Assembly on this issue.20 As with the Monitoring Team examined in the previous chapter, there is no existing sociolegal research on this procedural review mechanism. What has been written relies on the Ombudsperson’s own published reports about her work and is disconnected from how this delisting procedure actually operates in practice.

My analysis addresses this gap by examining the novel decision-making processes, ‘dialogue’ meetings and evidential standards the Ombudsperson has crafted to work in this ‘special’ environment. I argue that these practices help mute underlying political and legal tensions and glue the Al-Qaida list together - that is, they contain the multiplicity detailed earlier in the chapter. Observations from my own practice are used to show the stark inequities of the Ombudsperson delisting procedure and to critique the claims that it offers ‘in essence, de facto judicial review’21 and fairness for listed individuals. What emerges is a textured account of global emergency law in motion and empirical map of the listing assemblage in action. One that transforms the Ombudsperson from being the inert institutional end-result of a protracted list accountability debate to a key figure of expertise and protagonist who is sustaining the list in the face of tension and making its exceptional governance durable.

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20 My involvement in the production of this UNGA report is discussed in more detail below, in the ‘Compliant List’ section of this chapter.
The Legal List: Asserting Rights and Pursuing Accountability in the Courts

National and regional (EU) courts and international complaint bodies have been a leading force in pushing for UN procedural change and placing individual rights and global security law into productive relation. Were it not for litigation and attempts to obtain legal redress by listed individuals the UN1267 Ombudsperson would certainly have never been created. The following section provides a brief and selective overview of the key cases on this issue, highlighting how different courts have responded to the accountability problems of the list. The judicial approach is distinctive insofar as it measures the UN1267 regime against domestic constitutional protections, fundamental rights and international human rights norms. As detailed and argued below, the courts have enacted a Legal List that continues to exert powerful constitutionalising effects well beyond their specific jurisdictional borders.

(i) Sayadi and Vinck (2008)

One of the earliest legal critiques of the list’s accountability flaws came from the UN Human Rights Committee (HRC), the supervisory organ of the International Covenant on Civil and Political Rights (ICCPR). In 1994 two Belgian nationals (Nabil Sayadi and Patricia Vinck, hereafter SV) co-founded an Islamic charity *(Fondation Secours Mondial)* as a European branch of the US-based Global Relief Fund (GRF). When the GRF was put on the US and UN terrorism lists in 2002, the Belgian authorities started a criminal investigation into SV and recommended their inclusion on the Al-Qaeda list. After being listed in 2003 SV asked the Belgian government to help get them taken off, but they refused to assist claiming they were bound to afford primacy to international law. So forced their hand by bringing legal action in the Belgian courts and obtaining an order that required Belgium ‘to urgently initiate a de-listing procedure with the United Nations Sanctions Committee … under penalty of a daily fine of € 250 for delay in performance’. The government then submitted two delisting requests to the Al-Qaeda Sanctions Committee, both without success. As a result, SV filed a complaint with the HRC arguing *inter alia* that Belgium had violated their fundamental rights to fair trial and effective remedy by nominating them for inclusion on the Al-Qaida list without providing any ‘relevant information’ to explain why.

In their opinion the HRC found that Belgium had indeed violated SV’s rights to freedom of movement and privacy but not their rights to a fair trial. This omission was criticised as ‘a missed opportunity’ by scholars for not pressing the issue of human rights compliance. But the decision was nonetheless important because it affirmed for the first time that the HRC had jurisdiction to hear complaints on this issue and that states implementing Chapter VII resolutions of the Security Council must adhere to international human rights protections. Furthermore, Belgium was compelled ‘to do all it can to have their names removed from the list as soon as possible’. And the decision also sent a clear, albeit indirect, message to the Security Council: in the absence of a remedy at the UN level, the HRC can hear complaints

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22 I use the term ‘court’ to group these cases together, even though the HRC is a UN human rights treaty body.
23 Sayadi and Vinck v Belgium (Communication No. 1472/2006, 29 December 2008), UN Doc. CCPR/C/94/D/1472/2006, para. 2.4. The delisting procedure at that time was entirely diplomatic. A request could be made to the Sanctions Committee, but only by a listed person’s state of residence or citizenship. See UN 1267 Sanctions Committee, *Guidelines for the Committee of the Conduct of its Work* (7 November 2002), para. 7.
24 Ibid, para. 2.5
25 Ibid. The Committee found a violation of the right to free movement enshrined in Article 12(3) of the ICCPR because the prohibition on leaving the country imposed by the travel ban was ‘not necessary to protect national security or public order’ (para. 10.8). Because listing was held by the Committee to be preventative not punitive in nature it did not constitute a ‘criminal charge’ required to engage Article 14 of the ICCPR.
27 Sayadi and Vinck (n 23) para 12.
from listed individuals that will effectively force states to choose between violating their
citizen’s human rights or breaching their UN Charter obligations.\(^{28}\)

(ii) **Abdelrazik v Canada (2009)**

Abfousian Abdelrazik is a Sudanese/Canadian dual who was placed on the UN Al-Qaida list in 2006 at the request of the US government. He had been visiting family in Sudan at the time of his listing and intermittently detained there without charge at the request of the Canadian Security Intelligence Service (CSIS).\(^{29}\) After his release Abdelrazik sought to return to Canada. But the Canadian government refused to issue the necessary travel documents because he was on a US no-fly list as a result of his listing by the UN Security Council. Abdelrazik then brought judicial review proceedings in the Canadian Federal Court to challenge ‘Canada’s conduct allegedly thwarting the applicant’s return to Canada from Sudan and consequently breaching his right as a Canadian citizen to enter Canada’.\(^{30}\) The government argued the UN1267 Sanctions Committee was responsible for preventing Abdelrazik’s return because it was their listing decision that subjected him to a global travel ban and an asset freeze prohibiting the provision of funds for travel and repatriation assistance. The Court disagreed and held that Canada had breached Abdelrazik’s fundamental rights. The government were ordered to provide his travel documentation, airfare and an escort to ensure safe return in spite of the global ban imposed by the Council.

![Abousfian Abdelrazik at a press conference in Montreal, 15 June 2011. He is in front of an anti-UN blacklisting banner painted by the Project Fly Home group that helped campaign for his return to Canada and eventual delisting](http://bit.ly/2ejup86)

The Abdelrazik judgment shows how far domestic courts are prepared to go in defying unjust demands by the Security Council. Here the absence of a UN remedy provokes a constitutional dilemma and pushes Canada towards taking domestic steps that risk ‘disobeying’ the Security Council.


\(^{29}\) *Abdelrazik v Canada* (Minister of Foreign Affairs) 2009 F.C. 580, paras. 66, 91.

\(^{30}\) *ibid*, 2. The complex processes that caused Abdelrazik’s exile from Canada is recounted at paras. 11 - 41 and 66 - 131. On the politics of Abdelrazik’s repatriation, see: US Embassy Cable 09OTTAWA478 (dated 18 June 2009).
Council. 31 As Tzanakopoulos notes, one key effect of this decision is that “the Executive must now either comply with what it believes is the correct interpretation of SCR [Security Council Resolution] 1822 and disobey its own court; or it must comply with its domestic court’s decision and risk being found in breach of SCR 1822 and thus Article 25 of the UN Charter’. 32 Moreover, in coming to this decision the Court robustly criticised the unfairness of the UN listing and delisting process. The presiding judge (Zinn J.) described the listing regime as Kafkaesque 33 and linked the Court’s assertive review to the remedial inaction at the UN level. 34 in an oft-cited passage from the judgment Zinn J. stated:

> I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness … [T]he 1267 Committee listing and delisting processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when … the nation requesting the listing is one of the members of the body that decides whether to list or … to delist a person. The accuser is also the judge. 35

Such criticism is important because it delegitimises the Security Council’s claim to authority and challenges their novel assertion of jurisdiction in this domain. And as detailed below, the Abdelrazik case has emboldened other judicial actors to be similarly defiant when faced with legal challenges from listed individuals. Here the Court resolved the clash between the national and global legal orders by interpreting the Security Council resolution in a way ‘that allowed Canada to pay the airfare for Mr Abdelrazik’s return … even though the text of the resolution did not provide for this possibility’. 36 That is, by creatively reading a Chapter VII measure of the UN Security Council as authorising something that it prima facie prohibits.

(iii) Ahmed and others (2010)

In January 2010 the UK Supreme Court delivered its leading judgment on the conflict between the UN Al-Qaida list and the UK constitutional order. HM Treasury v Ahmed and others involved five people listed by the UK government further to Security Council Resolutions 1267 and 1373. 37 The case challenged the measures automatically implementing

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33 The 1267 Committee regime is … a situation for a listed person not unlike that of Josef K. in Kafka’s The Trial, who awakens one morning and, for reasons never revealed to him … is arrested and prosecuted for an unspecified crime’ – Abdelrazik (n 29) para. 53. Abdelrazik was finally taken off the list in November 2011: UN Doc. SC/10467, Security Council Al-Qaida Sanctions Committee Deletes Entry of Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq from its List (30 November 2011). Available at: http://bit.ly/1DrCIy6
34 Zinn J. states (at para. 53), ‘it is disingenuous … [to claim] that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court’.
35 Abdelrazik (n 29) para. 51 (emphasis added).
36 de Wet 2011 (n 17) 164. Specifically, it excluded ‘airspace’ from the scope of the ‘territory’ that the global travel ban regulates – Abdelrazik (n 29) para. 127.
37 HM Treasury v Ahmed and Others [2010] UKSC 2. G (Mohamed al-Ghabra) and Hay (Hani El Sayed Sabaei Youssef) had been placed on the UN Al-Qaida list in 2006 and 2005 respectively. A (Mohamed Jabar Ahmed), K (Mohamed Azmir Khan), M (Michael Marteen) had been placed on the UK’s domestic terrorism list implementing S/RES/1373 (2001) in 2007. All of their challenges had been rolled into one joint appeal for the Supreme Court.
these resolutions into UK law - the *Al Qaida and Taliban (UN Measures) Order 2006* (AQO) and the *Terrorism (UN Measures) Order 2006* (TO). Orders giving effect to Security Council resolutions in the UK must be deemed ‘necessary and expedient’. The litigants argued that the AQO and TO failed to meet that criteria because they gravely interfered with their fundamental rights and denied them an effective remedy. When those on the Al-Qaida list sought to challenge their listing before the UK courts, for example, they became aware that the merits of the UK listing decision could not be contested because it had been taken automatically following their designation at the UN level. Once again, targeted individuals were effectively told that their listing was something out of their government’s hands that could not be subjected to any meaningful judicial review at the domestic level.

The Court unanimously held that these implementing orders were unlawful. Under the common law legality principle, serious interferences with fundamental rights need a clear foundation in statute and must be no greater than required. But these listing measures were found to be particularly severe - they ‘strike at the heart of an individual’s basic right to live his [sic] own life as he chooses’ - and without proper parliamentary authorisation. So the Court used the English common law to counter the list’s accountability problems and quash the implementing orders. For Krisch this decision ‘largely avoids the difficult issues at the intersection of the different layers of law’ and cautiously offers ‘little more than a warning shot’ to the Security Council. To comply with the judgment, moreover, the UK government introduced new primary legislation that ‘merely re-enacts the orders quashed by the court’, thus muting its potential political impact.

But determining whether listed individuals had access to any mechanism of review required the Court to indirectly review the remedial possibilities (or lack thereof) at the UN level. Here the Court openly dismissed the procedural reforms the Security Council had introduced as irrelevant, declaring that ‘there was not when the designations were made, and still is not, any effective judicial remedy’ available for listed individuals to properly exercise their rights. The case also rendered the exceptional practices of global listing politics especially visible. ‘It is no exaggeration to say’ said Lord Hope, ‘that designated persons are effectively prisoners of the state’. One of the litigants (Mohamed al-Ghabra), for example, was informed by the UK authorities that his assets were frozen because he had been included on the UN Al-Qaida list that the government was duly bound to implement. But he was not told that it was the UK government who had secretly nominated him for inclusion on the list, thereby effectively shutting down the possibility of judicial review by relying on UN (rather than UK measures) to target him. As Guild notes in her commentary: ‘There appears here a transparent use of the Security Council as a venue through which to wash national executive decisions which otherwise would be subject to judicial control of their vulnerability to court supervision in the interests of the individual’. The case also highlighted the disparities between legislative and executive government that global security law engenders by showing how a list with

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38 It is a principle of UK constitutional law that parliament can pass laws breaching human rights, but only if they do so unambiguously. See Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115: ‘Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that ... [it] must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words’ (para. 131).

39 Ahmed (n 37) para. 60. Such a severe interference with fundamental rights would require unambiguous statutory language. It could not be implied from the general wording of the authorising Act in this case.

40 Krisch (n 2) 164.

41 Ibid

42 Ahmed (n 37) para. 78.

43 Ibid, para. 60.

‘devastating’ coercive effects can be given direct effect in UK through executive regulations without any parliamentary oversight.45

(iii)  **Nada v Switzerland (2012)**

In October 2001 Youssef Nada and his associated business interests were placed on the UN1267 list by the US government, who believed he was a key financier for the Al-Qaeda network. Nada was an Egyptian/Italian national resident in tiny Italian tax enclave wholly circumscribed by Swiss territory.46 As a result of the global travel ban flowing from his listing, Nada was prevented from leaving the enclave and so effectively placed under house arrest. In 2005 he brought legal proceedings in the Swiss courts to strike out the measure implementing the Al-Qaeda list into Swiss law, arguing that because Switzerland had determined the allegations of his supposed terrorist association to be unfounded there were no legitimate grounds for keeping him sanctioned.

In November 2007, however, the Swiss Federal Tribunal dismissed the case. The court acknowledged that the UN delisting procedures were patently inadequate and left Nada unable to exercise his fair trial rights.47 But it denied having the jurisdiction to review whether national measures implementing the Al-Qaeda list were lawful, because doing so would place Switzerland in breach of its UN obligations. Put differently: states have no discretion when it comes to implementing Chapter VII UN Security Council resolutions, unless they somehow violate peremptory (*jus cogens*) norms of international law.

Nada then filed a complaint to the European Court of Human Rights (ECtHR) alleging that Switzerland had violated his rights to effective remedy and private and family life. He also submitted applications to the UN Focal Point set by Resolution 1730 (2006) asking to be removed from the Al-Qaeda list. His first UN request was refused due to US opposition. But his second request was granted due to US support48 and, as a result, Nada and his companies were delisted in 2009.49

In 2012 the Strasbourg court finally delivered their judgment upholding Nada’s complaint. Switzerland had argued that they should ‘not be held responsible internationally for the implementation of the measures in issue’ because they were compelled to act as they had due to their UN Charter obligations.50 But the Court asserted jurisdiction to hear the claim51 and firmly rejected this argument, finding that ‘Switzerland enjoyed some latitude ... in implementing the relevant binding resolutions of the United Nations Security Council’.52 In a decision that draws from the *Sayadi and Vinck, Abdelrazik, Ahmed and others* and *Kadi* cases, the Court found that Switzerland had indeed violated Nada’s fundamental rights - for

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45 Ahmed (n 37) para. 60. The process of automatically implementing the UN Al-Qaeda list through executive regulations made pursuant to the United Nations Act 1946 that was challenged in this case highlights how global security law allows domestic executives to expand their own power ‘relative to everyone else in their domestic political space’: Kim Lane Scheppel, ‘The International State of Emergency: Challenges to Constitutionalism after September 11’, *Yale Legal Theory Workshop*, 21 September 2006 (unpublished manuscript), 5.

46 Campione is 1.6 square kilometres in area.

47 As protected by Article 6(1) of the ECHR and Article 14(1) of the ICCPR. *Youssef Mustapha Nada v SECO*, Staatssekretariat fur Wirtschaft (Schweizer Bundesgericht) (14 November 2007), 1A.45/2007/daa, para. 8(3).

48 US Embassy Cable O8STATE4740 (dated 15 January 2008) para. 8. US opposition to delisting followed concerns from Italy that they were being pressured by their courts to support his delisting before the Committee. See: US Embassy Cables O7ROME2515 (dated 28 December 2007) and O8ROME190 (dated 11 February 2008).

49 Egypt (then under the rule of Hosni Mubarak) vociferously opposed the delisting of Nada because he was seen as ‘the most important financier’ of the Muslim Brotherhood. See: US Embassy Cables 09CAIRO1363 (dated 15 July 2009) and 09CAIRO1976 (dated 19 October 2009).

50 *Nada v Switzerland* Appl. No. 10593/08 (ECtHR, 12 September 2012), paras. 102 - 103.

51 *Ibid*, paras. 121 - 123

52 *Ibid*, para. 180
example, by delaying for more than four years in informing the UN1267 Sanctions Committee that Swiss investigations had found the allegations against him to be unfounded\(^{53}\) and failing to substantively examine Nada’s complaints and provide him with ‘any effective means of obtaining the removal of his name from the list’\(^{54}\).

The *Nada* decision is a scathing indictment of the UN Al-Qaida listing regime by Europe’s leading human rights court. In arriving at their decision, the Court indirectly assessed and criticised the inadequacies of UN delisting procedures.\(^{55}\) The Court also defied the Security Council’s authority by demanding EU member states exercise discretion when implementing the list to ensure compliance with human rights standards – that is, by requiring states to ‘enforce domestic human rights guarantees even if this would lead to their non-compliance with UNSC resolutions’.\(^{56}\) Just as other critics (like the UN Special Rapporteur on Counterterrorism) had suggested that ‘if there is no proper or adequate international review available, national review procedures - even for international lists - are necessary’,\(^{57}\) the ECtHR opened the possibility for EU states to disobey the Security Council by delisting people at the nationally even though they remain listed as Al-Qaida associates globally.\(^{58}\)

(iv) **The Kadi cases (2005 - 2013)**

Undoubtedly the most powerful judicial rebuke of the listing regime and its accountability flaws was delivered by the EU courts in a series of cases brought by Yassin Abdullah Kadi - a Saudi national and founder of the *Al Barakaat International Foundation*, formerly one of the key hawala banking operators used for the transfer of remittances by the Somali diaspora.\(^{59}\) Whilst the *Kadi* cases briefly feature in each chapter of this book because of their influence in shaping the listing assemblage, the following section specifically examines the legal issues and conflicts that drove this litigation and justified the various decisions of the EU courts.

Kadi and Al Barakaat were placed on the UN Al-Qaida list by the US government in the immediate aftermath of the 9/11 attacks. In late 2001 Kadi commenced legal proceedings in the EU courts challenging the EC Regulation implementing the UN Al-Qaida list into the EU legal order on the basis that it violated his fundamental rights - including the right to be heard, the right to respect for property and right to an effective remedy.

In 2005 the European General Court (EGC, formerly known as the Court of First Instance) rejected the case, stating they lacked jurisdiction to review the implementing measure. The disputed regulation was designed to implement a Chapter VII resolution of the Security

\(^{53}\) *Ibid*, paras. 188 - 200

\(^{54}\) *Ibid*, para. 213.

\(^{55}\) *Ibid*, paras. 211 - 212. More explicit criticism of the Ombudsperson mechanism was delivered by the ECtHR in the subsequent Iraqi sanctions case of *Al Dulimi* in which the Court drew heavily on the 2012 report by the UN Special Rapporteur on Counterterrorism (discussed in the ‘Compliant List’ section below) to find that the Ombudsperson fails short of international human rights standards. See: *Al-Dulimi and Montana Management Inc. v Switzerland* App. No. 5809/08 (ECtHR, 26 November 2013), paras. 118 - 122.


\(^{58}\) de Wet 2013 (n 18) 805.

Council. As such, the Court held that the European Commission and Council exercised ‘circumscribed powers’ and ‘had no autonomous discretion’ in this matter. According to the EGC, EU courts could only indirectly review Security Council resolutions if they violated *jus cogens* norms. But no such violation was found here so the challenge was dismissed.

Kadi appealed to the European Court of Justice (ECJ) arguing that the EGC had erred by finding that the EU institutions were bound to implement Security Council listing decisions without providing targeted individuals the opportunity for redress. The appeal was bolstered by the Opinion of ECJ Advocate General Poiares Maduro, who argued that the EGC had misconstrued the proper relation between the EU courts and the UN Security Council. Crucially, for Maduro, it is ‘the Community Courts [that] determine the effects of international obligations within the Community legal order by reference to conditions set by Community law’. The contested regulation in this case clearly violated Kadi’s rights. For Maduro: ‘[H]ad there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of [the] implementing measures’. But because no such UN mechanism existed, the EU courts must review the implementing regulation and find it unlawful for breaching EU constitutional principles.

In 2008 the ECJ delivered their ground-breaking judgment overturning the EGC’s decision. Following Advocate General Poiares Maduro, the Court held that EU institutions must respect fundamental rights when implementing UN Security Council resolutions: ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights’. Listed individuals must be properly informed of the reasons for listing and be able to contest those reasons before an independent body. Yet in this case - because no meaningful review mechanism existed at the UN level and the reasons for listing were not available for review at the EU level - ‘the rights of the defence … were patently not respected’. The Court thus asserted the authority to ‘ensure the review, in principle the full review’ of EU measures implementing the UN Al-Qaida list. But it tried to limit the scope of this potentially far-reaching power by claiming that it is wholly EU focused and does ‘not entail any challenge to the primacy of [Chapter VII Security Council resolutions] in international law’.

Following this decision, EU authorities sent Kadi a ‘Narrative Summary of Reasons’ prepared by the UN 1267 Sanctions Committee and gave him the opportunity to comment. They then relisted him, arguing that with this summary they had discharged their duty to respect his fundamental rights. Kadi promptly filed another legal complaint and in 2010 the EGC declared that his renewed listing was unlawful. The Court held that the ‘in principle, full review’ envisaged by the ECJ actually extended to ‘the substantive assessments of the Sanctions Committee itself and the evidence underlying’ their decisions. As Cuyvers observes, ‘this means that EU courts should have full access to all evidence relied on and that listings may

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61 Kadi ibid, para. 226
62 Ibid, para 261 - 290
64 Ibid, para. 54
66 Ibid, para. 334
67 Ibid, para. 326
68 Ibid, para. 288
not be based on evidence not communicated to the Court’. But in this case EU authorities had performed a wholly inadequate review in which ‘the applicants rights of defence [were] observed only in the most formal and superficial sense, as the Commission in actual fact considered itself strictly bound by the Sanctions Committee’s findings’. Furthermore, they had failed to provide ‘even the most minimal access to the evidence against [Kadi] ... despite his express request’. And whilst the UN1267 Office of the Ombudsperson was acknowledged, it was ultimately dismissed as irrelevant: ‘the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee’. Accordingly, the EGC held that Kadi was left unable to ‘launch an effective challenge to the allegations against him’ and properly exercise his right to judicial review.

The EU authorities appealed once more to the ECJ. And whilst awaiting judgment the Sanctions Committee removed Kadi from the UN Al-Qaida list. In July 2013 the ECJ finally delivered their long-awaited decision. The case is multifaceted and discussed in more detail elsewhere in this book. For the purposes of this chapter the key issue concerned the scope, standard and intensity of judicial review that the EU courts must apply to measures implementing UN terrorist listing decisions. The EU authorities and the UK (with twelve other Member States intervening) argued that the applicable standard of review ought to be tempered by the special ‘international context’ of the UN Security Council. The EGC had thus erred by failing to ‘take into account the many material obstacles that exist to the communication of [underlying] information and evidence to the European Union institutions’ and by forgetting that the EU has no discretion when implementing Chapter VII measures. For EU listing authorities, the EGC’s call to review ‘the substantive assessments of the Sanctions Committee itself’ was therefore ‘excessively interventionist’.

Yet the ECJ held that the EU courts must indeed review the substance of the listing decision. Yet they limited the scope of ‘full review’ by declaring that only one sufficiently detailed reason (and not all of the underlying evidence, as suggested by the EGC) needs to be provided. In this case the ECJ reviewed the substance of the Al-Qaida listing decision itself for the first time, finding the allegations in the Narrative Summary sufficiently precise to allow for a proper defence but inadequately substantiated by supporting evidence. According to the Court, their substantive review was ‘all the more essential’ because existing delisting procedures at the UN level fail to provide ‘effective judicial protection’. In other words, despite the fanfare and profile the institution of the Ombudsperson had attracted, it remains wholly inadequate as a judicial review mechanism.

71 Kadi (n 69) para. 171.
72 Ibid, para. 173.
73 Ibid, para. 128: ‘the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee’.
75 See the discussion in the introductory chapter and detailed analysis below in Chapter 4.
77 Ibid, para. 79.
78 Ibid, para. 74.
79 Ibid, paras. 138 - 139.
80 Ibid, paras. 153 - 163.
81 Ibid, para. 133.
The overview of judicial resistance outlined above is far from comprehensive. But it shows how different courts and complaint bodies around the world (UK, Canada, EU and the UN) have responded to the accountability problems of the Al-Qaida list in markedly similar ways. Despite the manifold divergences on points of law across these jurisdictional divides, for the purposes of this chapter four common effects tie these disparate legal decisions together.

First, each case exerts pressure on national states and/or regional organisations (ie, the EU) to effectively choose between upholding their constitutional principles and adhering to the mandatory Chapter VII demands of the UN Security Council. The argument that the hands of states are nominally tied by their international obligations is firmly rejected here by Courts finding room for the exercise of discretion and state responsibility. If UN terrorist listing has ‘enmeshed’ global and national legal orders and more closely aligned their trajectories, then these cases have sought to disentangle this arrangement and ‘re-establish greater distance between the layers’.  

In doing so, the Courts have provided a robust challenge to the supreme authority of the Council by indirectly reviewing their global listing decisions, in effect. The Security Council is of course not formally bound by the decisions of subsidiary courts. But they are reliant on states to implement their Ch. VII decisions, and in the event of normative conflicts arising they have the UN Charter to compel states to do so. As detailed below, these judicial challenges render this national imperative to implement uncertain, threatening to undermine the Council’s powers and weakening their force by requiring compliance with domestic constitutional protections. So in spite of the formal legal architecture and international hierarchy of norms, there are powerful incentives for the Council to comply with these decisions by inferior courts.

Third, each decision examined above linked domestic defiance of international obligations with the extant lack of rights protection at the UN level.  This is a powerful nexus that has helped enable fundamental rights compliance to become central in the discourse of global security law. It is a productive relation that has been forged even though the UN ‘is not a party to any of the universal or regional treaties and conventions for the protection of human rights and fundamental freedoms’ and so is ‘not directly bound by the respective provisions guaranteeing standards of due process’.  

Finally, these legal challenges show the particularity of contemporary ‘collective’ security measures and reveal just how deeply post-9/11 global security law has penetrated and threatened to rearrange the constitutional orders of national states and regional bodies.  They show how executive actors have ‘use[d] the cover of international law to undermine domestic constitutions’ and ‘loosen [the] constraints’ of rights protections in the global war on terror, expanding their power ‘relative to everyone else in their domestic political space’.

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82 Krisch, (n 2) 187 – 188.
85 For Neil Walker these conflicts reveal how global security law ‘struggles to justify itself in universal terms. The object may be unlimited - all who can pose a threat to stability, but it is universal neither in its justification nor in its manifest source’: Neil Walker, ‘Out of Place and Out of Time: Law’s Fading Co-ordinates’ University of Edinburgh School of Law Working Paper 2009/01 (2009), 42.
and significantly altering ‘the legal bases of state action’ in the security field. The Al-Qaïda list is not a traditional form of international law with the pretension of universal values, but a far-reaching pre-emptive legal weapon and inchoate mechanism of world government. The Courts have been crucial actors in creating and shaping the Office of the Ombudsperson. Yet despite the high-profile nature of their decisions, the Legal List they have enacted to measure the Security Council’s Al-Qaïda sanctions regime is only one part of the broader assemblage that has enabled this unique experiment to unfold. Another key network of actors, overlapping moral discourse and version of the list has provided a vitally important vector for change in this domain. But to properly understand its governance effects we need to start by revisiting the ethical beginnings of the ‘targeted’ sanctions instrument.

The Humanitarian List: Academic Expertise and the Ethics of Targeted Sanctions

As discussed in the introductory chapter the use of UN sanctions against Iraq in the 1990s precipitated a humanitarian crisis. Measures directed against the Saddam Hussein regime ended up inflicting severe harm on the civilian population they ultimately aimed to protect. Following widespread critique of the ‘blunt instrument’ of comprehensive sanctions, the UN supported a multinational reform process led by Switzerland, Germany and Sweden to redesign sanctions and counter what became known as their ‘unintended consequences’. The result was ‘smart’ or ‘targeted’ sanctions, which have since become the Council’s most common tool for responding to situations of perceived threat or global emergency. The UN1267 regime adopted in 1999 was not the first UN smart sanctions experiment. But given its unique focus on global networks, the profound due process conflicts it has created and the enhanced political importance of counterterrorism in the post-9/11 era, it is the listing regime that has come to define UN targeted sanctions from inception to the present.


86 Schepple (n 45) 1, 5.
88 As Mueller and Mueller observed, ‘economic sanctions may well have been a necessary cause of the deaths of more people in Iraq that have been slain by all so-called weapons of mass destruction throughout history’: John Mueller and Karl Mueller, ‘Sanctions of Mass Destruction’ (1999) 78 Foreign Affairs 43.
89 The term comes from the former UN Secretary General Boutros Boutros-Ghali: ‘Sanctions ... are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects’. See: UN Doc. A/50/60-S/1995/1, Supplement to an Agenda for Peace (3 January 1995) para. 70. See also: UN Doc. SG/SMI7360. Secretary General reviews lessons learned during sanctions decade in remarks to International Peace Academy Seminar (17 April 2000).
like the Responsibility to Protect (R2P) doctrine were starting to take shape. It was a policy instrument formed through the concerted reform efforts of a novel transnational network of scholars, think-tanks, financial regulators, UN officials and security experts brought together by a common desire to reduce civilian suffering. Prominent academics from international relations, political science and peace studies have from the outset been critically important nodes in this governance network. Many went on to later advise the Security Council, guide reform efforts and shape political debates on the problems of the Al-Qaeda list. That is, despite ostensible humanitarian objections to war, after 9/11 these humanitarian scholars were elevated and revalorised as global counterterrorism experts. The following section of this chapter analyses their important list assemblage work. It shows how these academics played leading roles both in creating the Office of the Ombudsperson and then later defending their unique institutional experiment from political and legal attack. In my analysis the humanitarian impulse that stimulated targeted sanctions did not end with the 1990s. It remains embodied in the Humanitarian List that these scholar-experts enact and so continues to exert residual effects on how the Law of the List list is arranged and justified.

(i) Targeted Governance: Recalibrating the Civilian Pain - Political Gain Nexus

How can UN intervention to counter international threats be reorganised in the post-Cold war era to minimise ‘life threatening suffering’ and realise a New Humanitarian Order? What role might UN sanctions play in ‘expanding the legitimate area of international action’ and realising this ambitious global humanitarian reform project during the ‘sanctions decade’ of the 1990s such questions animated debates in global governance and sanctions scholarship. At that time, US scholars Thomas Weiss and Larry Minear worked together on the Humanitarianism and War Project at Brown University’s Watson Institute for International Studies. Together with David Cortright and George A. Lopez of Notre Dame University’s Kroc Institute for International Peace Studies, they co-edited the influential 1997 book Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions. This book was significant because it brought two hitherto distinct policy areas into productive relation - namely, ‘the wider use of multilateral economic sanctions and ... [the] more assertive humanitarianism’ characterising UN intervention at that time. It also brought together for the first time the two academic institutions (the Watson Institute and Kroc Institute) that have dominated scholarly-policy debates on targeted sanctions ever since.


95 David Cortright and George A. Lopez (eds.) The Sanctions Decade: Assessing UN Strategies in the 1990s (Lynne Rienner Publishers, 2000).

96 Weiss et al (n 94). I use this book here as a device for representing the emergence of targeted sanctions, and not to suggest that it somehow created this policy field in itself. Parallel research and reform projects were also being undertaken in the UK at the time. See, for example: Koenraad van Brabant, Can Sanctions be Smarter? The Current Debate: Report of a Conference held in London, 16 – 17 December 1998 (ODI, 1999). Available at: http://bit.ly/1VZMk8c.
UN sanctions have long been embraced as a more humane and ethical alternative to the use of military force. 97 Civilian populations may indeed suffer through sanctions, but not as much as if their country was embroiled in war. The book problematised this assumption by demonstrating that ‘the short-term humanitarian consequences and the long-term structural effects of economic sanctions are often themselves as harmful as war itself’. 98 Sanctions, it was argued, needed to break the ‘political gain-civilian pain’ nexus – that is, the idea that civilians should suffer to exacerbate political unrest and enhance the prospects of regime change in targeted states. 99 Only a ‘smart sanctions strategy of targeted constraints on the financial assets and capital vulnerabilities of elites’ has the potential to ‘apply ... economic coercion with the requisite finesse and precision’ and realise ‘a more humane and a more effective sanctions policy’.100

When this book was first presented to the Watson Institute board in 1998 an important synergy was forged and research project put into motion. 101 Following the meeting, the former Chair of the Institute approached the Director and said:

‘Well you said at the beginning that financial [sanctions] are more effective than trade ... and now we have heard that comprehensive sanctions have all these negative consequences. So why not target financial sanctions?’. And of course, there was a lot of people from finance in the room and they were nodding their heads. And he said, ‘I think the Watson Institute should start a project on this’ ... [And] so that’s how we started.102

Under the direction of Thomas Biersteker (a leading US international relations scholar) working closely with Sue Eckert (a former US government official who worked on expert control in the Clinton Administration), the Watson Institute soon became an important vector and repository of academic expertise on UN targeted sanctions policy. Along with Nico Schrijver and Larissa van Herik (legal scholars from the University of Leiden) this Institute has often defined the boundaries of political and legal debate on this issue - building consensus on how best to resolve some problems of the list whilst de-emphasising and ‘black-boxing’ others. 103 These scholars have been critically important actors ‘bringing disparate elements together and forging connections between them’ to sustain the Ombudsperson mechanism in the face of challenge. 104 But understanding this power first requires analysis of how their academic expertise on counterterrorism sanctions was constructed, valorised and came to be widely accepted as authoritative.

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97 There is a huge body of literature on economic sanctions as a form of just war. For a summary see George A. Lopez, ‘More Ethical than Not: Sanctions as Surgical Tools’ (1999) 13 International Affairs 143.
98 Weiss et al (n 94) xv.
99 See, for example, Patrick Clawson, ‘Sanctions as Punishment, Enforcement and Prelude to Further Action’ (1993) 7 Ethics & International Affairs 20.
100 Weiss et al (n 94) 240.
101 The Watson Institute board of the time was composed of eminently powerful figures including John Birkeland (former US intelligence officer and President of Dillon Read bank), Leslie Gelb (then President of the Council on Foreign Relations), William Rhodes (Vice Chair of Citibank), John Whitehead (former Chairman of Goldman Sachs and Director of the New York Stock Exchange) and Thomas Pickering (former US career Ambassador).
102 Interview with Watson Institute scholar, Toronto, March 2014 (‘Interview G’). All subsequent quotes in this Chapter attributed to Watson Institute scholars derive from this interview, unless indicated otherwise.
103 An actor grows with the number of relations he or she ... can put in black boxes. A black box contains that which no longer needs to be reconsidered, those things whose contents have become matters of indifference: Michel Callon and Bruno Latour, ‘Unscrewing the big leviathan: how actors macro-structure reality and how sociologists help them to do so’ in Karin Knorr Cetina and Aaron V. Cicourel (eds.) Advances in Social Theory and Methodology (Routledge, 1981), 284 - 285. See also: Bruno Latour, Science in Action: How to follow scientists and engineers through society (Harvard University Press, 1987): ‘The assembly of disorderly and unreliable allies is thus slowly turned into something that closely resembles an organised whole. When such cohesion is obtained we at last have a black box’ (131).
(ii) **Constituting Expertise and UN-Academic Symbiosis (1998 - 2004)**

In 1998 the Watson Institute, along with the Council on Foreign Relations, organised a series of workshops in New York with UN officials, diplomats, academics and prominent bankers and lawyers to lay the groundwork for their targeted sanctions research and reform agenda. Here Institute scholars forged close relations with two critically important ‘translators’ or ‘policy entrepreneurs’ - Joseph Stephanides (former head of Security Council Sanctions Unit in the UN Secretariat Department of Political Affairs) and Jenö Staehelin (then Swiss Ambassador to the UN). Both were key organisers of the ‘Expert Seminar on Targeting UN Financial Sanctions’ (or Interlaken Process) which the Institute was later invited to participate in. After the 1999 Interlaken meeting Stephanides asked scholars from the Watson Institute to share their thoughts on this sanctions policy reform process and then, without consultation, sent their memo to Staehelin inside the Swiss UN mission:

... And that’s when the Swiss approached us ... The policy entrepreneur from the Secretariat said ‘OK. Get the Swiss to give you money to do this report to carry the process forward’. And that’s actually how this unfolded ... [and] where the connection between the Swiss Government and the work the Watson Institute has been doing really started.

The ensuing report (the Interlaken Manual ‘for design and implementation’) was important for three key reasons. First, it was a ‘ready to use’ research instrument to assist officials drafting UN Security Council resolutions on targeted sanctions, providing ‘a menu of different language modules of text to include in future resolutions from which policymakers can choose’. As such it functioned as a vehicle of ‘methods standardisation’, cohering the objectives of different actors through common legal language and facilitating their collaborative involvement in the task of building targeted sanctions policy together. Second, the Manual - and the UN sanctions reform process it spearheaded - also operated as an enrolment device that expanded the possibilities for consensus and collective security action by the Security Council P5. The Manual’s depoliticised and technical formatting, as one former UN Secretariat official observed, had important and unforeseen political effects:

**UN Secretariat**: I can tell you, I felt very, very happy - and I never said this officially of course - that I saw repeatedly the Chinese delegation come into the [Security] Council. And visible in their briefs, they had the Interlaken (Manual). Simply because the formulations were highly technical and professional, done by experts (not by us generalists) they were extremely important to them. So they were transformed from being totally ignorant and nihilistic [on this issue] ... and hence we saw additional [collective security] measures pass since then.

**GS**: And not just sanctions related, presumably?

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106 Other prominent scholars in attendance at the Second Interlaken meeting included George A. Lopez (Kroc Institute, University of Notre Dame, USA), Claude Bruderlein (Harvard University, USA), Vera Gowlland Debbaas (Graduate Institute of International Studies, Switzerland) and John Ruggie (Harvard University, and former advisor to UN Secretary-General Kofi Annan).

107 Interview G. The Swiss government have continued to sponsor Watson Institute projects to this day, including the Targeted Sanctions Consortium of Scholars and Practitioners - see: [http://bit.ly/1QIPtHr](http://bit.ly/1QIPtHr).


Third, and most importantly for this chapter, the Manual was a key resource for bolstering the expertise and authority of the Watson Institute scholars and creating the foundations of their significant counterterrorism list assemblage work to follow:

[Its] a rather powerful transgovernmental network that operates in this domain ... You have a certain ... shared community, a certain knowledge. It’s linguistic ... [and] expertise defined. You need to know a certain amount of technical expertise to enter into the conversation. And once you’re at that level and credible at it, then people use each other ... Because we authored the Interlaken Manual ... that gave us a certain expertise. That was our credibility.\footnote{\textsuperscript{111}}

Actors in this network did indeed go on to use each other in diverse and mutually beneficial ways.\footnote{\textsuperscript{112}} And with each new collaboration, the possibilities for academic experts to exert influence over this emergent global policy domain expanded. UN Secretariat officials, for example, worked with both Watson Institute and Kroc Institute scholars\footnote{\textsuperscript{113}} to advance global humanitarian reform in ways they would not have been otherwise able, building networks of expertise and reframing political problems as technical ones that academics were best placed to resolve. As one former Secretariat official put it:

\begin{quote}
The Security Council members were beleaguered with ... an onslaught of daily work ... And the [sanctions] system had never been implemented due to the ... Cold War ... Due to lack of time, and also this divide, the Council could not do strategic planning. And so therefore we did it for them. But we tried to always let them claim paternity for what we engineered.\footnote{\textsuperscript{114}}
\end{quote}

Taking advantage of the fact that the UN diplomats responsible for designing and administering sanctions lacked the time, experience and resources to do so, Secretariat officials strategically forged relationships with scholars to help reform sanctions policy, bypass the intergovernmental deadlocks of the Council and create new possibilities for post-Cold War political co-operation. For the scholars this offered valuable opportunities to influence global security policy, procure research funding, carve out targeted sanctions as a distinct field of scholarship and build up their expertise on it. For the Secretariat officials involving ‘unassuming academic experts’ to produce policy-directed targeted sanctions research helped them advance far-reaching global humanitarian reform in discrete and cost-effective ways that are ‘better ... for us, otherwise, we might be accused of being partisan’ and operating outside the legitimate bounds of bureaucratic neutrality.\footnote{\textsuperscript{115}} For the UN Secretariat, therefore, scholars are an integral part of the formula for global political change:

\begin{quote}
Those behind this must be transient, following all and be the person who will be weaving and synthesising ... And the strategy is, first, to be incremental and not to be a full surprise (sic).
\end{quote}

\footnote{\textsuperscript{110}} Interview with former UN Secretariat official, New York, June 2014 (‘Interview H’). The value of targeted counterterrorism sanctions as a mechanism of political consensus building in the Security Council was a recurrent theme in my interviews with UN officials for this research.

\footnote{\textsuperscript{111}} Interview G.

\footnote{\textsuperscript{112}} See, for example: Thomas Biersteker, ‘Scholarly Participation in Transnational Policy Networks: The Case of Targeted Sanctions’ in Mariano E. Bertucci and Abraham Lowenthal (eds.) \textit{Narrowing the Gap: Scholars, Policy-Makers and International Affairs} (John Hopkins University Press, 2012).

\footnote{\textsuperscript{113}} See, for example, David Cortright and George A. Lopez (eds.) \textit{Smart Sanctions: Targeting Economic Statecraft} (Rowman and Littlefield, 2002) - where Stephanides thanks both Cortright and Lopez ‘for their leadership in dissecting the issue of targeted sanctions and helping to place it on the international agenda’ (viii).

\footnote{\textsuperscript{114}} Interview H. This process supports both Koskenniemi’s argument about international law’s fragmentation and shift towards the ‘politics of expertise’ and the claims of constructivist IR scholars on the autonomy of International Organisations. See, for example: Koskenniemi (n 14) 331; Michael Barnett and Martha Finnemore, \textit{Rules for the World: International Organizations in Global Politics} (Cornell University Press, 2004).

\footnote{\textsuperscript{115}} \textit{Ibid}. As Barnett and Finnemore point out, IO bureaucracies exercise significant political power yet they ‘need to be seen as impartial servants’ and are ‘legitimated by a myth of depoliticization’ (\textit{Ibid}, 21).
Once you have come to some level of accomplishment, you issue a crisp, very non-controversial factual report. And then the countries that have been sponsoring the process have the honour to write a letter to the President of the Security Council and say, “Your Excellency. My government - along with the government of so and so and the NGOs and whoever were motivated to assist in the process of ... [working] towards more improved measures - organised a round table or whatever and the attached is the initial report ... We would be grateful if you could circulate [it] to all Member States ... for their information and consideration.’ ... When you have done the whole exercise, you [then] organize a more theatrical conference. We invited everybody. And then it adopts something. And then you send it to them [i.e., the Security Council]. And that becomes the bible. So that’s the strategy.

GS: And that is how the Interlaken Manual was created?

**Secretariat:** Yes. Trust me: it works! It’s a very cost-effective way of doing business with a trivial commitment of money, instead of the frontal, egotistic ... [approach].

Scholar-experts were also engaged to advance global sanctions reform through education. Between 2002 and 2004 the Watson Institute were commissioned to provide targeted sanctions simulations and training workshops with UN Security Council, Member State and Secretariat officials at the US Naval War College and Watson Institute facilities in Rhode Island. These weekend retreats were important ways to informally build networks of actors in this field, allowing the Watson Institute and UN officials to work together ‘symbiotically’ and as part of ‘a community that shared information’ on this issue:

We would get people in the Secretariat Sanctions Unit saying ... ‘When you do you scenario, could you put something in that tries out this idea?’ ... So we would actually be a vehicle for what the Secretariat could never do on its own .... It [was] a kind of experiment, where we were co-creating possibilities. And ... some of the stuff we did ended up in [global] policy.

Such workshops gave Institute scholars the opportunity to connect new diplomats from the elected 10 (E10) Member States with key targeted sanctions interlocutors inside the UN bureaucracy ‘who you can get [information from] if you’ve got a technical question [and] you don’t want to raise it in a formal meeting’. Because E10 officials only have two-year terms and generally arrive untrained, this kind of practical connection-building work was highly valued. It helped scholars embed themselves as crucial nodes in this network and indispensable conveyors of historical knowledge on this issue.

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116 Interview H. See, for example: UN Doc. A/60/887-S/2006/331 (14 June 2006).
117 Interview G.
118 *Ibid*

Enacting scenarios within a university setting also allowed Security Council officials to feel ‘like students again’, levelling out (however fleetingly) their entrenched political divisions. But most importantly, this symbiosis created the conditions for new academic-UN policy networks to emerge based on shared technical knowledge rather than Member State or institutional affiliation:

There was a certain kind of informal sense of community and taking people out of New York was the key to that. Because in New York they’re in ‘I need to consult Capital’ [mode]. But ... [here] you’re meeting socially, you’re having dinner ... [and] creating different kinds of networks that ... cut across functional roles. It’s not like ‘I’m in this Unit or in that Unit’ No. And what do we share? We share expertise and knowledge about the sanctions’.119

According to Weiss, Carayannis and Jolly most International Organisations (IO) literature analyses Member States or the UN Secretariat to account for changes within the UN. But there is a markedly understudied ‘third UN’ - composed of ‘outsider-insider’ clusters of NGOs, academics, consultants, experts [and] independent commissions - that is increasingly determining UN action.120 The first phase of the Watson Institute’s activity on this issue clearly shows this ‘third UN’ in action, building important knowledge practices, discursive relations and expertise networks and putting them into motion. These scholar-experts were more than external advisors or agents with delegated authority from their UN principals. They had already started positioning themselves as authoritative experts on targeted sanctions. After 9/11 they went on to become a key part of the ‘epistemic infrastructure’ through which problems of global terrorism would come to be known and countered.121

(iii) From Humanitarian Concern to Global Security Expertise (2005 - 2009)

The original impulse motivating the targeting of sanctions was global humanitarian reform. But with the 9/11 attacks in 2001 the political focus and rationale for UN targeted sanctions dramatically changed. What had been initially embraced as an instrument of humanitarian governance was now rapidly recalibrated as a weapon of global pre-emptive warfare. And the humanitarian and IR scholars who were involved from the outset were transformed and revalorised as global security experts. Cortright and Lopez’s edited collection Uniting Against Terror: Co-operative Nonmilitary Responses to the Global Terrorist Threat succinctly captures this strategic re-composition unfolding:

The research for this volume began soon after the United Nations Security Council passed Resolution 1373 on 28 September 2001. That resolution created the Counter-Terrorism Committee (CTC) and called on all states to ... lock down the financial assets of individuals and organizations associated with terrorism ... [by using] the tools of targeted sanctions we had researched in previous years and ... examined in consultation with Security Council member

119 Ibid
120 Ibid
states and officials in the UN Secretariat. As the CTC began its work, therefore, we were able to carry on our roles of scholars/analysts and practical interlocutors with UN officials, focused now on countering terrorism. Thus began our expanded research agenda.123

This transformation - from targeted sanctions scholar to figure of global security expertise - was experienced by the academics involved as something arbitrary and circumstantial:

[It was] right after September 11. When people literally said ... ‘You’re an expert on [the countering of financing of terrorism]. And I said, ‘What constitutes expertise? How did I become an expert’? ... And it was only because of the fact that I was working on the instrument of targeted financial measures – and, of course, that 1267 was already up and running. And then suddenly that forced us into this sort of role of experts on the subject.124

But this rearrangement was not merely an effect of political circumstance. It was sought after and fostered by the scholar-experts themselves. ‘We were’, as Interviewee A reflected, ‘probably, in part, opportunistic. We took advantage of the now great interest in the subject and that our work was now relevant and important and useful in some way’.125 These academics found that they could attract more funding and political capital for their targeted sanctions research as counterterrorism experts. Valorisation had the circular effect of ‘skew[ing] the work in that direction’.126 Re-orienting sanctions research towards the dismantling of Al-Qaida meant that ‘we were not looking at other applications [of sanctions] any longer with as much attention or scrutiny’.127 The humanitarian reason that had allowed targeted sanctions to evolve as a global policy instrument was supplanted in the post-9/11 environment by the shared imperative of helping ‘starve the terrorists of funding’.128 But the unfairness of the Al-Qaida list had started to become an issue of political concern, largely as a result of domestic legal challenges and protracted attempts by Member States to secure the delisting of their nationals.129 In September 2005 the UN General Assembly ‘call[ed] upon the Security Council ... to ensure that fair and clear procedures for placing

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123 David Cortright, and George A. Lopez (eds.) Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat (MIT Press, 2007) xi.
124 Interview G.
125 Ibid
126 Ibid
128 ‘President Freezes Terrorists’ Assets’, Remarks by the President, Secretary of the Treasury O’Neill and Secretary of State Powell on Executive Order, 24 September 2001. Available at: http://1.usa.gov/1MfZbiX.
129 In November 2001, for example, three Somali Swedes were placed on the 1267 list by the US for alleged association with the Al Barakaat financial network. All three denied the allegations, complained they had no opportunity for redress and asked the Swedish government intervene. Sweden asked the US to provide proof of wrongdoing, but all they were sent was generic news material and background documents about Al-Qaida and the Al Barakaat network. Sweden thus sought to secure their delisting at the UN level, but were initially rebuffed. 12 members of the Council supported the petition, but the US, UK and Russia objected. In August 2002, the individuals were finally delisted after the Swedish government provided the US Office of Financial Assets Control (OFAC) with evidence showing that there were no connections between these individuals and Al-Qaida as well as written assurances from the individuals themselves that they would not associate with Al Barakaat. This process emboldened Sweden to critique the inequities of the listing regime and advocate for due-process reforms to be adopted by the Council. See, for example: Bruce Zagaris, ‘Somali Swedes Challenge Terrorism Freeze’, (2002) 18(7) International Enforcement Law Reporter 277; Eric Rosand, ‘The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions’, (2004) 98(4) The American Journal of International Law 745; Juan Zarate, Treasury’s War: The Unleashing of a New Era of Financial Warfare (Public Affairs, 2013) 38 - 39; Iain Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ (2003) 72 Nordic Journal of International Law 159; and Iain Cameron, Targeted Sanctions and Legal Safeguards, Report to the Swedish Foreign Office, October 2002. Available at: http://bit.ly/1VECH85. For German and EU support for reform, see: UN Doc. S/PV.4892 (12 January 2014).
individuals and entities on sanctions lists and removing them’ were implemented. The UN Office of Legal Affairs (OLA) also commissioned the legal scholar, Bardo Fassbender, to prepare a report clarifying whether (and how) the Security Council were obliged to provide due process rights to those targeted by sanctions. It was from this political context that the Watson Institute produced their two most influential policy reports on the Al-Qaida list: Strengthening Targeted Sanctions Through Fair and Clear Procedures (2006) and Addressing Challenges to Targeted Sanctions – An Update of the ‘Watson Report’ (2009).

The 2006 report, commissioned by Germany, Sweden and Switzerland, aimed to ‘clarify the issues and advance common objectives of fair and clear procedures in the application of targeted sanctions’. To that end, it recommended that an ‘administrative focal point’ be created in the Secretariat to receive delisting requests and ensure that individuals were notified of their listing – a suggestion later adopted by the Security Council in Resolution 1730 (2006). It also suggested all listings be reviewed biannually to ensure their accuracy and relevance - a proposal subsequently introduced in Resolution 1822 (2008).

Yet the key value of this document lies in its presentation of the effective remedy problem. It outlined five possible procedural review mechanisms that the Security Council could adopt to ‘prevent potentially damaging legal challenges to targeted sanctions’ and ‘enhance the[ir] perception ... as being responsive and transparent.’ These included (i) expanding the Al-Qaida Monitoring Team’s remit to allow them advise on delisting matters, (ii) creating an Ombudsperson mechanism within the UN Secretariat and/or (iii) assembling a Panel of Experts analogous to the UN Human Rights Committee. Because each review mechanism would be established under the Security Council’s authority, their recommendations would be non-binding. Two other review mechanisms with actual decision-making powers were also suggested - an independent arbitral panel and UN tribunal with the competence to judicially review Sanctions Committee decisions.

The report carefully avoided endorsing one particular reform option over any other. Instead, according to Biersteker, ‘what we provided was an organized, analytical framework for policy

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130 UN Doc. A/Res/60/1, World Summit Outcome (24 October 2005), para. 109.
131 Bardo Fassbender, ‘Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter’ [Study Commissioned by the United Nations, Office for Legal Affairs - Office of the Legal Counsel 20 (2006)]. The Fassbender report concluded that because UN targeted sanctions have ‘a direct impact on the rights and freedoms of the individual’ they create ‘a legitimate expectation that the UN will observe standards of due process’ (7). See also: Bardo Fassbender, ‘Targeted Sanctions and Due Process’ (2006) 3 International Organizations Law Review 437.
136 2006 Watson Report (n 132) 8, 43.
137 These reform options with real decision-making powers were only included in the report due to pressure from the governments who commissioned the research. According to leaked US Embassy cables, for example, one of the co-authors met privately with officials from the US mission to the UN during the report’s public launch in New York. In private, they ‘assured us [ie, the US government] that the Institute did not endorse the “more extreme options” in the paper, such as an independent arbitral panel to consider delisting proposals or judicial review of UNSC decisions’. Thus despite the report’s technocratic presentation of the different options, the Watson Institute supported ad hoc political, rather than judicial, solutions to this accountability problem. See: US Embassy Cable 06USUNNEWYORK714 (dated 4 April 2006).
comparison, an independently and theoretically derived set of evaluation criteria, and an assessment of the degree to which different options met those criteria. Each option was subjected to a succinct cost-benefit analysis and presented as part of a ‘range of choices from which member states could choose’ to optimally realise fair and clear procedures. The accountability problems of the Al-Qaida list were thus reposed in technical, apolitical terms. For these scholars ‘the key question’ was a managerial one: ‘to determine what institutional mechanism and combination of elements [best] meet the test of an effective remedy’.

Yet as Koskenniemi reminds us, in the fragmented global legal landscape of the present ‘there is no “innocent” or impartial neutral terrain from the perspective of which regime interaction could be managed’. Instead, ‘all management involves deciding in favour of some and against other interests, the setting up of a hierarchy ... that prefers some outlooks at the costs of others.’ In his account, functional expertise incessantly seeks to embed its own structural bias as the norm against which regime conflicts - for example, between security and human rights - are assessed. ‘Everybody enters’ the world of regimes ‘from the perspective of one’s own preferences that are always already partial ... but striving toward universal recognition’. In this way, the fragmentation of international law facilitates hegemonic struggle by experts and the conditions for its own interminable reproduction.

And so it is with the Watson Institute’s 2006 report. Critically analysing this study through the Koskenniemi lens allows us to better see how it embeds important contingent assumptions as given. As discussed earlier, UN targeted sanctions shrink the space between the global and national domains. By re-orientating collective security action towards individuals the UN Al-Qaida list directly interferes with human rights, creating complex constitutional conflicts and legal problems. Yet for the Watson Institute scholars this entanglement with individual rights claims is a secondary concern. Because in their view ‘it is important to remember’, at the end of the day, ‘that the imposition of sanctions is more of a political and administrative process than a legal one’. Terrorist listing may indeed violate human rights but only as the ‘unintended consequence’ of a Security Council targeted sanctions policy that is implicitly assumed to be primary and altogether more important.

This jurisdictional move and prioritisation of the Security Council’s Chapter VII authority has important effects on how accountability problems of the list are framed and made amenable to improvement. Like proponents of emergency powers who contend that fundamental rights must be modified during periods of exception, the Watson Institute scholars quickly move from the primacy of ‘the political’ to argue that because of the ‘extraordinary nature of the Security Council’s role in promoting international peace and security, some margin of appreciation or flexibility in interpretation as to what constitutes effective remedy is

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138 Biersteker (n 112) 143.
139 Ibid
140 2006 Watson Report (n 122) 44.
142 Ibid
143 Ibid
144 Koskenniemi (n 14) 338.
145 2006 Watson Report (n 132) 7. When UN listing decisions target individuals and interfere with their fundamental rights one could just as easily argue that they are indeed legal measures.
146 For Koskenniemi, ‘In a world of plural regimes, political conflict is waged on the description and redescription of aspects of the world so as to make them fall under the jurisdiction of particular institutions’ – Koskenniemi (n 14) 337 - 338. See also: Mariana Valverde, ‘Jurisdiction and Scale: Legal “Technicalities” as Resources for Theory’ (2009) 18(2) Social and Legal Studies 139.
appropriate’.\textsuperscript{147} They note that the right to effective remedy ordinarily requires ‘that a review mechanism [must] have binding authority or the power to decide a case’.\textsuperscript{148} Yet ‘it is possible’, they insist, ‘that ultimate decision-making responsibility remains [vested] in the sanctions committee or Security Council.’\textsuperscript{149} What needs to be created, in other words, is a diluted form of ‘judicial review-lite’ that resembles conventional review but lacks any of its core features. As shown below, this would eventually lead to a decision-maker without the power of decision. And a review mechanism incapable of reviewing listing decisions.\textsuperscript{150}

It would be three years before this possibility would come to be institutionally realised. The piecemeal reforms adopted by the Council up until 2009 did little to quell judicial criticisms of the Al-Qaida listing regime. The Focal Point mechanism set up by Resolution 1730 (2006) was promptly dismissed by the courts as nothing more than an administrative mailbox for the Security Council. A ‘Group of Like-Minded States’ was then assembled to pressure the Council to create a review mechanism compliant with international human rights norms.\textsuperscript{151} But it was the ECJ’s 2008 \textit{Kadi} decision that dramatically amplified this critique and made speedy resolution of the list’s accountability flaws much more politically urgent. ‘Bold action is needed’, declared US Ambassador to the UN Susan Rice in 2009, ‘to salvage the UN1267 al-Qaeda/Taliban targeted sanctions regime’ and stop it from being ‘seriously undermined by criticisms - and adverse European court rulings - asserting that procedures for listing and delisting names are not adequately fair and clear’.\textsuperscript{152} An 18-month review of the Al-Qaida listing regime scheduled for December 2009 provided the catalyst for the next round of reforms and proposed solutions to this problem to be advanced.

The scholar-experts who had helped create UN targeted sanctions policy were among those most prominently advocating for procedural reforms to ‘save’ the Al-Qaida listing regime from further judicial attack. George A Lopez and David Cortright of the Kroc Institute released two public reports during this period - \textit{Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists} (April 2009) and \textit{Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures} (November 2009).\textsuperscript{153} Thomas Biersteker and Sue Eckert of the Watson Institute prepared an influential policy document entitled \textit{Addressing Challenges to Targeted Sanctions: An Update of the ‘Watson Report’} (October 2009). These reports were launched at public events in New York and European capitals in the months prior to the new Security Council listing resolution being adopted.

\textsuperscript{147} The argument is similar to the one advanced by scholars of the exception that in times of emergency constitutional rights need to be restricted and/or redefined if they are to have any relevance. See, for example: Bruce Ackerman, ‘The Emergency Constitution’ (2004) 133(5) \textit{Yale Law Journal} 1029; Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ 2003 (122)(5) \textit{Yale Law Journal} 101; Alan Dershowitz, \textit{Why Terrorism Works: Understanding the Threat, Responding to the Challenge} (Yale University Press, 2002)
\textsuperscript{148} 2006 Watson Report (n 132) 55.
\textsuperscript{149} \textit{Ibid}
\textsuperscript{150} For Dyzenhaus such institutional experiments are ‘legal grey holes’ because they contain ‘the facade or form of the rule of Law rather than any substantive protections’. Yet as I argue in this chapter they are legally embedded forms of global exception and these humanitarian scholar-experts have played a crucial role in their assemblage: David Dyzenhaus, \textit{The Constitution of Law: Legality in a Time of Emergency} (Cambridge University Press, 2006) 3.
\textsuperscript{151} The Like-Minded Group was set up in 2008 and initially included Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland. Belgium, Costa Rica and Finland joined in 2009. See, for example: UN Doc. A/62/891 - S/2008/428 (2 July 2008). Here the group recommended an independent UN expert panel be created to review listing decisions, loosely modelled on he World Bank Inspections Panels. For an overview of the activities of the Like-Minded states on this issue, see: Katalin Tünde Huber and Alejandro Rodiles, ‘An Ombudsperson in the United Nations Security Council: A Paradigm Shift’ (2012) \textit{Anuario Mexicanode Derecho Internacional: Décimo Aniversario} 107.
\textsuperscript{152} US Embassy Cable 09USUNNEWYORK818 (dated 4 September 2009).
\textsuperscript{153} The first report of April 2009 was co-authored with Alistair Millar and Linda Gerber-Stellingwerf and is available at: \texttt{http://ntrda.me/1OEFhvd}. The second report of November 2009 was co-authored with Linda Gerber-Stellingwerf, Eliot Fackler, Sarah Persinger and Joshua Weaver and is available at: \texttt{http://bit.ly/1ZFDuey}.
The Kroc Institute’s approach was tempered by a pragmatic assessment of ‘the political climate in which any of the proposals will be considered’.\textsuperscript{154} The ‘crux of the dilemma’, in their view, is that reforms complying with international human rights standards are ‘politically infeasible’ due to P5 opposition and reforms potentially supportable by the Security Council ‘contain shortcomings’ vis-à-vis accepted international human rights standards.\textsuperscript{155} Breaking this ‘impasse’, they suggest, requires adopting a strategy of ‘pursuing incremental change’. Following the Watson Institute, they advocate in favour of shifting the terms of the accountability debate to ‘focus on developing mechanisms that ... provide quasi-judicial review procedures while preserving the prerogatives of the Security Council’.\textsuperscript{156} In the counterterrorism domain such experiments often end up embedding states of exception and undermining fundamental rights. But there is little risk of legal violence occurring here because, in the optimistic vision of the Kroc Institute scholars, the Security Council is evolving into a more human rights sensitive institution and ‘the tide is gradually turning’ on this issue:

\ldots the Security Council listing system is on an evolutionary path toward modestly improved due process procedures ... [and] the Council has entered a period of system response and adjustment. After an initial period in which listing decisions were made hastily and with little regard for human rights, the Security Council has adopted an approach of greater responsibility and sensitivity to due process rights. Under these circumstances ... the most effective strategy may be to apply continuous pressure for the system to adapt further and ... move the reform process forward.\textsuperscript{157}

Leaked Embassy cables provide a rare glimpse into how key political actors sought to harness and shape the Kroc Institute’s mode of ‘pragmatic’ engagement. In March 2009 the Canadian Mission to the UN convened a meeting of diplomats, UN Secretariat officials and academics (including Lopez, Cortright and Biersteker) to discuss ‘challenges facing targeted sanctions’ and provide a platform for these scholars to launch a ‘new process’ of learning and reform modelled on the earlier Interlaken meetings.\textsuperscript{158} “This “process”’, stressed Cortright, ‘would not be an official UN-mandated endeavour, but rather a loose collection of academics, experts and diplomats who seek to harmonize their collective efforts’.\textsuperscript{159} It will be organised through informal working groups and aimed at ‘develop[ing] recommendations that were relevant to policymakers’ on issues such as fair and clear procedures.\textsuperscript{160}

Although incipient, the US quickly recognised this initiative’s potential importance and noted that ‘similar informal initiatives in the past have been influential in developing the sanctions tools that the Security Council uses to respond to threats to peace’.\textsuperscript{161} Yet it is critical that such initiatives stay within the ‘partition of the sensible’: ‘USUN will continue to urge leading participants to ensure their recommendations are relevant and grounded in political reality. To this end USUN has recommended that the U.S. academics involved in this initiative meet with Washington policymakers at an early stage’.\textsuperscript{162} Engaging scholar-experts to ensure ‘policy relevance’, in other words, is a vehicle of de-politicisation that provides a way of ‘heading off more radical and dangerous proposals’ for reforming the law of the list.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{154} April 2009 report, Ibid 7.
  \item \textsuperscript{155} Ibid
  \item \textsuperscript{156} November 2009 report (n 153) 10. For these Kroc Institute scholars, expanding the Monitoring Team’s role to assist in delisting applications and setting up an independent review panel of experts to make non-binding recommendations was the preferable reform option.
  \item \textsuperscript{157} Ibid, 9.
  \item \textsuperscript{158} US Embassy Cable 09USUNNEWYORK301 (dated 23 March 2009).
  \item \textsuperscript{159} Ibid. Note: this quote is hearsay - it is from a US official who wrote the cable recounting what Cortright said.
  \item \textsuperscript{160} Ibid
  \item \textsuperscript{161} Ibid
  \item \textsuperscript{163} US Embassy Cable (n 152).
\end{itemize}
The Watson Institute’s 2009 ‘update’ marked a turning point in their engagement with the list accountability problem. Like their earlier study, it laid out a range of procedural reform options on a ‘balance sheet’ and assessed the pros and cons of each - including various review mechanisms with an advisory role under Council authority (expanded Monitoring Team, Advisory Panel and Ombudsperson) and an independent judicial body capable of taking binding decisions. The key point of departure, however, lies in the report’s recommendations. Here the Institute put their managerial approach to one side and laid their political preferences on the table, advocating for the creation of a UN Ombudsperson to ‘meet [the] contemporary challenges of global governance in this issue domain’.  

Within two months this recommendation would be given the force of global law as a Chapter VII edict of the Security Council. US government support and ‘ownership’ of this reform process was a critical element underpinning this resolution’s adoption. Yet this support did not simply organically emerge from the Obama administration’s more enlightened and ‘comprehensive’ approach to counterterrorism. It was a complex negotiation that the Watson Institute scholars played a key role in proactively facilitating. As interviewee G explained, in 2009 ‘we crossed the line ... for the first time, we went from analysis to advocacy’. Drawing on the political resources and contacts opened up by their sustained policy engagement and accumulated technical expertise on this issue, these scholar-experts engaged in a multipronged and ultimately successful lobbying offensive to secure their preferred UN procedural reform. The Watson Institute’s academic expertise networks were engaged to push the Ombudsperson option forward within the White House:

We used even more ties ... I mentioned earlier Harold Koh and Anne Marie Slaughter. Well Harold was in the Obama administration ... - a key position as International Legal Advisor to the Secretary [of State]. So Harold was coming to [my city]. I said, ’Harold, I’m going to come to your lecture. Let me just send you this draft report that we’ve written’. He read it on the plane. We talked about it [my city]. So I got straight to the Secretary of State’s Legal Advisor. Anne Marie is an old friend. So I made sure that we got a meeting in Policy Planning. And I talked with Anne Marie and her staff about the issue. So we lobbied - because we had friends [in the US government] - ... and we became advocates because we did have a position now.  

The State Department have traditionally represented the US government in UN affairs. But terrorism listing has long been the preserve of the Office of Foreign Assets Control (OFAC) within the Treasury Department, who have the added advantage of their own in-house intelligence agency to facilitate the global pre-emptive targeting process. Changing US government thinking on the UN Al Qaida list thus required these scholars (now counterterrorism experts) to engage this powerful institution of ‘financial warfare’,

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164 2009 Watson Report (n 132) 31. As Interviewee G noted (n 102): ‘the Report that had even more impact was the 2009 second Watson Report, because then we really pushed the Ombudsperson much more’.  
166 Interview G.  
167 Ibid. Harold Koh (Professor of International Law at Yale University) was an International Legal Advisor to the US State Department from 2009 to 2013. Anne Marie Slaughter (currently president and CEO of the New America Foundation) was Director of Policy Planning at the US State Department from 2009 to 2011. The locational details of the meeting with Koh have been made generic here to preserve anonymity.  
168 OFAC has the added-value of its own dedicated, in-house intelligence agency - the Office of Terrorism and Financial Intelligence (TFI). See: http://1.usa.gov/1zUgrN2  
169 Zarate (n 129). Zarate was formerly the Assistant Secretary of the Treasury for Terrorist Financing during the Bush administration. He argues that after 9/11 ‘[Treasury] began to devise means of using money as a weapon against terrorists ... As a result, we are now living in a new era of financial warfare. The ability to undercut and disrupt the financial flows and networks of our enemies gave the United States a different kind of leverage’ (2).
responsible for hastily populating the UN Al Qaida list with most of its ‘toxic designations’ in the aftermath of the 9/11 attacks. As one scholar noted, ‘US policy is not made by the State Department. State is entirely secondary to Treasury [on this issue]. Treasury is what drives the policy in the US. And that’s why we went there’:

Interviewee: We went into OFAC and ... [found] we could gain their confidence. We went into an OFAC secure room ... where they decide ... whom to designate. It’s a scary place, because there were all these electronics around us and it was in this kind of bunker within the Treasury Department. And we sat down with the people who make the designations from OFAC. And they had no idea that this had any implications beyond the US. They were like: ‘Really? Oh, and this would potentially have an impact on the instrument of targeted sanctions? Yes. This is why we’re [here]’ ... Some of them were quite resistant to the idea that anyone would look into their [decisions] ... But we actually sat down and talked with them and tried to expand their knowledge of this.

GS: Specifically, about the problem of effective remedy at the UN?

Interviewee: Yes ... that there has to be a review mechanism at the UN level.

More importantly, the Watson Institute also pressed their Ombudsperson point in personal meetings with the OFAC Director, who was arguably the key figure with capacity to change the US position on this issue from firm opposition to reluctant support: ‘[We] sat down with Adam Szubin for an hour ... and basically lobbied Adam saying, ‘Look, you need to lighten up, just let up’. Now that’s when we crossed the line, when we became advocates for a policy’. The aim of this meeting, according to Biersteker, was simple: to use ‘our research as the basis for arguing that Treasury should drop its resistance to UN level reforms’.

This carefully focused and politically astute lobbying campaign evidently worked. The US soon began taking the lead in the drafting process for the upcoming Security Council resolution on this issue. The US Mission to the UN finally acknowledged there was ‘room to improve’ and confirmed they would soon ‘take additional steps to ensure that the process for listing and delisting individuals is as fair and transparent as possible’. And finally, in December 2009, Security Council Resolution 1904 was unanimously adopted, establishing the UN 1267 Office of the Ombudsperson.

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170 2009 Watson Report (n 132) 24. See also: US Embassy Cable (n 158) - which cites Biersteker and defines ‘toxic designations’ as ‘UN designations made in the immediate wake of the 9/11 attacks that were based on weak information and have since undermined the integrity of the 1267 sanctions regime’.

171 Interview G.

172 Ibid. For biographical details on Szubin see: [http://1.usa.gov/1M7Vcxd](http://1.usa.gov/1M7Vcxd). On the shift from opposition to support by the US, compare US Embassy Cable 06USUNNEW YORK714 (dated 4 April 2006) and US Embassy Cable (n 152).

173 Biersteker (n 112) 144.

174 The Watson Institute were of course not solely responsible for this shift. For an excellent account of the complex institutional politics associated with this development, see Carlotta Minnella, ‘Human Rights in the Counter-Terrorist Sanctions Regime’ in Imperfect Socializers: International Institutions in Multilateral Counter-Terrorist Cooperation, (PhD thesis, University of Oxford) copy with author.

175 Statement by Ambassador Alejandro Wolff, US Deputy Permanent Representative, in the Security Council, on the 1267, 1373 and 1540 Committee Briefings (13 November 2009). Available at: [http://1.usa.gov/1NpzYhN](http://1.usa.gov/1NpzYhN)

176 The creation of the Ombudsperson did not bring the activities of these scholar experts to an end. Rather, it prompted a new phase of work defending the Ombudsperson from political attack, arguing it should be extended to other sanctions regimes and undertaking further assessments of the effectiveness of sanctions through the Targeted Sanctions Consortium ([http://bit.ly/MIMijF](http://bit.ly/MIMijF)) and the High Level Review of UN Sanctions ([http://www.hl-unsanctions.org/](http://www.hl-unsanctions.org/)). This third phase of activity is analysed later in this chapter.
The emergence of the Ombudsperson is usually explained as the result of a dialogue between the UN Security Council and the EU courts. But this section has highlighted the critical role that engaged scholars have played in creating and sustaining this experimental mechanism. At one level it is a story about the power of specialised academic expertise and the importance of micro-political knowledge practices in enabling and shaping global law. At another level it shows how humanitarian logics and technologies of pre-emptive warfare have become symbiotic and enmeshed through contemporary security arrangements and how humanitarians ‘increasingly provide the terms in which global power is exercised’.  

In the previous chapter we observed how the jurisgenerative work of the Monitoring Team was obscured through technical layering and justification and how listing experts considered their work as mere implementation with the politics of global listing properly taking place elsewhere, in Security Council forums. The scholars studied here disavow the effects of their work and expertise in similar ways. As one Watson Institute scholar explained, ‘we are part of the network up to a certain point. But when governments decide, “OK, we are crafting a new resolution”, … when it actually comes to the design, the doors are closed’. 

The formal intergovernmental domain is, however, only one privileged site where this body of global security law is produced. That is, drafting and adopting The Law is not the same as creating and sustaining legal relations. As Foucault reminds us, power is not a thing that can be held, but rather a relation that ‘functions in the form of a chain’ and ‘something that has to be made’. Or as Latour puts it: ‘those who are powerful are not those who “hold” power in principle, but those who practically define or redefine what “holds” everyone together’. Using an assemblage framework thus allows us to conceptualise legal governance as ‘the consequence of an intense activity of enrolling, convincing and enlisting’ and an effect of diverse practices of translation, not just an external force and the cause of social behaviour. When analysed in terms of its capacity to hold the relations of the list together, scholarly expertise on UN targeted sanctions can be reappraised a crucial element in this domain of global law-making:

I would say that we weren’t that original or creative – because the Ombudsperson idea was a Danish non-paper and the Focal Point was a French non-paper. So these things were already in circulation. What we did was: we assembled them … We created this frame, this structure, a way of thinking about the arguments … that [was] accessible, non-threatening and familiar to the policy world. We didn’t invent or solve it on our own. We simply assembled.

177 David Kennedy, ‘Reassessing International Humanitarianism: The Dark Sides’, The Allen Hope Southey Memorial Lecture, University of Melbourne Law School, (8 June 2004) 2. Available at: http://bit.ly/1H2WOwm. This security-humanitarianism nexus is important not only because of the kinds of expertise that it valorises, but also because when legal violence is made humane it becomes more widely accepted and frequently deployed. See, for example: David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton University Press, 2005); Eyal Weizman, The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza (Verso, 2012); Matt Craven, ‘Humanitarianism and the Quest for Smarter Sanctions’, (2002) 13(1) European Journal of International Law 43.


179 Foucault 2003 (n 11) 29.


181 Ibid, 273

182 Ibid

183 Interview G.
Yet as we have seen, there is nothing particularly simple about practices of assemblage. They involve ‘the hard and ongoing work of legitimisation’, the forging of new epistemic objects and infrastructures, the privileging of some expert knowledge claims with their attendant structural biases and the active disregard of others as external and irrelevant. Through their technical expertise, policy-orientated research, managerial framing, calibrated network construction and discourse formation and boundary-policing work, these scholar-experts have effectively established themselves as an ‘obligatory passage point’ through which all positions and debates on ‘fair and clear procedures’ for UN terrorism listing are filtered and defined. The Watson Institute scholar whom I interviewed for this project summarised their global governance work on this issue in the following terms:

Interviewee: Well we collated, we put it [ie, listing accountability debates] into a structure ... We don’t say this is what should be done. We lay out the options ...

GS: But you structured the debate and that’s perhaps more powerful?

Interviewee: Exactly. That’s what we did ... [And so officials have ultimately] credited the Watson Report with defining the issue in New York ... Now we have put ourselves in a more general position of expertise ... [and] are sort of cornering the market because everybody who works on UN targeted sanctions as a subject is part of our [Targeted Sanctions] Consortium ... We’ve actually heard that both the UK Foreign Office and even the State Department are starting to use our categories ... If we can get that level of policy to start using our language then, wow, we are actually having some impact now. Whether that makes the Institute worse or abused, that’s a different kind of challenge to think about.  

Discursive programmes, as Foucault observed, are much more than inert background frames and ‘induce a whole series of effects in the real .... They crystallize into institutions, they inform individual behaviour, they act as grids for the perception and evaluation of things’. Without the dedicated assemblage and discursive work of these scholar-experts the Office of the Ombudsperson would never have emerged. Driven by a desire to reduce civilian suffering and achieve global policy relevance, these academics have shaped this body of law in profound ways and become revalorised as security experts in the process. As Biersteker has argued: ‘When we scholars participate in TPNs [ie, transnational policy networks] ... it is not as neutral outsiders. We participate in ways that should be self-reflectively and critically examined’. This section has sought to answer this call by examining academic engagement with the problems of the list as a powerful source of global security law in its own right.

The Living List: the Al-Qaida Monitoring Team as Accountability Reform Advocates

In the previous chapter, we observed how the formation of the Monitoring Team in 2004 precipitated a markedly ‘technical turn’ in UN terrorism listing expertise. Instead of naming

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185 The term ‘obligatory passage point’ (OPP) is used in Actor Network theory (ANT) to refer to a point that all actors are made to pass through in knowledge-production chains. It describes the processes that particular actors use to render themselves indispensable in any given network. As Latour puts it, once an actor has inserted themselves as an OPP, ‘whatever you do and wherever you go, you have to pass through the[ir] ... position and ... help them further their interests - Latour (n 103) 120. See also: John Law and Michel Callon, ‘Engineering and Sociology in a Military Aircraft Project: A Network Analysis of Technological Change’ (1998) 35(3) Social Problems 284; and Star and Griesemer (n 109).
186 Interview G.
187 Michel Foucault, ‘Questions of Method’ in Graham Burchell, Colin Gordon and Peter Miller (eds.) The Foucault Effect: Studies in Governmentality (University of Chicago Press, 1991) 81; cited in Li (n 184). According to Li, the power of discursive technologies and devices to perform ‘extraordinary feats of assembly work ... should not be underestimated’ (593).
188 Biersteker (n 112) 148.
and shaming recalcitrant states for inadequate implementation of the list, the Monitoring Team focused their attention on technical issues thought to be less politically contentious. As part of this shift, under the direction of former MI6 counterterrorism official Richard Barrett (2004 - 2012), list accountability problems became key matters of concern for the team. Many of the procedural reforms they proposed during this period ended up being adopted by the Security Council in one way or another. Yet the Monitoring Team’s motivations for advocating change were not the same as those of the Courts, critics and academics variously analysed in their reports. The version of the list enacted and shaped through their interventions in this accountability conflict was something altogether singular. The following section suggests five reasons why intelligence, defence and government analysts from a small UN expert team with strategic ‘fusion capabilities’ came to champion due process for those ‘associated with’ Al-Qaida and create the conditions for the Ombudsperson to be created. It highlights the crucially important assemblage work of the Monitoring Team that has sustained the Ombudsperson experiment in the face of political and legal tension. I argue that the Monitoring Team’s engagement is animated by a Living List that dynamically evolves to meet new threats and exploit strategic opportunities. The Living List grapples with accountability concerns instrumentally - as a means of forging new security mechanisms, bolstering functional expertise and embedding political authority.

(i) Accountability as Opportunity: the list as ‘test bed and standard setter’

The Monitoring Team are acutely aware that the Al-Qaida list is a unique instrument of global security law and that ‘it is very unlikely we’re going to get another thing like this – a global regime’, targeting an amorphous threat with enough plasticity that all members of the Security Council can agree because global terrorism is not defined and ‘no-one supports Al-Qaida’. Making sure the Al-Qaida list endures is seen as a key way to maintain this political consensus and ensure that ‘we won’t go back to a Council which is fundamentally divided on issues among the permanent members’. As one former team member explained: ‘there’s great international interest in keeping the Council together as an expression of international resolve. We don’t want this regime upsetting that international resolve. We want it to be reinforcing that international resolve’ and sustaining the Council’s assertion of Chapter VII authority to police global terrorism into the future. Resolving the accountability problems of the list in the present is thus seen as important by the team because it opens up further global governance opportunities down the line:

Because [after] Security Council resolutions get adopted, they don’t often get rescinded. So if you’re setting up a regime - and particularly this sanctions regime, the 1267 regime - you’re setting up something which is going to provide precedents for sanctions regimes way down the road. If this works – and particularly in the legal aspects of due process aspects, if it works, if it becomes better and more effective, if it's implemented more thoroughly as a result of the measures that are introduced and procedures which are changed - then you can be absolutely sure that this will set the pattern for other regimes.

Earlier Monitoring Team reports cautioned the Security Council against considering any kind of review mechanism that might ‘erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter’. But by 2009 the

189 Interview with former member of the 1267 Monitoring Team, New York (via Skype), June 2014 (‘Interview F’).
190 Interview with former member of the 1267 Monitoring Team, New York, November 2012 (‘Interview A’).
191 Ibid
192 Ibid
193 Ibid
team were taking the longer view, recommending that the Council take the initiative from its critics and ‘get ahead of the law in this area’ by establishing ‘some form of independent review’, suggesting that an Ombudsperson would be the most preferable reform option. Yet their advocacy for ‘fair and clear procedures’ has little to do with protecting human rights or bolstering functional expertise. It is more concerned with nurturing a powerful, yet fragile, political resource that ‘is proving to be a very good test bed and standard setter’ for new forms of collective security action in the future.

(ii) Tackling Due Process to Undermine the Threat of Judicial Review

At the same time, due process problems are presented by the Monitoring Team as a potential source of danger and ‘legal risk’ that must be mitigated. The lack of effective remedy at the UN level and correlated rise in judicial review by listed individuals before national and regional courts is repeatedly advanced by the team as a potential threat to the legitimacy and ‘legal authority of the Security Council in all matters, not just in the imposition of sanctions’. The argument is straightforward, primarily informed by analyses of the political implications of EU listing litigation such as the Kadi case: ‘If States cannot implement decisions taken by the Council under Chapter VII of the Charter of the United Nations without contravening their own laws, the global community will lose the power to take coordinated action against threats to international peace and security’.

For the Monitoring Team these cases are like canaries in the proverbial coal mine. They are early warnings that show what might happen if the Security Council remained intransigently opposed to the introduction of procedural reforms with capacity to satisfy the courts. Although it has not happened, the ECJ - representing 28 of the most powerful states the world, including 2 of the Security Council P5 - could issue a decision that effectively prevents Member States from applying UN Chapter VII measures in their jurisdiction. ‘And if the EU isn’t going to implement, no-one’s going to implement’, thus introducing an especially massive chink in the chain. Security against transnational terrorism has been characterised as a ‘weakest link’ global public good because it ‘can be rendered futile if only a small group of governments does not cooperate’. ‘So these court decisions’, as one former team member stressed, ‘are incredibly important, they’re fundamental to survival of the sanctions regime’. From this viewpoint, tackling due process problems through some kind of review mechanism ‘that leaves the fundamental Security Council structures intact’ but ‘makes some minor modifications to the Committee’s procedures’ provides an important way of neutering an embryonic threat to the Council’s political authority. Simply put: ‘the more effective the de-listing procedures’ offered at the UN level are ‘the less likely that listed individuals and

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196 Interview A.
197 Interview F.
199 Nico Krisch, ‘The decay of consent: international law in an age of global public goods’ (2014) 108(1) American Journal of International Law 1, 20. As Richard Barrett has argued in his academic work on counterterrorism financing: ‘The global nature of financial markets ... suggest the need for a universal regime. A hole in the defences, wherever it might be, could allow money to enter the system and flow to a recipient planning or supporting terrorism. Regulation should apply universally so as to close all possible gaps, and to ensure uniformity of effort’: Richard Barrett, ‘Time to Reexamine Regulation Designed to Counter the Financing of Terrorism’ (2009) 41(7) Case Western Reserve Journal of International Law 7, 11.
200 Interview A.
entities will choose to launch challenges in national courts.  

In fact, after the Office of the Ombudsperson was created the Monitoring Team quickly determined that it ‘appears to meet the standard of effective review’ and in practice takes decisions ‘that are just as binding as those of a national or regional judicial body’. And now that the persistent due process problems of the list were apparently finally resolved, listed persons ought to be made - through an innovative twist of the ‘exhaustion of domestic remedies’ rule coupled with the global force of UN decision - to first ‘exhaust the process available at the United Nations before seeking relief in their national and regional systems’. Although this ‘exhaustion of international remedies’ idea was never actually implemented, it highlights just how eager the Monitoring Team were to push UN reforms forward for the purposes of undermining the threat of EU judicial review.

The Monitoring Team were also at pains to stress that this threat must be dealt with pre-emptively. Even though ‘the law is not clear in this area’ the team argued that the Security Council ‘would be ill-advised to do nothing’. Instead they should take the upper hand ‘and exercise their authority in this matter’ first, by establishing ‘the desired standard of review, rather than effectively cede this role to others’ - that is, by leaving the accountability flaws and remedies to be determined by the courts below. As one former team member put it, ‘the Council should not be a body playing catch-up. It should be getting ahead of problems and dealing with’ them. If they fail to set the reform agenda and instead respond ad hoc to the different Court decisions as they arise then ‘the optics are absolutely terrible’. Because then ‘it looks as though you’re acting in fear’ and being made to act by institutions with less power than you, rather than exercising your absolute authority, ‘and some permanent members take that very seriously’.

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205 S/2009/502 (n 195) para. 43. The Monitoring Team were the first to make this far-reaching argument. Thereafter, the former Special Rapporteur on countering terrorism (Martin Scheinin) entered the fray by supporting the idea, but only if the Council could ensure that (i) ‘any listing proposal requires the submission of the full set of information that is used as the substantive basis for the listing proposal;’ (ii) ‘the person ... subjected to the listing proposal has the right and practical means to effectively challenge [it]’; (iii) ‘the Delisting Ombudsperson has access to the full set of information used for the listing;’ and (iv) the delisting recommendations by the Ombudsperson or delisting proposals by the designating State are in practice respected, so that they are not overturned through a consensus decision by the 1267 Committee or referred to the full Security Council’. This argument was then stripped of its procedural protections and elaborately extended by Juliane Kokott (an Advocate General of the ECJ) and her legal secretary, Christoph Sobotta in an article published in the lead up to the 2013 ECJ Kadi decision. Their text - which is based on what I suggest to be based on unfounded assumptions about the Ombudsperson delisting process - draws ‘inspiration’ from case law on ‘cooperation between EU institutions and Member States’ and procedural rules of international human rights law to argue that an exhaustion of international remedies rule of this kind could be used ‘to reduce significantly the risk of conflict between UN sanctions and EU judicial protection’ in listing cases. See, respectively: UNOHCHR, Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin (29 June 2011). Available at: http://bit.ly/1QL2gpG; and Juliane Kokott and Christoph Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law - Finding the Balance? (2012) 23(4) European Journal of International Law 1015, 1022 - 1024.

206 The Council did ultimately endorse the idea, but it did not seek to make it mandatory. See: S/RES/2083 (17 December 2012) para. 24 - which requests that Member States ‘encourage’ those seeking to challenge their listing to submit applications to the Ombudsperson.

207 S/2009/502 (n 195) 5, para. 42.

208 Ibid

209 Interview A.

210 Ibid

211 Ibid
(iii) **Accountability as an Obstacle: Due Process as a Time Waster**

A third overlapping rationale advanced by the Monitoring Team in support of procedural reform frames due process as an obstacle that needs to be overcome so that the Security Council can free up the necessary resources to get on with the business of fighting the global war against Al-Qaida. In this zero-sum approach, procedural fairness is valued only for its ancillary utility in enabling better *implementation* of global security governance:

**GS:** So ... in terms of the cases, despite what some of the states might be suggesting, they really are concerned about ... the legitimacy question?

**Interviewee:** ... It’s not [legitimacy]. Legitimacy is more of an argument up there. It’s implementation. *We want these things to be implemented and this is going to get in the way of the implementation.* It’s not just the EU either. Turkey have had cases. In Pakistan, you've got cases. And you can guarantee that there’ll be cases all over the place if there was a chink [in the chain].\(^{212}\)

This fairness-implementation nexus began to be drawn by the Monitoring Team shortly after their inception. This discourse has been crucially important and productive because, as I demonstrate later in this chapter, it taps directly into the Security Council’s prime concern with the obedience of UN Member States. By 2005 the team were reporting to the Council that legal challenges ‘pose a serious impediment to the success of the sanctions regime, not least by discouraging States to add names to the List’\(^{213}\). Accountability concerns were preventing States from ‘applying sanctions with the required rigour, thereby undermining the[ir] credibility and effectiveness’\(^{214}\). This nexus became a continual refrain in the team reports leading up to the creation of the Ombudsperson. One reason put forward in 2007 to explain why so few states were proposing names to be listed, for example, ‘has to do with the Committee’s procedures, which some States believe are insufficiently in tune with human rights concerns’.\(^{215}\)

Another report from this period notes in a rather circumspect and defeated tone that ‘the regime carries on, but with mixed support’, observing with some frustration how the ‘persistent call’ for improving UN delisting procedures has been largely ignored to date by the Security Council P5:

> The procedures and processes behind the regime are slow to change and the Committee and the Team need to find ways to manage the expectations of States ... [But] the Committee ... *must* seek better ways to show that it is examining their comments and suggestions in depth, and with a will to make changes as a result*.\(^{216}\)

This idea of due process as governance obstacle, however, became most apparent in relief after the Office of the Ombudsperson was actually created. The Monitoring Team’s hasty conclusions about the Ombudsperson working as well as a court and providing those targeted with a *de facto* effective remedy were part of a much broader strategic effort to ‘refocus the narrative’ about the list toward issues of implementation and away from persistent problems

\(^{212}\) *Ibid*


\(^{214}\) *Ibid*, para. 54.


of accountability and unfairness.\textsuperscript{217} In a 2011 report, for example, the Monitoring Team stated upfront that they would not be recommending further reforms as in the past ‘because the challenge now lies far more with Member State implementation than with refinements of the Committee procedures’ and that ‘the aim of the Security Council must now be to reassure the courts that the sanctions regime established pursuant to Security Council resolution 1267 is fair’.\textsuperscript{218} Monitoring Team reports, as one team member explained, ‘are reports to the Committee although we write them very much with the public in mind’.\textsuperscript{219} So as part of this broader messaging effort to assuage the concerns of courts and critics in the lead up to the 2013 ECJ \textit{Kadi} decision, the team changed how they framed the accountability problems of the list and de-emphasised their political importance.

Due process flaws, for example, were now recast merely as the ‘perception that listed persons continue to lack an effective remedy’.\textsuperscript{220} In the Monitoring Team’s view, the Al-Qaida list had finally reached ‘a stable, if temporary, equilibrium with respect to due process issues’\textsuperscript{221} as a result of the Ombudsperson so now ‘Member States have little justification for incomplete compliance with the sanctions measures on the grounds that the regime lacks fairness’.\textsuperscript{222} Only two remaining issues - the ongoing Kadi litigation (discussed above) and the critical report of the UN Special Rapporteur on Countering Terrorism (discussed above) - carry the potential to ‘upset this balance’\textsuperscript{223} and ‘distract’ the Security Council ‘from looking forward’\textsuperscript{224} and realising their ‘implementation agenda’.\textsuperscript{225}

In a legal domain exemplifying what Neil Walker describes as ‘the global disorder of normative orders’\textsuperscript{226} this discursive refocusing towards list implementation and effectiveness is not a neutral move. It brings an overtly ‘managerial approach’\textsuperscript{227} to bear on resolving the problems of the listing assemblage that precludes any serious consideration of its accountability flaws. Assuming that such issues have now been resolved serves to ring-fence and marginalise critics, listed persons and courts contesting the fairness of the list as misguided for failing to embrace the team’s great leap forward and looking back towards ‘abstract’ and ‘structural due process issues’.\textsuperscript{228} In other words, the discourse of effectiveness

\textsuperscript{217} I describe this shift as a ‘broader’ effort because the Security Council P5 states, academic experts and the Monitoring Team all change the way they represent this issue in markedly convergent ways in response to the 2012 report by the UN Special Rapporteur on Countering Terrorism (as discussed in the Compliant List section below). For a recent example that partakes in this pragmatic refocusing, see: Larissa van den Herik, ‘Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes’ (2014) 19(3) \textit{Journal of Conflict and Security Law} 427. As noted in Humanitarian List section of this chapter, van den Herik is a one of the leading scholar-experts working with the Watson Institute on targeted sanctions.

\textsuperscript{218} S/2011/245 (n 198) 6.

\textsuperscript{219} Interview A.

\textsuperscript{220} S/2011/245 (n 198) para. 36.

\textsuperscript{221} S/2012/968 (n 204) para. 17.

\textsuperscript{222} S/2012/729 (n 203) para. 23.

\textsuperscript{223} S/2012/968 (n 204) para. 17.

\textsuperscript{224} S/2012/729 (n 203) para. 33.

\textsuperscript{225} Interview F. According to this expert, who joined the Team after the creation of the Ombudsperson: ‘I am very clear that my mandate coming into this job was not to neglect due process or fairness ... but to really focus a bit more on implementation and growing ... the strategic communications of regime ... To my mind the ultimate metric is: are these sanctions respected and are they implemented?’.


\textsuperscript{227} Koskenniemi (n 141).

\textsuperscript{228} S/2012/968 (n 204) para. 21. In an excellent article Alejandro Rodiles argues that the key problem with managerialism is that it ‘tends to fade out certain issues in favour of the effectiveness it pursues’ - which, in this context, means side-lining human rights concerns - Alejandro Rodiles, ‘The design of UN sanctions and the interplay with informal arrangements’ in Larissa van den Herik (ed.) \textit{Research Handbook on International Law and United Nations Sanctions} (forthcoming 2016, copy with author). Van den Herik’s claim - (n 217) 427, 443, 439 - that the ECJ’s ‘non-negotiable commitment to high standards of judicial review’ and ‘dismissive appraisal of the UN system’ by refusing to recognize the ‘revolutionary reform’ of the Ombudsperson in their 2013 \textit{Kadi} decision is
A fourth rationale embraced and advanced by the Monitoring Team for addressing the problem of list accountability concerns the question of relevance. That is, the need to maintain a credible list that adequately reflects the threat posed by Al Qaida that is operationally relevant for security services to use as an administrative security tool. 

As discussed in the introductory chapter, the years immediately following 9/11 saw scores of people hastily nominated for inclusion on the list - mostly by the US, but often in co-sponsored decisions with the UK and other states like Italy - with little to no consideration as to how they were allegedly linked to Al-Qaida. According to insider accounts, US Treasury officials were under considerable pressure to show demonstrable progress in the financial war against Al-Qaida and adding names to the UN1267 list ‘was one of the best indicators’ of success in this regard. 

‘It was almost comical’, as former US Treasury General Counsel David Aufhauser later remarked, ‘we just listed out as many of the usual suspects as we could and said, Let’s go freeze some of their assets’. In fact, the extraordinarily loose targeting criteria of ‘associated with’ was only elaborated by the Council in 2005, by which time more than 400 hundred people and groups had been already designated, most of whom are still listed today. 

As a result, the Al-Qaida list remains stacked with what one former team member described as ‘low-hanging fruit’ that most states and some members of the Security Council may know very little, if anything, about.

Picking low-hanging fruit off and pruning the list, however, has proven to be more difficult than one might think. Taking someone off the list requires the consent of the states that nominated them for inclusion, as well as input from the states where targeted people were born or have been resident. Where multiple states are responsible for the listing, consensus

an assertion of ‘peripheral hegemony’, performs in academic discourse what the Monitoring Team seek to do here with their reports to the Council.


231 On the list being operationally irrelevant see, for example: S/2007/132 (n 215) para. 17.


235 Leaked US Embassy Cables associated with the comprehensive review of the Al-Qaida list in 2009 - 2010 pursuant to S/RES/1822, para. 25, show a plethora of cases where there were insufficient grounds for listing in the US government’s view. Yet many of those flagged as being listed without sufficient supporting evidence in 2009 remain on the Al-Qaida list today.
must be achieved. But states are reluctant to delist because of the political risk that whoever they take off might turn out to be terrorists. As one former team member put it:

It’s always going to be more difficult to get people off than get people on ... Would you as a Home Secretary in the UK be willing to sign a document that says you support the delisting of such and such? Where they might say, ‘Well, this is historic’. But they’re not necessarily convinced that there is no threat. Would you sign that?  

The other related obstacle to getting rid of unfounded or out-of-date listings has less to with risk and more to do with the fact that removal requires the active involvement of states. And as is clear from the Ombudsperson’s reports and my own observations of the delisting procedure discussed later in this chapter, when asked to provide supporting information states have tended to either provide nothing at all or rely on generic assertions of threat. It is difficult, moreover, for states to support delisting if they don’t know why people were put on the list in the first place, even if they were the country that put them on. To work around this problem of collective inertia, and get rid of the ‘low hanging fruit’, in 2012 the Monitoring Team proposed a new procedure for the triennial list review process: unless States can explain why someone should remain on the list, the default position should be that they are taken off. But the Council rejected the proposal and the dilemma remains.

So long as it is considered safer to have people preventatively listed indefinitely on the 1267 list, there will be scores of people who may pose little threat but who cannot easily be delisted. Yet the need to get them off the list is becoming more pressing with time. Because each person left there who probably shouldn’t be is another potential Kadi case waiting to happen.

So the Monitoring Team has supported and pushed for review mechanisms like the Ombudsperson because they help perform an essential pruning function. Such procedures can short-circuit the complexities of state security politics and vagaries of intergovernmental negotiation, helping to get rid of unfounded listings and undermining potential litigation challenges without the risk of setting dangerous legal precedent.

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236 S/RES/1989 (n 6) para. 28.
237 Interview F.
238 See, for example: S/2013/71, Fifth Report of the Office of the Ombudsperson, pursuant to Security Council Resolution 2083 (2012), 31 January 2013, para. 34. Here the Ombudsperson observed that:

One of the most pressing challenges to the effectiveness of the whole process, remains the lack of specificity in the material submitted by States with respect to individual cases. Of particular concern are States’ responses that provide only broad assertions as to purported support activity on the part of petitioners and limited, and in some instances, no substantiating information or detail ... In the absence of specific information, it is very difficult and in some instances impossible to properly assess the sufficiency, reasonableness and credibility of the underlying information or to have a meaningful dialogue with and receive a specific response from the petitioner.

239 See, for example: US Embassy Cable 09ROME652 (dated 9 June 2009) which discusses how ‘on behalf of the US, Italy had proposed numerous candidates for designation’ on the list ‘about which they knew little’ and they will have difficulty justifying these listings ‘unless they get ... [supporting] information’ from the US government.
240 S/2012/968 (n 204) para. 24: ‘Unless the designating State argues for continued listing, and provides its detailed reasons for doing so, the Committee should act as if the designating State had recommended delisting’. This proposal was also strongly supported by the Ombudsperson and builds on an earlier ‘attention-grabbing proposal’ by the US government to make Al-Qaida listing decisions time-limited by making ‘the default outcome of the [review] process ... the expiration of a designation instead of its retention’. See S/2014/73, Seventh Report of the Office of the Ombudsperson, pursuant to Security Council Resolution 2083 (2012), 31 January 2014, paras. 65 - 68; and US Embassy Cable (n 152) para. 10.
Dealing with the list’s accountability flaws thus provides a means to an end. And ‘the end game is having an effective regime against this amorphous and very hard to define threat’. 242 As one former team member explained, the Al-Qaeda list ‘is always going to be backward looking. But you’ve got to make it as forward looking as you possibly can’. 243 Maintaining a list ‘that reflects ... and adapts to the current threat’ is important, according to another former member of the team, because that ‘also allows you to then address all the cases where there may be questions about relevance’. 244 Having a list that is accurate is a laudable enough aim. What interests me here though is how the discourse of relevance comes to subsume and transform persistent problems of unfairness. Here due process isn’t so much about accountability or providing individual redress. It is something tied to the realisation of a more ambitious (and utopian) global governance project: the creation of ‘the living list’. 245

This term was first coined by former US Ambassador to the UN, Susan Rice, when justifying the US government’s support for creation of the Ombudsperson mechanism and it dovetails with the strategic ‘refocusing of the narrative’ about the list post-2011. ‘The whole purpose here’, said Rice, ‘is to make the 1267 regime and the list a living process ... that is refreshed and renewed with additional listings when appropriate and delistings when individuals no longer merit being on’ it. 246 It’s a goal that the Monitoring Team have long pushed for in their regular reports to the Council, but which until recently received little political support from the P5 states and others. 247 In the imaginary of the living list, the Al-Qaeda sanctions regime is a pared down, dynamic and flexible global security governance tool. Not clunky, steeped in international bureaucratic wrangling, resistant to structural change and stacked with out-of-date targets once thought by someone to pose a threat. The discourse of relevance and the living list idea has certainly helped to smooth the way for reforms such as the Ombudsperson. But linking the protection of due process to the realisation of an almost impossible governance project also produces a subtle displacement effect, deferring reforms for anything more meaningful and robust than that into the indefinite future.

(v) Ensuring Accountability to Preserve the List as a Potential Intelligence Resource

The fifth rationale provided by the Team for institutionalising some kind of review mechanism is that it can help to yield valuable intelligence - not only about people who are on the list and trying to get off but anyone else associated with them. In the months before the Office of the Ombudsperson was formally created, when everyone across the listing assemblage was debating what procedural reforms to introduce, the Monitoring Team recommended ‘that the Committee consider ways to gather the maximum information possible about the activities of individual and entities that apply for de-listing’. 248

When the Ombudsperson mechanism was adopted shortly after in Resolution 1904 (2009), new processes for information gathering and exchange were incorporated into its architecture - including provisions for a two-month ‘dialogue phase’ during the delisting process. Legal scholars and critics warmly welcomed this move as a step toward greater fairness and giving listed people a right to be heard. Global administrative lawyers were

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242 Interview A.
243 Ibid
244 Interview with former member of the Monitoring Team, New York (via Skype), August 2014 (‘Interview I’).
246 Ibid
247 See, for example: S/2012/729 (n 203) paras. 9 - 29.
248 S/2009/245 (n 202) para. 32.
particularly effusive in their praise. As reiterated later in this chapter, however, when I share some of my own advocacy experiences of this dialogue phase, its important to remember that this procedure isn’t simply about giving the accused their long-awaited day in court.

The list targets people speculatively on the basis of what they might do in the future using an extraordinarily broad standard designed more for ‘the sandy foundations of diplomatic negotiation’ than legal challenge as its ordinarily understood.\footnote{Statement by Ben Emmerson QC, Special Rapporteur on Countering Terrorism, UN General Assembly (21 November 2012), transcript with author.} Dialogue with the Ombudsperson ‘gives petitioners the occasion to express themselves’ and so has been firmly encouraged by the Security Council.\footnote{Remarks of the Ombudsperson at the workshop on the UN Security Council, Sanctions and the Rule of Law (31 May 2012), 2. Available at: \url{http://bit.ly/1MWdmXi}.} But it also provides an important opportunity for generating new threat information and potential terrorist ‘associations’ - for example, by requiring those listed to explain in what ways (if any) they have ever known or been associated with people on the list or anyone else deemed somehow associated with them. These associations can then be used to either broaden the scope of the pre-emptive security net that the Al-Qaida list casts (by identifying new potential targets or persons of suspicion), deepen it (by providing some kind of derogatory information where non existed previously) or translate it for use in other fora (by moving from ‘a closed material situation into an open information situation’ that ‘can then be used to form judicial proceedings’ as well as ‘by the committee to defend the listing before the Ombudsperson’).\footnote{Interview with former member of the UN1267 Sanctions Committee, New York, June 2014 (‘Interview F’).}

All information that listed persons provide during dialogue is shared with ‘relevant States, the Committee and the Monitoring Team’, who can then ask any further ‘follow up’ questions of the petitioner in the event of ‘incomplete responses’.\footnote{S/RES/1904 (n 4) Annex II, para. 6.} The team then store this information indefinitely in their files (which for each listed person ‘can be up to a few thousand pages’),\footnote{Interview I.} using it to help the Ombudsperson draft the report to the Security Council recommending either continued listing or delisting, as well as updating their narrative summaries of terrorist association (as discussed in the previous chapter).\footnote{S/RES/1904 (n 4) para. 7.} Procedures for reviewing the list thus carry their own strategic benefits. They are a potential intelligence resource and information multiplier that can help expand pre-emptive security governance mechanisms as well as nominally seek to keep them in check. In any event, as one team member explained, you can almost be sure that any listed person prepared to go through the rigmarole of the delisting procedure does not actually pose a security threat:

If someone is willing to hire a lawyer for a thousand dollars an hour, out himself, give his address, come to the European Court in person, then he’s no longer a threat to international peace and security. The mere fact that he writes to the ombudsperson, or that he writes to the European court, alone is a clear indication that he can no longer be as intimately involved with Al-Qaida as he used to be before. He has to divulge so much information, which puts him at such a high risk ... that you can easily, every time you have these kinds of court cases, you can delist him. What’s the threat of that guy? You know how he looks like. You know about his passport is. You know what his address is. You can call him, if you want. Where is the terrorism threat of someone who is that known?\footnote{Interview F.}

The five rationales outlined above are far from exhaustive. But they nonetheless help to explain why a small expert team of mostly ex-intelligence and counterterrorism officials have been some of the strongest advocates pushing to make this list more procedurally fair and
accountable. In this section I have highlighted some of the crucially important discursive and assemblage work that the Al–Qaida Monitoring Team have done that has allowed the experiment of the Ombudsperson to unfold and persist in the face of continued criticism. In so doing, I have tried to disturb the standard accounts of the Ombudsperson emergence that disregard the micro-political procedural work of the Monitoring Team and others as incidental bit part-players in a much bigger and more properly powerful macro-political story. In my analysis, the Monitoring Team is an important crucible of knowledge production shaping this domain of global law and sustaining its techniques of governance. They have performed crucial suturing work that has helped to make the Ombudsperson possible.

The Compliant List: Global Constitutionalism and the UN Special Rapporteurs

One cannot understand the politics of the United Nations without grappling with the divide between the hard and soft - or what Koskenniemi describes as the conflict between ‘the police’ (the Security Council) and ‘the Temple of Justice’ (the General Assembly):

This dichotomy between hard UN (political activities for which the Security Council is mainly responsible) and soft UN (activities for which the General Assembly ... is mainly responsible) is functionally and ideologically the most significant structuring feature of the organization. It governs everything from the career options of UN staff members and the specialization of diplomats at permanent missions ...to the organization’s image in the ... mass media. It has been both a source of constant tension in the orientation of the UN’s activities as well as an invaluable asset in overcoming difficult periods.256

The story of the Al-Qaida sanctions regime presented in this book is one of ‘the police ... ransacking the temple’.257 In the previous chapter, for example, we observed how the existential problem of defining terrorism was left with the General Assembly to argue over while the Security Council got on with setting up an exceptional security governance regime that didn’t need to define global terrorism because it could list it. And whilst the Assembly have more recently been building a Global Counterterrorism Strategy reaffirming that ‘the promotion and protection of human rights for all and the rule of law is essential’,258 the Council have expanded their listing practices in ways that allow state executives to continue to act ‘unconstrained by domestic judicial review, or the international human rights treaties by which they are bound’.259 On the whole, the General Assembly has had remarkably little influence on the evolution of the Al-Qaida list. But the following section highlights some of the effects that assembly-appointed officials have had in changing list accountability discourse, critiquing Council practices and conditioning this domain of global security law.

In 2005 the UN Commission on Human Rights (now Human Rights Council, or HRC) created a new Special Procedure position: the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter, the Special Rapporteur). The Special Rapporteur is mandated to gather information on alleged violations, promote best practices, engage in dialogue and make recommendations to the HRC and General Assembly on ‘the promotion and protection of human rights and fundamental freedoms while countering terrorism’.260 There have been two post-holders since the role’s

257 Ibid, 348
inception: Martin Scheinin (2005 - 2011), a Finnish professor of International Law and Human Rights at the European University Institute (EUI) and Ben Emmerson QC, a British barrister who co-founded Matrix Chambers in London and has litigated some of the most high-profile human rights and counterterrorism cases before the UK and EU courts.261

The Special Rapporteurs play an unusual role and important role within the broader listing assembly. Whilst they are jurists like the courts analysed earlier in this chapter, they are not restrained by the facts of the cases placed before them. They don’t have to adjudicate or administer justice in specific instances, but are specifically empowered to critique political institutions for their human rights failings. For this reason, their arguments tend to be dismissed by diplomats and listing experts as unduly ‘academic’ because they don’t take the idiosyncrasies of Security Council politics into account. Yet their reports are a world away from the pluralism and fragmentation of international law and the ‘global disorder of normative orders’264 that drives much of the contemporary academic legal debate on this issue. The Special Rapporteur’s world is a globally constitutionalist world with clear ground rules that everyone ought to agree on. They are guardians of the Temple of Justice. Here human rights aren’t just one normative order among many others, colliding in transnational space.265 They are master narrative, grundnorm,266 foundational.267 And as shown below, their engagement in this accountability conflict is animated by a legally Compliant List in accordance with international human rights norms.

While a lot of General Assembly work remains bogged down in lengthy intergovernmental processes, the Special Rapporteurs bypass much of that and ‘tell it like it is’, or rather how it is that they see it through the powerful lens of international human rights compliance. Their findings overlap with the courts but are even more systemic and human rights focused. Which means that they have provided a constant source of critique of the Security Council’s listing practices, saying things other actors are unprepared to say and pushing accountability debates further than they would otherwise go. And unlike much of the General Assembly’s output, their reports do carry considerable weight and stimulate broader public debate - especially amongst the worldwide legal community and others engaged with questions of security and fundamental rights. In other words, in contemporary academic-speak, their research and knowledge production has substantial impact, public profile and valorisation.

Scheinin signalled his interest in critically engaging with the list early in his mandate.268 In

appointed by HRC on issue areas as diverse as such as food, child prostitution, self-determination, disabilities, extrajudicial killings and albinism. See: http://bit.ly/1S9vmx.

263 For details of the professional backgrounds of Scheinin and Emmerson, see http://bit.ly/1N1eoBv and http://bit.ly/1PRyXbJ respectively.


267 Teubner and Fischer-Lescano (n 264). ‘Rather than secure the unity of international law’, according to Teubner and Fischer-Lescano, ‘future endeavors need to be restricted to achieve weak compatibility between the fragments’ (1045).


269 The Special Rapporteurs are, after all, appointed officials of the HRC – the guardian body of the International Covenant on Civil and Political Rights (ICCPR).

268 Special Rapporteurs are usually tasked to ensure compliance by states, not necessarily UN bodies themselves.
what has since become a convention of truth in Special Rapporteur discourse, he acknowledged that ‘the need for preventive action is an important aspect of the fight against terrorism’. But he then noted with concern how the Al-Qaida ‘listing procedure infringes a number of human rights’ and outlined ‘basic principles and safeguards’ that needed to be respected to make Security Council listing human-rights compliant. Six specific lines of critique are advanced, each overlapping and building on each other. First, the ‘principle of legality and legal certainty’ — that is, the political problem of defining terrorism, reposed as something legally axiomatic: ‘All international and national executive bodies in charge of including groups or entities on lists should be bound by a clear and precise definition of what constitutes terrorists acts and terrorist groups’. Absent a definition, elastic standards like ‘associated with’ could be used to target ‘improperly’ and arbitrarily. Second, the principle of proportionality - the idea, as Lord Diplock once put it, ‘that you must not use a steam hammer to crack a nut, if a nutcracker would do’. The Special Rapporteur traced the list’s origins back to the humanitarian targeting of sanctions and the desire to impact ‘as little as possible ... the population’. But implicitly rebuking the scholar-experts examined earlier, he argued that just because sanctions are ‘targeted’ does not mean that they are legally proportionate.

Third, he noted that listing was supposed to be a temporary measure, not something ‘open-ended in duration’. Being legally compliant means reviewing the list every 6 - 12 months to ensure all listing decisions remain ‘necessary and supported by evidence’. Fourth, the thorny question about appropriate standard of proof was posed. Is the list ‘civil’, ‘criminal’ or something more preemptive? What is its proper legal ‘nature’ and how does that shape what procedural guarantees ought to apply? But Scheinin turns the issue around and instead starts with the question of impact. If listing decisions apply indefinitely then their impacts must be severe. That makes them punitive - ‘no matter how they are qualified’ by the Monitoring Team and others who claim the list to be something uniquely administrative and preventative in ‘nature’. ‘Another requirement’, according to the Special Rapporteur, is the need to transform UN listing decisions into domestic criminal prosecutions: ‘if such evidence [of association with terrorism] exists ... then States should have an obligation to prosecute’ in accordance with ‘normal rules and standards of proof’. Finally, and perhaps most ambitiously, changing this preemptive security list into a criminal charge sheet means ‘transform[ing] intelligence into evidence to be used ... in a court of law’. Security listing is thus reframed as a conduit for channelling speculative allegations back to the legal source, where their uncertainty can be properly tested through adversarial challenge.

Reviewing these demands one cannot help but notice just how far apart the Special Rapporteur and the Security Council are in their approach to what the Al-Qaida list is. The Special Rapporteur projects the possibility of a legally Compliant List endowed with certainty and definitional clarity. Yet the Security Council have a list precisely valued for its semantic plasticity and capacity to create global terrorism as a governable object. Whilst the Special Rapporteur claims listing as a means to an end, the Security Council claim listing

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270 Ibid.
271 Ibid., para. 32.
273 A/61/267 (n 270) 33.
274 Ibid., para. 34.
275 Ibid.
276 Ibid., para. 35.
277 Ibid., para. 36.
278 Ibid., para. 37.
279 As detailed at length in Chapter 2.
as an end in itself. Something that allows states to globally rescale pre-emptive security claims and effectively bypass their courts. In this approach criminal procedure is the list’s antithesis, not its raison d’être. These divergences are not about one actor being right and the other being wrong. Nor are they merely different perspectives on the same basic problem. They reveal the heterogeneity of the listing assemblage and how its conflicts are as much ontological as they are normative. They show, in other words, the enactment of the list as a ‘multiple object’.  

In his final report to the General Assembly as Special Rapporteur, Scheinin ratcheted this critique up a few crucial notches. Gone were the acknowledgements of work well done and gentle reminders that the Council needed to act in good faith to ensure rights compliance. Instead, the Special Rapporteur said the list was unlawful vis-à-vis the UN Charter and argued it should rightfully be abolished. 281 Citing Koskenniemi’s ‘Police in the Temple’ article, 282 the crucial issues identified now involved questions of legal competence, the proper relation between the Council and the Assembly and the legal limits of Chapter VII targeting. 283 The Council’s use of emergency powers ‘should always be limited to a particular situation and should be interpreted as being of a preliminary rather than a final character’. 284 But modifying the list after 9/11 to target those all ‘associated with’ terrorism around the world made it ‘no longer limited in time or space’ and imbued it with a ‘judicial or quasi-judicial character’. 285 ‘Such powers’, according to the Special Rapporteur, are quite simply, ‘difficult to reconcile with the legal order of the Charter’ - posited here as the ‘constituent instrument … [that] provides the foundation for and limit to action by the Security Council’. 286

The Ombudsperson had only just started operating two months before this report. But in a stinging rebuke to the Security Council, delivered at a time when the mechanism was attracting wide praise for the move towards greater fairness it signalled, the Special Rapporteur concluded that ‘the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law’. 287 The key problem, discussed in more detail later in this chapter, was that the Ombudsperson has no power to take decisions. Whether someone stays on the list or not is thus still decided via secret political machinations of the Security Council, as it always has been since the listing regime’s inception. For the Special Rapporteur, solutions to the list accountability problem could come about in either one of four ways. Either (i) reform UN listing and delisting practices properly to bring them into line with human rights norms; (ii) encourage acts of ‘civil disobedience’ by domestic judiciaries and support their ‘indirect review’ of UN listing decisions to make the list human rights compliant; 288 (iii) dismantle the

280 Mol (n 15).

281 UN Doc. A/65/258, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (6 August 2010) para. 57: ‘the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions in individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter’. Instead, the Council’s counterterrorism resolutions - including S/RES/1373 (2001) - should be replaced by ‘a single resolution, not adopted under Chapter VII’, and thus not mandatory to implement (2).

282 Ibid, para. 38


284 A/65/258 (n 282) para. 52.

285 Ibid

286 Ibid, paras. 52, 35

287 Ibid, para. 56

Al-Qaida listing regime altogether for being ultra vires the UN Charter; or (iv) set up a World Court of Human Rights with jurisdiction over decisions of the UN. 289

The reaction to such systemic critique by Council officials and other experts inside the listing assemblage ranged from outright hostility to silence. The report was thoroughly dismissed by the P5 states when presented to the General Assembly. Both the US and UK made it abundantly clear that they disagreed with the ultra vires argument and the idea that their Chapter VII powers could be limited in scope. 290 Russia ‘categorically rejected the attempt by the Special Rapporteur to exceed his mandate and consider the legality of the Security Council as part of his functions’ and dismissed the report as ‘superficial’. 291 Others, like 1267 Monitoring Team, did not even formally acknowledge the Special Rapporteur’s report at all.

But any hopes that such critique might quietly fade away were misplaced. Ben Emmerson took over as Special Rapporteur in August 2011 and his second report to the Assembly assessed whether the Ombudsperson was compatible with international human rights norms. In the introductory chapter I discussed some of the challenges and opportunities of doing this research as someone working professionally as a lawyer on this issue. One advantage is that it has opened up research sites and possibilities that otherwise would have been inaccessible. 292 Having represented people in delisting proceedings before the Ombudsperson, for example, I was invited to London to meet with the UN Special Rapporteur and discuss the matter with him. Thereafter I was asked to convene a group of lawyers working on this issue to prepare a submission sharing our experiences of using the Ombudsperson delisting procedure. This document was then used to help the Special Rapporteur draft his report to the General Assembly.

We were six lawyers from three countries (UK, the Netherlands, and Canada) representing 15 individuals between us who either had been, or still were, on the Al Qaida list. Although most of us had clients who had been delisted following applications to the Ombudsperson, we all still had ‘serious and shared misgivings’ about the fairness of the process. 293 In almost all other analyses the experiences of lawyers who’ve gone through the Ombudsperson delisting procedure is notably absent. Our submission was the first attempt to fill that gap and intervene in the broader list accountability debate. It highlighted a number of core deficiencies of the Ombudsperson mechanism – including the reliance on secret evidence and material allegedly gained from torture, the lack of provision for legal aid, the punitive (after) effects of listing and delisting, the Ombudsperson’s weak decision-making powers, the failure to provide listed people with underlying material and the manifold other ways that the delisting process operates outside of basic due process principles and the rule of law. We argued that addressing these concerns was a precondition for any meaningful reform of the list and that failing to do so would only ‘exacerbate the crisis of legitimacy that is continuing to develop with respect to the UN Security Council’s power to target terrorism suspects in this way’. 294

The Special Rapporteur’s report was issued in September 2012, taking on board many of the concerns we had raised. The report welcomed the ‘significant due process improvements’

289 A/65/258 (n 282) paras. 17, 80.
291 Ibid, 7
292 As a result of helping prepare this report the Special Rapporteur facilitated introductions with a number of listing officials in New York. Some of the key interviews relied in this book came out of this collaboration.
293 Letter to Ben Emmerson QC, UN Special Rapporteur on Counterterrorism and Human Rights (13 August 2012), Copy on file with author.
294 Ibid
that the Ombudsperson mechanism has brought. But its conclusions ran against the grain of the prevailing wisdom being forged by the Monitoring Team, academic experts and other supporters by concluding that ‘the Al-Qaida sanctions regime continues to fall short of international minimum standards of due process’. The key problem, according to the Special Rapporteur, was the Ombudsperson’s continued lack of decision-making powers. This meant that delisting decisions were still taken by the Sanctions Committee - effectively making the Security Council a judge in its own case and the Office of the Ombudsperson insufficiently independent. The Ombudsperson (at that time, Kimberly Prost) had successfully ‘demonstrated independence of mind’ and made the mechanism as fair as possible ‘within the limits of her mandate’. But ‘the structural flaws’ of the Al-Qaida listing regime nonetheless ‘remain the same’ despite this ‘appearance of independence’. The Special Rapporteur argued that the recommendations of the Ombudsperson ‘should be accepted as final by the Committee and … the decision-making powers of the Committee and the Council should be removed’. The Office of the Ombudsperson should then be renamed the Office of the Independent Designations Adjudicator and explicitly afforded ‘jurisdiction to review and overturn a designation by the Committee’. In this way, the Ombudsperson would effectively be transformed into a human-rights compliant institution of international judicial review, akin to Martin Scheinin’s proposed World Court of Human Rights, with the express power to overturn Chapter VII decisions of the Security Council.

I attended the launch of the report at the UN General Assembly in New York in November 2012 to gauge its immediate political impact. After the Special Rapporteur introduced the report and outlined its key findings, the floor was opened for states to provide comments. The US and UK, essentially reading from the same script, stressed the unique nature of the Al-Qaida list and the significant procedural improvements they have made. Both cited the Ombudsperson’s own assessment of her delisting procedure enshrining ‘fundamental principles of fairness’ as evidence to show that the accountability flaws of the list were now effectively resolved. As such, both states expressed considerable ‘concern’ that someone - in this case, the Special Rapporteur - could even still say something like the list violates fundamental rights. ‘In light of the Security Council’s significant changes to the regime’ said the US, ‘we are somewhat concerned by your statement that the Al-Qaida sanctions regime continues to fall short of international minimum standards of due process’. Similarly, the UK said, ‘we were concerned at your assertion, Mr Emmerson, that the Al-Qaida sanctions regime falls short of international minimum standards of due process’. The report, in other words, succeeded in breaking the emerging consensus that the due process problems of the list were a thing of the past. It disturbed the partition of the sensible and reclaimed the Office of the Ombudsperson as an ongoing site of political contestation, clash of divergent regimes (human rights vs collective security) and source of jurisdictional conflict.

The Special Rapporteur’s approach to this problem, for example, is animated by the idea of a legally Compliant List. See A/67/396 (n 259) para. 33.

A/67/396 (n 259) para. 33.
Ibid, para. 59.
Ibid, paras. 31, 35.
Ibid, para. 33.
Ibid, para. 34.
Ibid, para. 35.
Ibid.

Ibid para. 35

See A/65/258 (n 282) and Martin Scheinin, ‘Towards a world court of human rights’, Agenda for Human Rights: Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (June 2009) Available at: http://bit.ly/1N7HzvO.

See UN Doc. A/C.3/67/SR.26A, United Nations General Assembly, Third Committee, Summary Record of the 26th Meeting (10 January 2013). All quotes cited from this meeting are taken from the transcript of my recording of the event, which is more detailed than the meeting record listed above (Copy on file with author).
... is that it leaves us in a murky process where diplomacy is allowed to take the place of law ... [Yet] at the end of the day there are parts of the world where constitutional law is applied in a manner that requires interferences with fundamental rights to be regulated by law ... and by the bedrock of due process and not shifted to the sandy foundations of diplomatic negotiation.\footnote{Ibid}

Notice that law is not infringing on diplomacy here. The problem is rather about diplomacy being ‘allowed to take the place of law’. And the locus of analysis is the interference with human rights that listing produces, not the unique prerogatives of UN Security Council politics. This approach clearly resonates with that adopted by the courts - the ECtHR decision in Al-Dulimi and Montana Management Inc. v Switzerland, for example, referred to the report’s finding that the Ombudsperson was incompatible with human rights and stated that ‘the Court unreservedly agrees with that conclusion of the UN Special Rapporteur’.\footnote{Al Dulimi (n 55) para. 119.}

But when regimes clash divergent versions of the list are enacted and held in relation. And because there is no ‘meta-regime, directive or rule’ for ‘determining the frame’ and deciding who ought to decide, a jurisdictional battle ensues with different actors and institutions each trying to claim their list as the authoritative one and embed their structural bias as the norm against which all listing problems are assessed.\footnote{Koskenniemi (n 14) 336.}

This process can be most clearly observed from the Watson Institute reaction to the Special Rapporteur’s report.\footnote{Koskenniemi uses the ‘hegemonic contestation’ to describe those situations in regime conflicts where ‘what is at stake is not only what the general view is, but who is entitled to determine it.’ See: Koskenniemi (n 141) 312.}

In December 2012 they released Due Process and Targeted Sanctions: An Update of the ‘Watson Report’, primarily to shape debates associated with the renewal of the Ombudsperson’s mandate. But the report also sought to counter the Special Rapporteur’s claim that the Ombudsperson was unlawful, refocus the narrative of the list in the light of this discursive disturbance and bring the accountability problem back within their particular realm of expertise. After noting the Special Rapporteur’s conclusions, the first move of these scholar-experts was jurisdictional:

\begin{quote}
It is useful to recall the context within which this unique Ombudsperson mechanism functions. Targeted sanctions are political measures imposed by a political body, the United Nations Security Council ... Decisions to list individuals or entities are not legal determinations \textit{per se}, but rather political findings of association with Al-Qaida.\footnote{Sue Eckert and Thomas Biersteker, Due Process and Targeted Sanctions: An Update of the ‘Watson Report’ (Watson Institute for International Studies, Brown University and the Graduate Institute, Geneva, 2012) - hereafter, the ‘2012 Watson Report’.}
\end{quote}

Having reasserted the appropriate political lens through which this problem ought to be assessed, these scholar-experts could then disregard the Special Rapporteur’s approach and reassess the Ombudsperson mechanism in a different, more favourable, light. Their second move thus sought to reclaim the discursive middle-ground, differentiate their reasonable approach from the unreasonable demands of the Special Rapporteur and embed their particular bias as normal. ‘According formal judicial review by making the Ombudsperson’s decision final might be optimal from the perspective of the courts’ but, according to the Watson Institute scholars, it ‘is not an even-handed approach that respects the Council’s unique prerogatives’.\footnote{Ibid, 37} Here the Compliant List is denigrated for imposing an ‘excessively narrow and rigid institutional framework of judicial review’ and ‘mechanically transplanting
national due process standards onto a more complex, postnational political environment.  

What the Special Rapporteur fails to realise, according to these scholars, is that this special domain requires ‘a more flexible interpretation’ to be adopted. One that recognises that ‘the provision of due process has to be balanced with the Council’s responsibility to maintain international peace and security’ and that standards of procedural fairness must ‘be tailored to the unique features of the United Nations system and Security Council prerogatives’, even if they are grounded in fundamental rights.

Having differentiated flexible ‘due process-lite’ from its more inflexible legalistic version and resituated the protection of fundamental rights onto a sliding scale, the Watson Institute then went on to conclude that ‘the Office of the Ombudsperson should generally be regarded as a success’. Relying on the Ombudsperson’s self-assessment of her own performance as well as the views of ‘some experts’ such as the Monitoring Team, the Institute argued that the Ombudsperson ‘has addressed critical due process concerns’, created ‘a presumption of de facto authority’ and provides what they call ‘in essence, de facto judicial review’. Finally, after reframing the list accountability problem these scholars then sought to obscure the politics of this redefinition in a technical idiom and reaffirm their frame as something preordained. ‘Rather than a problem to be solved’, they argue, ‘a more appropriate perspective’ on the regime clash between security and rights in this domain ‘may be that these are challenges to be managed’.

Bringing in the discourse of regime coordination alters the whole point of the list reform exercise. Procedural reforms are recast as important not because they can address egregious conditions of unfairness but because they can help to realise ‘the ultimate objective’ – namely, ‘strengthening the credibility of the Security Council and its instruments of targeted sanctions’.  

When the first Watson Report was published in 2006, the differences between these scholar experts and jurists calling for reform seemed relatively slight. Both appeared to be on the same ‘progressive’ side, pushing for reforms to provide targeted individuals with redress. But by 2012 the divergences between these two groups were starkly drawn. This became evidently clear to me during an interview where one Watson Institute scholar described the Special Rapporteur’s report on the Ombudsperson as an example of ‘legal fundamentalism’:

I found [Emmerson’s report] really offensive and intemperate … Having played a role in the construction of the mechanism we thought it wasn’t adequately respected, recognised and researched - both by Emmerson and by the ECJ [in the 2013 Kadi decision]. That’s what I call legal fundamentalism … I mean it’s easy for an International Law and Individual Human Rights person. It’s clear. She does not have effective remedy. So you either have it or you don’t. Well that’s a fundamentalist kind of view. It’s not a matter of saying, for all intents and purposes, she does have effective remedy. There’s been a lot of compromise and an under-appreciation of how far member states, particularly the US, have come on this issue.

The main problem with ‘legal fundamentalism’ and the Compliant List it enacts is that it threatens the Humanitarian List that these scholar-experts have painstakingly built since the end of the Cold War. And because of the incessant focus on individual rights, it purportedly

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310 Ibid
311 Ibid, 24
312 Ibid, 37
313 Ibid, 38
314 Ibid, 23: ‘The Ombudsperson and some experts argue, however, that Ombudsperson’s [sic] current mandate adequately safeguards the rights of listed persons to a fair, independent and effective process’.
315 Ibid, 36, 37.
316 Ibid, 40
317 Ibid
318 Interview G.
risks taking us back to an era of civilian suffering through comprehensive sanctions:

[The Special Rapporteur’s report] … is too narrowly defined on just one issue and loses sight of … the larger issues. What are the implications of insisting on individual rights over all other … rights or larger communities? … That’s what worries me the most about Emmerson’s report and the ECJ decision. That it’s going to lead us … back to the bad old days where, quite frankly, … its just easier, if its Iran, to close it out … So I say step back. If you’re really interested in human rights, think about all of humanity, not just the individuals that happen to end up in the crosshairs of [this list].  

So for these academics - who first became engaged with targeted sanctions in the 1990s through humanitarian sentiments - the issue has now come full circle. The Special Rapporteur’s report and 2013 Kadi decision have brought their Humanitarian List back into view as just one contingent choice among many and undermined the authority of the unique institutional experiment that they helped to create. According to Larissa van den Herik, ‘The high standards of judicial review that the ECJ has developed and imposed in Kadi can have unintentional and paradoxal [sic] consequences … [including] a retreat to less targeted and more blunt sanctions’. Other Watson Institute scholar-experts put the impact in similarly hyperbolic terms:

GS: So the humanitarian logic comes into play again in light of the position that Emmerson insists on. And now the danger is that we revert to comprehensive sanctions?

Interviewee: Or broader non-discriminating measures … I’ve heard people speculating that in light of this, yes exactly. That in fact, okay, now we’ll just go to sectoral. I mean we can just say, that sector is blocked. I mean if we’re going to lose all those cases anyway. But we’re not going to lose cases against the sector because there’s no basis for litigation. So the logic is that we could easily revert back to broader [measures]. And that’s why we’ve been advocating this … humanitarian concern that may actually be now … tak[ing] us back to the original Civilian Pain-Political Gain question.

When Koskenniemi suggested that the ‘police are ransacking the temple’ he held out the hope that things could be made otherwise. If the General Assembly was ‘determinate enough’, he argued, it might once more ‘recover its role as the normative Temple … and provide the counterweight to the [Security] Council’. This section has traced the efforts of the UN Special Rapporteur on Counterterrorism to reaffirm the Assembly’s power against the Police in this domain, by enacting a global security list that complies with international human rights norms. That is, a list dramatically at odds with the one the Security Council are building and divergent from the other lists examined thus far in this chapter. I have analysed these efforts to help show how the list works as a ‘multiple object’ and to reframe the Ombudsperson as a political site where different regimes, forms of expertise and versions of the list clash and seek to become embedded as authoritative. And I have examined my own involvement in processes of list redefinition through the Special Rapporteur with other lawyers engaged in Ombudsperson delisting procedures. In sum, the Special Rapporteurs are important conduits of critique that have helped to expand the realm of the possible in this context. They have been critical agents both in enabling the Office of the Ombudsperson to first emerge and then in redefining it as an illegitimate experiment.

319 Ibid
320 van den Herik (n 217) 446.
321 Statements about the spectre of civilian suffering and return to comprehensive sanctions have been made by various Watson Institute scholars in a range of different fora since the Special Rapporteur’s report and the 2013 Kadi decision - including by Sue Eckert Smarter EU Sanctions? Workshop, University College London, 8 November 2013 and Larissa van den Herik, Targeted Sanctions Workshop, University of Amsterdam, 24 February 2014.
322 Koskenniemi (n 256) 347.
The Credible List: the Security Council P5 Making the Global Exception Durable

The Security Council P5 are conventionally seen as the architects of the Law of the List. With their unique veto powers, ability to determine threats to international peace and security and create binding Chapter VII resolutions with worldwide effect, the P5 are the most powerful of global actors. The radical transformation of collective security since 9/11 has turned the UN Security Council into a novel form of ‘global quasi-government’.

The UN1267 Sanctions Committee – a subsidiary organ composed of P5 diplomats exercising delegated powers from the Council - has been said to exemplify ‘global hegemonic international law’ in action, with listing procedures specifically designed to ‘inure to the benefit of the powerful’.

Such criticisms give rise to a number of important questions: Why would such an omnipotent global body need to respond to critique by the courts and try to counter claims that it has overstepped its powers? Why would the Security Council build pre-emptive mechanisms that violate rights at the national and regional levels and disregard a global population of potentially risky subjects from legal protections on the one hand, yet set a dangerous precedent by creating a new international review mechanism to offer targeted individuals a modicum of redress on the other?

What is at stake in this apparent turn towards rights compliance and ‘global administrative law’ by international organisations?

This section explores these problems by analysing how and why the Security Council P5 came to institute the Office of the Ombudsperson. It does so by empirically excavating the Council’s motivations and identifying what the list, and its accountability problems, means for them. What emerges is a rather different story than the one usually presented on this issue.

Conventional accounts use the Ombudsperson to explain how the Security Council is gradually evolving into a more human-rights friendly international organisation, relying on a variety of norm diffusion models. In these narratives, the Ombudsperson is delivered as proof that the Council are institutionally learning - albeit slowly and in response to concerted legal and political pressure - to take their human rights obligations more seriously.

In this section I show how individuals and their fundamental rights have very little to do with how and why the Security Council has responded the way it has to this problem. I argue that accountability concerns are wholly peripheral to the P5’s primary aim of ensuring state compliance with Chapter VII counterterrorism resolutions.

In my analysis, three issues have driven P5 engagement with the list accountability problem: credibility and state

323 Krisch (n 87) 879.
324 José E. Alvarez, ‘Hegemonic international law revisited’ (2003) 97(4) The American Journal of International Law, 873. For Alvarez, ‘the hegemon [ie, the United States] can only do so much to alter the fundamental sources of international obligation on its own. But when acting with the Council, the hegemon can do almost anything, while still appearing to be acting consistently with the Charter’s vague Principles and Purposes’ (887). For a similar critique, see Kim Lane Schepppele, ‘Empire of Security and the Security of Empire’ (2013) 27 Temple International and Comparative Law Journal 241.
326 On global administrative law, see (n 10).
328 Li (n 184) 592.
implementation, de-politicisation and ensuring longevity both of the Al-Qaida list and the Council’s counterterrorism powers. The Security Council, in other words, are playing the long game of strengthening their global authority through time. The Ombudsperson thus plays a crucially productive role in assembling the Law of the List. It helps to stave off critique, boost the Council’s fledgling credibility vis-à-vis potentially disobedient Member States, and legitimate their novel assertions of authority in the counterterrorism domain. In other words, with the Credible List the primary beneficiaries of these due process reforms are not so much targeted individuals who have been denied redress, but the Security Council themselves.  

(i) **Containing Critique through Incremental Change**

In the beginning designated individuals were not informed that they were put on the list and there was no procedure available for them to petition for removal. It wasn’t until 2005 that those targeted were notified in writing of the fact and the broad standard of ‘associated with’ was spelt out in any detail. A requirement to submit a ‘statement of case’ - essentially, a cover sheet with the target’s personal details outlining, in generic, box-ticking terms, how they meet the ‘associated with’ criteria - was also introduced to ‘standardize listing requests’ by designating states. At that time, the only way for individuals to be delisted was to petition their states of residence or nationality and have them take the matter up on their behalf in New York - that is, by relying on a confidential diplomatic process that was both opaque for the individuals concerned and generally ineffective in delivering any redress.

Despite unduly optimistic claims by some academics that these initial procedural reforms strengthened the rights of targeted individuals, they unsurprisingly failed to satisfy the courts. So in 2006 the Security Council created a ‘Focal Point’ or administrative mailbox within the UN Secretariat to receive delisting requests directly from targeted individuals and groups, forward these requests to designating states and states of residence for their

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331 ibid., para. 4; US Embassy Cable 06USUNNEWYORK1078 (dated 26 May 2006), para. 6.
332 See, for example, the case of Abdirisik Aden - one of the Somali Swedes discussed at (n 129) above. The Swedish Government sought delisting (on Aden’s request) from the UN1267 Sanctions Committee but were initially unsuccessful – see: Per Cramer, ‘Recent Swedish Experiences of Targeted UN Sanctions, The Erosion of Trust in the Security Council’ in Erik de Wet and Andre Nollkaemper (eds.) Review of the Security Council by Member States (Intersentia, 2003). See also the Sayadi and Vinck case (discussed in the Legal List section above) and Youssuf v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 3 - which notes that ‘from June 2009 until late 2012 the Secretary of State actively supported his removal from the Sanction Committee’s Consolidated List, and attempted to persuade other members to agree, but without success’ (para. 4).
333 For Feinäugle, for example, ‘the application of the ‘associated with’ standard gives the Committee’s decision-making process an impetus away from a political decision and towards a decision according to written legal standards’. It is an element providing ‘legal clarity and certainty’ that is ‘reminiscent of domestic administrative law’. The statement of case is said to compel the designating state to submit ‘a detailed collection of evidence that allows the Committee to assess the case objectively and to apply it’s ‘associated with’ standard’ – Clemens A. Feinäugle, ‘The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?’ in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.) The Exercise of Public Authority by International Institutions (Springer, 2010) 118, 129, 117. Such claims are disconnected from how the listing process works, and how the Council exercises its authority, in practice. The Sanctions Committee takes listing decisions using a no-objection procedure. There is no legal decision-making process per se that is defined by written standards. Furthermore, the targeting standard has been designed so expansively that it can readily encompass almost any link or potential form of association. Being ‘associated with’ someone ‘associated with’ Al-Qaida is now sufficient to justify being targeted – see S/RES/2083 (2012) para. 3. The ‘associated with’ criterion also contains an open-ended expansive clause of ‘otherwise supporting’. In the recent resolution against foreign terrorist fighters the Council made clear that ‘otherwise supporting’ included activities undertaken ‘through information and communications technologies, such as the internet, social media, or any other means’ – that is, incitement or support on Facebook or Twitter. See: S/RES/2178 (2014), para. 7.

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consideration and inform listed persons whether their requests were ultimately successful or not. 334 Leaked US Embassy Cables reveal considerable debate amongst the P5 about how to best design and delimit this mechanism. The US originally sought to have Member States create their own delisting procedures, thus outsourcing the administration of delisting to the national level. France opposed this move ‘because many of the European States most concerned with ‘due process’ wanted to shift the onus of decision-making from the national level to the sanctions committee in order to protect themselves’. 335 And it was out of these circumstances that the Focal Point was born as a compromise procedural solution.

For France, ‘the Security Council [needed] to maintain control of decision-making, but not be at the “forefront” of the process’, and here the Focal Point offered certain advantages. 336 It provided a “visible” change to procedures’ without actually changing existing decision-making processes, threatening substantive review or altering the status quo in any way. 337 ‘The focal point proposal’, as French diplomats explained in meetings with USUN officials, sent ‘more of a “political message” than anything else’. 338 This procedure was widely discredited shortly after it was created so it is not a particularly important reform in itself. 339 What is interesting for the purposes of this chapter are the twin themes of visibility and messaging that emerge from the P5 debates whilst the mechanism was being constructed. Such concerns allow us to better understand the Security Council’s motivations for creating procedural reforms in this area in the first place. They also help explain why the Office of the Ombudsperson was ultimately built the way it was, with all of its legal flaws and limitations. The next round of incremental reforms came in 2008 when the Committee were required to create and post online a Narrative Summary of Reasons 340 for all new and existing list entries, and undertake a comprehensive review of the list over the following two years to ensure that it was as ‘updated and accurate as possible’. 341 These reforms were introduced in response ‘to public criticism that the Council’s decisions to impose targeted sanctions are opaque’. 342 They were also aimed at convincing the EU courts to defer to the Security Council in this area because they were taking the need for ‘fair and clear procedures’ seriously. 343 The US government went to great lengths to curb criticism and manage the public perception of

334 S/RES/1730 (n 134). The Focal Point was staffed by one person on a part-time basis only.
335 US Embassy Cable 06USUNNEWYORK917 (dated 4 May 2006) para. 3. The key issue here was deniability. The key benefit of the Focal Point, according to the French, was that ‘it removed states from a potentially “difficult position” of having to deny their own citizens de-listing requests’.
336 US Embassy Cable 06USUNNEWYORK1078 (dated 26 May 2006), para. 8.
337 ibid
338 ibid
339 ibid
340 In the 2008 Kadi decision, for example, the ECJ dismissed the Focal Point mechanism as ‘in essence diplomatic and intergovernmental’ in nature -- see: Kadi (n 65) para. 323. For a fascinating account of the intergovernmental politics of the Focal Point (in this case, between the US and Italy), see: US Embassy Cable 07ROME2515 (n 48).
341 I have already discussed the importance of Narrative Summaries at length in the previous chapter. Whilst these summaries purport to offer factual accounts of why listed persons are targeted and so address the right to be informed, they are also translation devices that transform speculative security inferences into more factually solid forms of evidence and can be highly misleading. Narrative Summaries also empower the Monitoring Team, because they are the listing experts who administer these quasi-authoritative statements of terrorist association.
342 S/RES/1822 (n 135) paras. 13, 25.
343 US Embassy Cable 08USUNNEWYORK640 (dated 18 July 2008).
344 On the latter point, see US Embassy Cable 08USUNNEWYORK640 (dated 18 July 2008) and the debate between the US and Costa Rica on the precise wording of S/RES/1822, para. 28 which ‘Encourages the Committee to continue to ensure that fair and clear procedures exist for placing individuals and entities on the Consolidated List and for removing them’ (emphasis added). Costa Rica objected because the wording suggested that fair procedures already existed with the Focal Point, when in their view they did not. For the US amending this wording ‘would have been tantamount to the Council agreeing that its own procedures for imposing targeted sanctions are not valid, and by extension the decisions to sanction those on the list were not valid. This would have provided further fodder for the criticism about the lack of “due process” in the Council’s sanctions regimes, while taking the focus away from the significant improvements to the Committee’s procedures.’
these reforms, in line with their overarching concerns about credibility and legitimacy. They pressured states that had previously voiced criticisms of the list and implored all other 15 Security Council members ‘at the highest appropriate level’ to:

... acknowledge positively and publicly the fact that we have followed through on our commitment to include new measures ... to strengthen procedures to ensure fairness and transparency ... We do not believe that statements emphasizing that the Council can and must do more will serve any other purpose than to cast further doubt on the Council’s decisions ... We ask that you refrain from statements focusing on the 1267 Committee’s weaknesses and instead recognize the positive changes that will be implemented and encourage others to do the same. 344

The comprehensive review was promoted by the Council as a way of showing that the list was preventative, rather than punitive, in nature and calibrated against the current threat. Yet analysis of how this review was conducted shows just how inexacting it was, with very little substantive consideration by states as to why someone was listed or not in some cases. In one series of cables, the US government undertook a ‘careful and detailed review and analysis of all available information’ of a number of listings they had co-sponsored with Italy and ‘determined that it currently lacks information sufficient to conclude’ that those people should remain listed. 345 But Italy objected to delisting a number of these individuals simply stating, ‘the GOI believes that these individuals have been and still are connected with terrorist activities’. 346 Although they arrived at differing conclusions, no further consideration appears to have been undertaken between these two designating states. No more questions were asked by the US about the basis for this ‘belief’, even though in their own analysis there were no grounds for continuing listing. These cables also show Italy pushing for other individuals to be delisted on the grounds that they were now ‘actively cooperating with Italian intelligence authorities’ - lending further support to the argument, discussed in the previous chapter, that global terrorist listing is being used generatively as a mechanism for turning Muslim suspects into informants for national security services. 347

After 9/11 Italy had nominated around one hundred individuals for listing - ‘more than any other country except the United States, UK and Russia’. 348 Yet they did so ‘at the behest’ and ‘on behalf of the United States’ for ‘purely political considerations’, rather than out of concern that these individuals posed threats to international peace and security. 349 Evidently, Italy knew little about many of those it claimed were associated with Al-Qaida. So when the comprehensive review asked nominating states to supply the Council with derogatory information, the Italians understandably found themselves in some trouble. Not only did they lack original supporting material capable of justifying their listing decisions, but they also lacked any ‘recent information whatsoever’ about many of the individuals concerned. 350 In these circumstances, as their own lawyers plainly put it, ‘it will indeed be very difficult for Italy to confirm that a listing remains appropriate’. 351 And so Italy reached out to the US to ask for their help, by providing them with details concerning those they had targeted. Responding

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344 US Embassy Cable 08STATE69684 (dated 27 June 2008). The critical states singled out for special attention in this cable were Liechtenstein, Sweden, Switzerland, Denmark, the Netherlands and Germany.
345 US Embassy Cable 09STATE109494 (dated 22 October 2009).
346 US Embassy Cable 09ROME1405 (dated 23 December 2009), para. 2. ‘GOI’ is the government of Italy.
347 US Embassy Cable 09ROME1344 (dated 4 December 2009), para. 3.
348 US Embassy Cable 09USUNNEWYORK474_a (dated 8 May 2009), para. 6.
349 US Embassy Cable (n 239) paras. 8, 2; US Embassy Cable 09ROME1404 (dated 23 December 2009) para. 3.
350 US Embassy Cable (n 348) para. 4.
351 Ibid. The comments were made by Stefano Mogini, then legal adviser of the Italian UN Mission, to USUN officials in confidence. In 2014 Mogini was appointed as a judge of the highest Italian court - the Suprema Corte di Cassazione. See http://bit.ly/1TzEBGh
to the Council’s request by effectively having the Council’s most powerful state meet their reporting obligations for them.

This reform initiative was supposed to provide accountability to those listed and show that the Council were serious about ‘fair and clear procedures’. According to the Watson Institute, this was ‘a serious, thorough and laborious process’ of review. Others such as Rodiles claimed the review ‘was conducted thoroughly, evaluating all available information and generating a lot of a pressure on those who had proposed the entry or wished to maintain it to give reasons and discuss them at the Committee’. Yet the picture emerging from my analysis here is of a wholly political process fractured along strategic lines. One where states list people first without knowing why, to perform political allegiance, and only later seeking out the information they ought to have had in the first place to provide post hoc justification.

(ii) Forging Alignment and Stretching the International Peace and Security Envelope

The Security Council had hoped these incremental changes might be enough to satisfy the EU courts. But the ECJ’s 2008 decision in the Kadi case, delivered less than three months after UNSCR 1822, definitively put such hopes to rest. In May 2008 Germany, Switzerland, the Netherlands, Denmark, Liechtenstein and Sweden came together to form the ‘Group of Like-Minded States’ and advocated for more far-reaching reforms to be adopted - including an external review panel of legal experts to provide recommendations to the Council on delisting requests. But all P5 states were formally opposed to setting up a mechanism of this kind, primarily out of concern it would undermine the Council’s Chapter VII authority.

Privately, the US government were lobbying extensively in European capitals and institutions to undermine these reform proposals of the Like-Minded States and convince officials that the changes introduced by UNSCR 1822 (2008) could make the list sufficiently robust and legally compliant once fully implemented. Although the UK had made it plain that they ‘would not support the appointment of an advisory panel to opine on Council decisions’, they were privately studying the full range of reform options (including an independent panel) and remained confident that ‘a solution [could] likely be worked out’. The most important factor for the UK was ‘the need to protect the credibility of the Security Council and not create a mechanism that would undermine its authority’. As a former director from

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352 2009 Watson Report (n 132) 16.
354 See for example, US Embassy Cable 09LONDON452 (dated 20 February 2009) which notes (para. 2) that the UK’s priorities as far as list reform is concerned:

are to identify end-goals, pragmatically evaluate which goals are achievable and determine what approaches would avoid censure by the European Court of First Instance ... ie, will the changes from ... [Resolution] 1822 be sufficient to put off the courts once fully implemented ... Key to all their deliberations is how the European Court of Justice’s decision in the Yassin Qadi case will continue to ripple through UK and EU asset-freezing regimes.

355 The Like-Minded Group has since expanded to include Austria, Belgium, Costa Rica, Finland and Norway. For recent statement showing the group’s approach to reform, see UN Doc. S/2014/286 (dated 21 April 2014). For a good analysis of the role played by the group in procedural improvements in this area, see: Rodiles (n 353).
356 See US Embassy Cable 08USUNNEWYORK421 (dated 12 May 2008), which recounts a meeting between the Group of Like-Minded States and the UN1267 Sanctions Committee to discuss their advisory panel proposal. Russia, France, the UK, US and Italy all ‘made clear that they did not support the idea of a panel’ (para. 1).
357 See, for example, US Embassy Cable 09BRUSSELS616 (dated 29 April 2009)
358 US Embassy Cable (n 354) para. 3.
359 US Embassy Cable 08LONDON1690 (dated 24 June 2008) para. 3
360 Ibid, para. 2
the UK Foreign and Commonwealth Office (FCO) responsible for UN Sanctions explained in interview, the prime impetus for Security Council reform was neither accountability or due process but rather Member State implementation:

We were getting cases where there were a growing number of ... legal issues raised by individuals. And so we thought again, as part of our wish to try to ensure the respectability of sanctions, that we really ought to allow some sort of appeal mechanism. So it was introduced ... and that was the reason. Let’s allow some sort of appeal mechanism. And that would mean that countries would be more willing to implement the sanctions - if they knew that there wasn’t this collateral damage effect that might otherwise give them an excuse not to implement them.361

For the UK enhancing list implementation was not merely about making sure there were no weak links in the chain. It was a means of embedding the Security Council’s novel assertions of global authority and jurisdiction following the end of the Cold War and the events of 9/11:

The Security Council, strictly speaking, can only deal with threats to international peace and security. Traditionally, those threats have been seen as state aggression. Come 2000, the mood was very much that the threats are different ... On the one hand, we face new threats from state implosion, through internal rebellion; on the other we face new threats from non-state entities that could be operating internationally. These were perceived as new issues which hitherto, the Security Council had not dealt with ... That was when we got into the "What is the definition of international peace and security" [problem]?362

For the P5 states this meant governing transboundary threats and challenges productively in ways that could expand the legitimate scope of Security Council powers. Or, as the former FCO Director explained, when responding to emerging threats ‘we were trying to stretch the international peace and security envelope’.363 The best known example of this stretching was the Responsibility to Protect doctrine, which authorised pre-emptive action in response to international humanitarian crises and recognised the Council’s right to intervene in internal conflicts.364 But the transformation of the list and rise of global security law were other key sites where the scope for Council intervention was dramatically expanded. After 9/11:

... Al-Qaida obviously was now seen as a transnational, international threat. It was something where we thought, well if the Security Council can deal with this, then let’s try. I don’t think anybody was sufficiently starry-eyed to think that Security Council action on its own would solve the problem – it was never going to do that. It was more ... ‘Can we get everyone to agree that this is a problem’?365

Forging alignment between the Security Council and Member States that global terrorism is a problem capable of being properly targeted in this way is an important governance effect.366 Recognising that the Council could interfere with the lives of terrorist suspects directly and indefinitely, wherever they were located in the world, was far-reaching in itself.367 Yet being able to demand that Middle East and North African states take action against individuals in

361 Interview with former UK Foreign and Commonwealth Office Director, London, April 2013 (‘Interview J’).
362 Ibid
363 Ibid
364 On R2P, see: Anne Orford, International Authority and the Responsibility to Protect (Cambridge University Press, 2011). For analysis of how R2P facilitated the Council’s post-9/11 global counterterrorism campaign, see: Cohen (n 91) 269.
365 Interview J.
366 Here problematisation works as a translation device ‘linking together the objectives of the various parties to an assemblage, both those who aspire to govern conduct and those whose conduct is to be conducted’ – Li (n 104) 265. See also: Nikolas Rose, Powers of Freedom: Reframing Political Thought (Cambridge University Press, 1999) 48.
their territory - who may pose no threat to them, but potentially pose a threat to the US or UK - was a ground-breaking legal development and exercise in global governmentality. 368

What consensus on Al-Qaida did ‘was essentially give ... the Security Council the right to hold countries to account’ for what would have previously been considered internal issues beyond the scope of Council control. 369 Or, as Jean Cohen argues, it ‘entail[ed] a quasi-dictatorial expansion and use of Council powers without accountability or apparent legal or institutional checks and balances’ - a global state of emergency. 370

When the problems and reforms of the Al-Qaida list are reframed in this light, we can see why credibility concerns were considered so important and individual rights claims so peripheral for the Security Council P5 states. Reforming the list would enable this unique preemptive weapon to be preserved and undermine the more far-reaching calls for change that were being proposed. It would also bolster the authority of the Council to govern terrorist suspects and recalcitrant Member States in unprecedented ways. Securing state compliance with Council resolutions required a credible list. If that meant giving targeted individuals a degree of administrative standing to contest the Council’s authority and providing ‘the appearance of accountability’, then so be it - that was undoubtedly a political price worth paying. 371 As the former FCO Director explained:

The main motive for pushing [reforms] forward was ... our sense that the legitimacy of the sanctions regime depended on us trying to address these problems ... We didn’t want states to turn a blind eye to implementing these sanctions on the argument that actually, the courts were tearing into them, to put it bluntly. Legitimacy for us always absolutely key. We well understood ... that sanctions have to be supported. It’s pointless just waving a piece of paper around that the Security Council have endorsed, if some key countries are no longer supporting them. So a key part of our argument was: if we have to adjust the procedures in order to be able to address some genuine concerns, then we must do that. 372

The US had originally been trenchantly opposed to reforming the list in any meaningful way. But after 2008, list reform was seized as an opportunity by the Obama administration to show renewed commitment to multilateralism in global affairs, and the US and UK took markedly similar approaches toward ‘the hard and ongoing work of legitimization’ necessary for strengthening Council authority in this domain. 373 In my analysis, three key issues have driven US engagement with list accountability problems since this time: credibility and implementation, de-politicisation and the need to ensure longevity both of the Al-Qaida list and the Council’s newly asserted counterterrorism powers. In a confidential cable entitled ‘1267: Saving the Al-Qaeda/Taliban Sanctions Regime’, then US Ambassador to the UN (Susan Rice) outlined a package of ‘bold’ and ‘attention-grabbing’ reforms aimed at countering criticisms by various European states, human rights NGOs and the EU courts that listing and delisting was an ‘opaque, Kafkaesque process’. 374 Such critique had ‘gravely undermined the regime’s credibility and perceived fairness’ and was facilitating the ‘erosion of this tool’s

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369 Interview J.

370 Cohen (n 91) 19.

371 True-Frost (n 329) 1242.

372 Interview J.

373 Li (n 184) 592.

374 US Embassy Cable (n 152) paras. 1, 9, 4. These reforms included making sanctions time-limited and giving the Monitoring Team input into listing and delisting decisions.
perceived legitimacy’. Reform was thus primarily valued as a way for the US to bolster the fledgling credibility of the list. And credibility was key because it allowed better implementation of the list by states and strengthened the Council’s legitimacy to govern terrorism in this way.

Second, these ‘new fairness enhancements’ were explicitly advanced as anti-politics measures capable of ‘closing down debate about how and what to govern and the distributive effects’ of current listing arrangements. As Ambassador Rice plainly put it, adopting these reforms ‘would go far toward restoring confidence in the regime and heading off more radical and dangerous proposals’. For the US government, enhancing credibility and depoliticising the list went hand-in-hand. Debates about accountability and fairness needed to be defused because they were ‘undermining US interests in effective enforcement and expansion of the 1267 sanctions regime and other UN sanctions’. The call by European states and NGOs to create an independent review panel was singled out as especially problematic and something that must be derailed. This panel promised a ‘more thorough’ review than anything the Security Council were prepared to provide, raised ‘thorny issues regarding the Security Council’s primacy under the UN Charter’ and would ‘truly handicap the current sanctions regime’ if it came to be implemented.

The third aim of list accountability reform was longevity - that is, making whatever changes were necessary to placate the critics and ensure that this unique tool and global governance mechanism could ‘endure for yet another decade’. The US well appreciated the contradiction between a list formally justified as a calibrated mechanism of temporary, preventative action against individual threats to international peace and security and a list stacked with ‘low-hanging fruit’ hastily targeted after 9/11 with little consideration as to why and little prospect of ever being removed. With EU courts pushing towards substantively reviewing UN listing decisions, the need to prune the list and show the preventative, rather than punitive, nature of the sanctions was becoming ever more acute. Yet there remained little incentive for designating states to delist, even if they knew little about why individuals were targeted in the first place. Listing decisions were shielded under the secrecy of ‘diplomatic discretion’. And the reputational risks associated with delisting encourage a practice of political inertia. As one sanctions official plainly put it: ‘no government wants to be in the forefront of saying that we’re about to lift sanctions on Al-Qaida. That goes without saying.’

What calls for accountability and fairness provided, according to Ambassador Rice, was the opportunity to transform this reified list into ‘a living process’. One that ‘is refreshed and renewed with additional listings, when appropriate, and delistings when individuals no longer

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375 Ibid, paras. 3, 13
376 Ibid, para. 5. The anti-politics quote comes from Li (n 104) 265. See also Ferguson (n 229).
378 US Embassy Cable 96USUNNEW YORK1430 (dated 31 July 2006). Although this cable predates Rice’s intervention it is revealing about the US rationale for reform and so relevant in relation to the Ombudsperson.
379 US Embassy Cable (n 152); US Embassy Cable Ibid paras. 6, 2. The implication was that a review panel would be denied access to the classified material said to be underpinning listing decisions.
380 US Embassy Cable (n 152) para. 15.
381 On the problem of ‘low hanging fruit’ and listing as a means of showing demonstrable progress in the war against terror, see discussion in the Living List section of this chapter and Suskind (n 233) 193.
382 On this reluctance see: US Embassy Cable (n 239) para. 3. Here Italian officials acknowledge that they used the list to target many people ‘about which they knew little’ but still state that ‘Italy is not enthusiastic about delisting people from the 1267 list’.
383 US Embassy Cable 08ROME711 (dated 4 June 2008). This cable provides an illuminating account of how states use diplomatic cover and affairs of state to foster secrecy in their security governance arrangements.
384 Interview J.
385 Rice (n 245).
merit being on’ it. 386 But the living list idea was about more than dynamic governance and calibration against the current threat posed by Al-Qaida. It was about repositioning the Security Council to adapt, through this unique weapon and its novel targeting powers, toward whatever threat might come next. That is, renewing agreement on the problem of global terrorism in the present to allow the international peace and security envelope to be stretched through the list in the future. By 2009, for example, it was already widely acknowledged that Al-Qaida no longer posed the threat it once did. But the Syrian civil war had not yet started and it would be five more years before the list would be repurposed as a key weapon in the global war against ISIL and ‘foreign terrorist fighters’. 387 When the US government expresses concern about the longevity of this ‘irreplaceable UN counter-terrorism tool’, I argue that it is precisely such envelope-stretching transformations of collective security that are at stake. 388 So when counterling claims that list improvement meant ‘a failure to designate terrorists’, Rice was adamant that such criticism missed the key point of reform: ‘The preservation of the tool, and the global consensus that it represents’, she argued, was ‘far more important than the designation of a handful of marginal figures’. 389

These reform proposals formed the basis for a draft Security Council resolution presented to the other P5 states for consideration in early December 2009. Significantly, the revised draft incorporated an idea originally proposed by Denmark for an Ombudsperson post to be created within the Secretariat to receive and review delisting requests by those targeted. To assuage the concerns of Russia and China that these reforms would undermine the authority of the Council, the US made it abundantly clear that no substantive review would take place. Instead, this mechanism would ‘only have a coordinating role in the gathering of information’. 390 The prerogative to list and delist would remain vested in the Council and require P5 consensus, as had been the case since the inception of the Al-Qaida regime. Nothing, in this sense, would change. UNSCR 1904 (2009) was unanimously adopted by the Security Council shortly thereafter on 17 December 2009, amid much fanfare about ‘fair and clear procedures’. And the Office of the Ombudsperson was born.

(iii) Credibility and the Sedimentation of Global Emergency Governance

Initially the Security Council sought to list to terrorist suspects indefinitely without review, and had jealously guarded their Ch. VII powers from potential encroachment. The initial P5 attitude toward list reform could properly be described as one of disdain. Yet incremental changes were eventually introduced in an effort to placate criticisms by liberal Like-Minded states, EU courts and human rights NGOs. When the Office of the Ombudsperson was instituted in 2009, it was widely celebrated as victory for fairness and respect for human rights by powerful international organisations. These changes weren’t perfect, but most agreed they were an improvement and an important step in the progressive movement toward ‘a global rule of (administrative) law’. 391

My analysis of P5 motivations complicates this human-rights friendly narrative. Drawing from secret embassy cables and interviews with former sanctions officials, I have shown that rights and accountability concerns have little to do with these changes, so far as the Security Council are concerned. P5 practice enacts, and is animated by, a different kind of list. A living list credible enough to be adhered to and thus able to ground their global authority through

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386 Ibid
387 S/RES/2178 (2014). This repurposing of the list is discussed in more detail at the conclusion of this book.
388 US Embassy Cable (n 152) para. 3.
389 Ibid, para. 15
time. One that draws from the discourse of fairness in providing an ‘appearance of accountability’, but without offering substantive protections or altering the existing distribution of power in any meaningful way. In this account, list reform has been embraced by the P5 for enhancing credibility and undermining critique, both of which boost state implementation. This helps forge the alignments needed for the list to survive in the face of legal and political tension. Longevity of the list ultimately serves to embed the Council’s jurisdictional claim to govern global terrorism this way and allows the international peace and security envelope to be stretched again in novel ways later down the line.

As Kanishka Jayasuriya observes, the international state of emergency underneath global security law is not so much concerned with securing the ‘untrammeled exercise of sovereign power’. Rather, it is the ‘creation and entrenchment of new forms of administrative power and jurisdiction … alongside, and within, existing constitutional practices’ that is important. My analysis of P5 procedural reform supports this account of global exceptional politics. One where reform is seized productively as an opportunity to foreclose debate and deflect critique from where it might matter most. Neither state utility-maximization models or norm-diffusion approaches to international relations adequately grasp the dynamics of what is stake in this process. And whilst the Ombudsperson mechanism might instinctively appeal to Global Administrative Law (GAL) enthusiasts, their single-minded focus on transparency, participation and reasoned decision-making ‘occludes awareness of the political significance of the processes under review’ in this exceptional domain and how such improvements can work to ‘obfuscate, rather than deliver rights protections for individuals at the international level’.

**The Assembled List: the Ombudsperson as Boundary Object and Figure of Expertise**

So far this chapter has examined how different actors have responded to the accountability problems caused by the Security Council’s post-9/11 program of pre-emptive security listing. By providing a detailed praxiographic account, I have shown how divergent listing practices enact different versions of the list that prefigure particular aims and concerns. The reform efforts of humanitarian scholars, P5 states, the Courts, Monitoring Team and UN Special Rapporteurs are animated by very different conceptions of what the list is and how listing problems should be addressed. In other words, the list is a ‘multiple object’ produced through overlapping and potentially contradictory epistemic practices that operate in conjunction but that do not necessarily align. Yet multiplicity in global governance does not equal fragmentation. Heterogeneity is inevitably ‘smoothed away’, reduced to organisational ‘influence’ or otherwise subsumed into grand narratives of international legal progress. Things ‘hang together’, as Annemarie Mol observes, but the key ‘question to be asked … is how is this achieved?’ How are the different realities of the list assembled?

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392 True-Frost (n 329) 1242.
395 Although my thesis may have relevance for rationalist/constructivist debates in IR, such debates are outside the scope of this chapter’s global security law focus.
398 Bueger (n 122) 2: - defining ‘epistemic practice’ as ‘a particular kind of practice that aims at constructing a distinct epistemic object and manipulating it.’
400 Mol (n 15) 55.
To address this problem this final section hones in on the Ombudsperson as a unique figure of global legal expertise. Most accounts posit the Ombudsperson as the end-result of the list accountability debate and focus on the question of whether this mechanism brings the list within the remit of human rights law or not. This section brackets this normative concern and instead empirically examines the novel delisting practices the Ombudsperson is crafting to meet the ‘fair process challenge’, focusing on her decision-making processes, ‘dialogue’ meetings and unique evidential standards.401 My main argument is that the Office of the Ombudsperson is a crucially important composite body that helps to contain multiplicity, absorb conflict between different actors and hold the disparate strands of the listing assemblage together. It is an institutional ‘boundary object’ that facilitates convergence between different versions of the list that might otherwise drive legal fragmentation and political conflict.402 The particular expertise of the Ombudsperson lies in her recombination of existing legal categories and practices into novel quasi-juridical forms tailored towards embedding pre-emptive security logics. In my account, the Ombudsperson is a unique conduit of expertise assembling the listing regime and making its global exceptional governance durable.

(i) De Novo decision-making and Fair Adjudication

One of the key criticisms of the Ombudsperson mechanism is that it remains procedurally weak and undertakes a review that is insufficiently independent. The Ombudsperson can recommend whether to retain or remove a listing, but the ultimate decision still rests with the Security Council - the same body that took the listing decision in the first place. Whilst the Ombudsperson concedes she is not the ultimate decision-maker, she does not believe this makes the Council a judge in their own cause. Instead, the Ombudsperson says that the decision taken by the Committee to put someone on the list and the decision taken to remove someone from the list are ‘completely separate’, and that she only assists the Council in this latter decision by making a recommendation to the 1267 Committee.403 She does not ‘look back’ or ‘presume to know what was before the Committee at the time of listing’ - that is, she does review the original listing decision. Doing so, according to the Ombudsperson, ‘would be impossible and … would not work in this context unless you have all the information the agency had that made that decision’.404 So whilst most literature frames the Ombudsperson as a review mechanism, it is important to note from the outset that she does not actually review the original decision to list. Instead, her analysis and decision is solely focused on the present situation and whether ‘the continued listing of the individual or entity today is justified based on all of the information now available’.405 The Security Council take ‘a fresh

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402 For Susan Leigh Star and James Greisemer, ‘boundary objects’ are ‘objects which inhabit several intersecting social worlds … and satisfy the informational requirements of each of them’. They are ‘plastic enough to adapt to local needs and the constraints of the several parties employing them, yet robust enough to maintain a common identity across sites’. Boundary objects, in other words, are critically important translation devices. ‘The creation and management of boundary objects is a key process in developing and maintaining coherence across intersecting social worlds’, or what they term ‘institutional ecologies’ - Star and and Griesemer (n 109) 393. See also: Susan Leigh Star, ‘This is not a Boundary Object: Reflections on the Origin of a Concept’ (2010) 35(S) Science, Technology & Human Values 601.
403 Interview with the former UN 1267 Ombudsperson, Kimberly Prost. New York, November 2012 (‘Interview K’). Unless indicated otherwise, all further references pertaining to the Ombudsperson in this section are drawn from this interview. Although Ms. Prost has been out of post since 2015 (n 5), I still refer to her as the Ombudsperson throughout this chapter.
404 Ibid
405 Ibid
decision on today, should this listing be maintained? And I’m feeding into that with ... considerable power.'

According to the Ombudsperson, this exclusive focus on the present situation is a procedural strength rather than a weakness. It makes her unique brand of decision-making better for listed persons than conventional judicial review because it allows them to ‘present new information and explanations’ and gives them reassurance that ‘there is no issue of deference to the original decision maker’ taking place. Moreover, it is a mistake to think that conventional review could possibly work in the ‘very unique context’ of the Council:

I know [the UN Special Rapporteur’s] calls for this independent judicial review process. [But] the first question I have is, what judicial review? What is a fair process in this particular context? Because what judicial review is in the United States ... is very, very different from what judicial review is in the European Union and it’s very different from what it might be in the United Kingdom. So my question is, in this international context, what judicial review? ... I think there is a more fundamental question. It’s not so much this whole idea of there must be judicial review for it to be fair. My question is, what makes it fair in this very context? And I’m not so sure judicial review is the answer.

This practice of not looking back has certainly assisted in having individuals removed from the list and so it underpins the mechanism’s broader claims to success. By early 2016, 63 delisting requests had been made to the the Office of the Ombudsperson and only 11 had been subsequently refused by the Council. With such impressive results, humanitarian scholars, experts, the Monitoring Team, Security Council P5 and the Ombudsperson herself have all effusively praised this novel 'de facto judicial review' procedure. Legal scholars have argued that in light of the ‘high level of de facto judicial protection offered by the Ombudsperson ... [it] no longer seems appropriate to summarily dismiss the protection that is offered’. Even EU judges have claimed that due to these procedural improvements it is now finally time for the courts to adopt a more deferential stance, perform less intensive review and acknowledge that UN listing and delisting procedures ‘can no longer be regarded as purely diplomatic and intergovernmental’ in nature.

The Ombudsperson’s de novo decision-making practices are helping to align and hold together the divergent versions of the list enacted by the different actors across the listing assemblage. But they also introducing an important temporal chasm into the delisting procedure that is generating three significant governance effects. First, this unique decision-making process frees designating states and the Security Council from ever having to explain the underlying basis for their listing decisions and claims of terrorist association to those that they target, whilst assuaging concerns the threat of independent review. That is, whilst promising fairness and greater accountability this practice also works to consolidate the list as an exceptional governance technology. As the Ombudsperson notes:

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406 Ibid
408 Interview K.
410 The literature praising the Ombudsperson as a procedural improvement is too vast to account for here. For some of the most impassioned support, see: 2012 Watson Report (n 8); van den Herik (n 217); and Devika Hovell The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making (Oxford University Press, 2016).
411 Cuyvers (n 70) 1786.
The fact that I focus my analysis on present day circumstances solely has been very important. I would not have been in the job long if I had attempted to start reviewing ... I keep completely out of the question and I avoid ... the whole issue of what was the basis for the listing. Because ... there is all sorts of information in these cases, [or] in many of these cases that I'm not receiving ... It’s very important that I can say [to states]: ‘I accept that when you listed this person you may have known all sorts of things [and that] you may still know all sorts of things, but this is all I’m looking at today.’  

As a result of this temporal cut, individuals can be legitimately listed by the Council for many years and then delisted without ever really knowing why they were either targeted or removed. Indeed, this has been the experience of some I have represented in Ombudsperson delisting proceedings - which operated entirely by written procedure with little to no input from either the Ombudsperson, designating states or the 1267 Committee. In one case, I was directed to a story that a client has ‘liked’ on his Facebook page as evidence that he constituted a threat to international peace and security. In another, I was presented with generic allegations drawn from a Narrative Summary that appeared to be loosely based upon someone else’s trial proceedings. When my clients were finally removed from the list, following a wholly opaque process, no reasons were given despite the Security Council being expressly required to do so. The sole reason for delisting given to one client, who had been targeted by global sanctions for more than eight years, was the following obscurity: ‘There is nothing in the Petitioner’s personal circumstances to indicate that his lack of current involvement with Al-Qaida is attributable to anything other than a personal choice’. Whilst these individuals clearly welcomed the final decision to lift the sanctions against them, they all nonetheless experienced the Ombudsperson delisting procedure as opaque and unfair. They left the process with little more understanding of why they had been targeted than when they had started.

This procedure also provides a pragmatic, face-saving solution for delisting individuals for whom the original reasons for listing were either manifestly unfounded or unknown. As discussed earlier, the 1267 Sanctions Committee does not have access to the classified material underpinning their own listing decisions. Instead, they approve proposed designations using a confidential ‘no-objection’ procedure that precludes substantive consideration of the grounds. The Ombudsperson’s de novo approach to delisting complements this process by providing a mechanism for annulling unfounded listing decisions without risk of creating damaging precedent through adverse court findings:

A state can choose whatever information they want to give me. I know states are choosing not to give me certain pieces of information and that’s fine. It might not even be classified information. … Some states have just decided: ‘Well we had this information way back then, ….

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413 Interview K.
414 S/RES/2161 (2014), Annex II, para. 16 mandates the Committee to convey whether the measures are retained or terminated, setting out reasons. In formal correspondence in relation to my clients on this issue, the Ombudsperson stated: ‘Regrettably, the communication from the Committee, while it references the reasons for the recommendation of the Ombudsperson, does not set out those reasons or any other. In my opinion, this is contrary to the plain wording of paragraph 16 of Annex II to resolution 2161’. Letter from UN1267 Ombudsperson (25 August 2014), Copy on file with author.
415 Letter from UN 1267 Ombudsperson (21 December 2012), Copy on file with author. This problem of reason-giving has also been highlighted by the Ombudsperson in her reports to the Security Council. See: UN Doc. S/2011/447 (22 July 2011) para. 45; and S/2013/452 (31 July 2013) paras. 36 - 42. This explanation still remains entirely baffling to me. My client also said that he had no idea what it meant.

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but we don’t want to bother [because] we are not opposed to delisting’. So they just don’t give me information and that’s also perfectly fine. ... Can I do a proper review? I can do a proper review of the decision I have to make ... because it will be based solely on what they give me.\textsuperscript{417}

According to the Ombudsperson, more than half of all delisting applications she has handled have been accepted by the Security Council P5 without any objections being raised or counter-material provided. And in a significant proportion of delisting cases, states have provided no response at all.\textsuperscript{418} This means that the majority of delisting cases are effectively dealt with \textit{ex parte}, with little to no input from the other side. So not only does this unique review refrain from reviewing the listing decision, but it also often takes place using material provided by those who are listed and little else. How can we account for the limited engagement by states in this de facto ‘review’ process? I suggest that the Ombudsperson is primarily valued for the important list pruning function it provides. As discussed earlier, getting off the Al-Qaida list is far more difficult than getting on. The collective inertia of states to delist, the indefinite application of the sanctions, the lack of \textit{pro bono} lawyers doing this defence work and the reduced ‘scrutiny from the press and NGO community because “even human rights groups don’t want to stand up for terrorists”\textsuperscript{419} all cumulatively mean that once someone is listed they will likely \textit{remain} listed forever, irrespective of the grounds or justification offered.\textsuperscript{420} The Ombudsperson’s \textit{de novo} techniques bypass these political obstacles and help to trim the list of ‘low hanging fruit’. This mitigates the threat of judicial review - by dissipating potential norm conflicts before they reach Court - and so strengthens the Council’s global listing authority.

But most importantly, this temporal cut allows the Ombudsperson to advance the claim that her decision-making processes are fair because they allow listed persons to know the case against them. This claim comes, however, with an important caveat: ‘when I say that I believe that listed individuals have been told about the case, it’s the case against them \textit{such as has been given to me}'.\textsuperscript{421} Yet the Ombudsperson acknowledges that her understanding of the cases is partial and fragmentary at best, often based on the ‘general, unsubstantiated, vague and unparticularised’\textsuperscript{422} Narrative Summary of Reasons and/or Statement of Case released by the Committee ‘and nothing more. That does not mean that there is nothing more, but that I have nothing more’.\textsuperscript{423} For the Ombudsperson, however, this disparity does not create an inequality of arms between the Security Council and those whom they target. Rather, she insists that the delisting process remains fair because her recommendation and the Sanctions Committee’s decision are based on exactly the same information - ‘If that wasn’t the case, [then] I would say that it is an unfair process’.\textsuperscript{424}

This idea of symmetry between the Ombudsperson and Council resonates with the conventional idea of review, where the decision-maker decides upon findings of fact and accepted evidence. But how can one readily assume that in this exceptional domain these two bodies ground their respective decisions on the same material? The relation between Council and Ombudsperson is not akin to that of executive decision-maker and court. I suggest that in the ‘emergency context within which the Security Council necessarily

\textsuperscript{417} Interview K.
\textsuperscript{418} Interview with the former UN 1267 Ombudsperson, Kimberly Prost. New York, June 2014 (‘Interview L’).
\textsuperscript{419} US Embassy Cable 09LONDON452 (dated 20 February 2009) para. 5 (recounting dialogue between UK FCO and US diplomatic officials on list accountability reform).
\textsuperscript{420} With the exception of those individuals who have the money to engage legal counsel (such as Mr Kadi).
\textsuperscript{421} Interview K.
\textsuperscript{422} Kadi (n 69) para. 157.
\textsuperscript{423} Interview K.
\textsuperscript{424} \textit{Ibid}
This symmetrical myth anchors claims of procedural fairness and thus helps to assuage concerns of legal critics. But the Ombudsperson and Council remain qualitatively different institutions with no ‘constitutional connective tissue’ binding them together - they are fundamentally asymmetrical. There are any number of pragmatic or political reasons why the Council might choose to remove people from the list (or not). As the legal representative of listed individuals I have worked at length to prepare detailed arguments setting out why my clients were not ‘associated with’ Al-Qaida, as any defence lawyer would. Yet throughout the delisting process I was continually reminded - through the procedural irregularities and novelties of this mechanism - that this was a political and at best quasi-judicial procedure where my legal submissions may have little bearing on the end-result. Decisions to retain or remove listings may ultimately have nothing to do with the arguments put forward by listed parties or the recommendations of the Ombudsperson. As the former chair of the 1267 Committee plainly acknowledged: ‘At the end of the day, it’s a political decision based on a political process’. Avoiding litigation and consolidating the Security Council’s authority to govern global terrorism this way are the more likely catalysts for the delisting decisions undertaken to date.

(ii) Speculative Standards

The Ombudsperson’s unique global decision-making processes are enabled and strengthened by the novel evidential standards that are produced in and through her work. These standards are unique, were crafted by the Ombudsperson herself and are both an effect and cause of her legal expertise in this special environment. When considering delisting requests the Ombudsperson applies an evidential standard of whether there is ‘sufficient information to provide a reasonable and credible basis for the continued listing’. Whilst this standard is loosely based ‘on concepts generally accepted as fundamental across legal systems’, it is

425 Hovell (n 410) 50.
426 S/2013/452 (n 415) para. 57.
428 This is an effect of the ‘no-objection’ procedure. As one Committee member explained: ‘We usually have Committee meetings once every two or three weeks. We’ll discuss Monitoring Team trip reports, Monitoring Team recommendations and the substance of [Monitoring] Team reports. Listing and delisting requests typically are not handled within the Committee.’ – Interview F. See also: Guidelines ibid paras. 6(n), 7(f)
430 On the political nature of UN listing, see also A.G Bot’s 2013 opinion in the Kadi case (n 412) para. 80:

It is true that listing is based on evidence indicating how the conduct of a person or an entity has a link with a terrorist organisation and therefore constitutes a threat to international peace and security, but it also has regard more generally to strategic and geopolitical interests … Listings are thus part of a political process which goes beyond any individual case.

432 Ibid
novel insofar as it has no direct equivalent in either domestic or international law. As the Ombudsperson has candidly said, ‘I made it up’.433 The nominal reason for doing so was to create ‘an international standard appropriate in this context’.434 One that could blend and synthesize elements from different jurisdictions without being necessarily tied to any one of them:

This a standard being used at the international level. So what it cannot be is simply lifted from a legal system. Whether they acknowledge it or not, the FATF [for example] has always used language that is common law language, because of who they were driven by and that causes problems when you’re dealing with other countries that don’t come from that tradition. Like ‘reasonable grounds to believe’ means something to me, but it doesn’t mean a heck of a lot to the French. And so what I wanted to do is get away from, you know, things that were familiar in one system and move to something that has those concepts, but that is in language that everyone can understand ... so that everyone can say, ‘Okay, that for me means this and that for me means that’.435

This cosmopolitanism not only purports to foster greater inclusivity. It also significantly expands the Ombudsperson’s discretion as expert by deflecting the reach of domestic and regional laws of proof:

GS: What kind of work can you do with this that you couldn’t do with reasonable suspicion or balance of probabilities standard?

Ombudsperson: What it does for me is that it doesn’t restrict me to what might be developed case law in any particular jurisdiction ... I don’t have to go into a whole reams of, you know, ‘what does the case law in five common law jurisdictions say about X’? It gives me, quite frankly, freedom and the flexibility to say, ‘I’m just using the common definition of what’s reasonable, what’s credible’. And that, in this area, is much more practical ... There are people who make the point to me ... that I’m not a judge [and] this isn’t a legal process. So I say, ‘OK. This isn’t a standard that you use in any particular court ... or judicial context. Its an international standard appropriate in this context. It also helps me that way’.436

So just as the Ombudsperson’s unique decision-making processes are forged from the dissensus surrounding international judicial review and hold together different versions of the Al-Qaida list, her evidential standards are designed to suture together localised legal elements into something distinct, quasi-juridical yet familiar and recognisably global. But as with any practical compromise solution, something important is lost in the movement away from formality and specificity. In this case, the resulting standard is so elastic that it can readily allow just about any material into the delisting procedure whilst at the same time failing to provide targeted individuals with any clarity about how they might go about getting off the list. The Ombudsperson’s emphasis on practicality also reflects a functionalist approach to this deeply political issue. Existing standards of proof are reassembled as ‘technique[s] of pragmatic governance’, based on an apparent common-sense understanding of what is reasonable and appropriate in the circumstances.437 Yet as Koskenniemi points out, ‘if people were able to agree on what is reasonable ... no courts or law would ever be needed’.438 That is, when listing is something inherently inferential, speculative and contested, ‘reasonableness’ does work to absorb these uncertainties and recast the list in apolitical terms.

433 Hovell (n 410) 150.
434 Interview L.
435 Ibid
436 Ibid
438 Ibid, 22.
The internationalism of the standard is also used by the Ombudsperson to justify her distinct approach to assessing material tainted by torture. Because global listing is often based on local threat information drawn from security and intelligence actors in regions where torture is endemic, reliance on tainted material is an ever-present risk in this domain. ‘Intelligence from torture has’, according to the UN Special Rapporteur on Counterterrorism, ‘been used to justify the designation of individuals’. The use of torture evidence is ordinarily firmly prohibited. It is both jus cogens and contrary to the UN Convention against Torture (UNCAT), which requires states to ‘ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings’.

The use of torture evidence is ordinarily firmly prohibited.

But because these prohibitions are designed for national states there is uncertainty about whether they apply to the ‘special’ global context where UN listing and delisting decisions take place. Defence lawyers for listed persons and the UN Special Rapporteur on Counterterrorism have both argued for clear rules to be adopted to make plain that torture evidence must be excluded from listing and delisting procedures. But the Ombudsperson argues that ‘the measures applied by the Security Council are preventative in nature and thus ‘exclusionary rules’ are not appropriate’. And that ‘even more significantly [because] this is an international mechanism ... it should not be premised upon, or reflective of, specialized rules arising from one legal system’ - that is, the common law tradition:

I am not prepared to apply any exclusionary rules of evidence because that takes me down a path that I do not want to go down ... My job is more like an investigating judge in the civil-law context than the traditional Ombudsperson ... I gather all the information and I look at the individual pieces of it for questions like reliability and credibility. A key issue would be if the petitioner says, ‘Listen ... I was tortured’, those kinds of cases come up. So I look at all those factors, but not in this common-law tradition of exclusion - even though I know that’s coming...

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439 A/67/396 (n 259) para. 49.
440 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 15. For decisions concerning the exclusion of torture evidence at the domestic level, see: A and others v Secretary of State for the Home Department (No 2), [2005] UKHL 71; Oberlandesgericht (OLG), OLG Hamburg, Decision of 14 June 2005, reprinted in (2005) 58 Neue Juristische Wochenzeitschrift 2326; Hamdan v Rumsfeld, 548 US 577.
441 Letter from the UN1267 Ombudsperson (dated 12 November 2012), Copy on file with author.
442 Ibid
from the Torture Convention. I look at it more of, you know, looking at all the factors.  

Following external pressure and criticism, the Ombudsperson finally made a public statement on the issue in 2013 stating that if she is ‘satisfied to the relevant standard that the information has been obtained through torture’ she will not rely on it in her analysis and recommendations. Yet given that the sources of the underlying information are never disclosed to the Ombudsperson, it remains entirely unclear how such an assessment could be undertaken and findings of ‘inherent unreliability’ drawn. States are under no obligation to disclose potentially tainted and exculpatory material. How can the Ombudsperson realistically assess claims of torture - even in accordance with her own very elastic standards - if she does not have ‘sufficient information’ to do so? As Lord Bingham of the House of Lords once observed in the comparable context of UK Special Immigration Appeals Commission (SIAC) proceedings: ‘despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been “established”’. Moreover, in an interview in 2012 the Ombudsperson expressed a much more cavalier attitude towards the use torture material seemingly at odds with her later public statements on this issue, that was driven by the pre-emptive logics of the list rather than considerations of unreliability:

Jack Bauer, you know, on 24. He tortured a lot of people [and] he got information [that] there is a bomb about to go off. Nobody would suggest that you shouldn’t use or rely on that information and go look for the bomb. So taking that in a preventative context here, if ... you’ve got information and it indicates from a preventative point of view that you should be using the sanctions, I don’t think anyone would argue that you shouldn’t, from a prevention point of view, rely on that information.

This novel assessment standard has been rightly criticised by jurists for being too vague and setting the evidential threshold too low given the ‘quasi-penal consequences’ that flow from being on the list. But for the Ombudsperson the applicable standard in this domain has to be kept ‘a bit fuzzy and a bit lower’ than conventional criminal or civil standards because the list is ‘preventative in nature’ and her assessment hybridises two very different kinds of information - intelligence and evidence:

[With intelligence] you have to be looking at what the inferences are much more than you do with evidence. With evidence, you know you’re looking at concrete facts ... But here, it’s more about can you draw inferences from ... certain activities? ... It’s not just [in] the information but in the inference [that petitioners] have a chance to respond ... and explain.

The anomalies of assessing intelligence-as-evidence are discussed at length in the following chapter. For now, I just wish to highlight how the Ombudsperson’s novel standard is primarily a speculative standard that facilitates the drawing and assessment of inferences, potential associations and dangers. A mosaic standard capable of imbuing disparate fragments of information from the past with cumulative purpose and future effect. This quasi-juridical
measure is designed ‘a bit fuzzy’ not just because of the ‘international context’ of the list, but because the list is a pre-emptive security technology animated by logics of possibility rather than probability. It is important to recall that people are not listed here for what they have done, but rather for what they might do in the future - this is what the ‘preventative in nature’ mantra effectively means. Listed persons are not ‘known terrorists’ as such but rather emergent and ‘dividuated’ subjects made up of fragments of risk and inferences of potential threat. The speculative standard used by the Ombudsperson helps actualise this potential terrorist and correlate their associations to render them amenable for quasi-legal assessment. This is not so much a standard of proof directed towards establishing the truth, in the conventional sense. It is better thought of as what David Dyzenhaus has termed ‘an imaginative experiment in institutional design’ arising from conditions of global emergency.

An experiment that reassembles existing standards in accordance with the pre-emptive logics of global security, loosely tethering the list to claims of legality and further entrenching it as an exceptional governance technology.

(iii) Inquisitorial Dialogue and Speculative Lawyering

After gathering information from the Committee and other relevant bodies the Ombudsperson delisting procedure enters what is known as the ‘dialogue phase’: a two-month period of engagement where listed persons are said to be ‘made fully aware of the case against him or her and be afforded the opportunity to respond fully to it’. This dialogue is held out as a ‘critical part of the process in terms of fairness’ that enables the Ombudsperson to meet both ‘the right to be informed and the right to be heard’. It is the phase where ‘the listee can present his side of the story’. As academic commentators such as Dominic Hoerauf have enthusiastically observed, this dialogue isn’t ‘just an exchange between the listee and some organ somewhat participating in the delisting process, but a hearing before a neutral de facto decision-maker’. Such accounts present the ‘dialogue phase’ of the Ombudsperson’s delisting procedure as a model example of international due process in action. But in my experience it is more inquisitorial and exceptional than dialogical and cathartic in nature. As I will show, the dialogue phase is where the speculative standards of the Ombudsperson are really put into effect. The following section illustrates how by sharing my own experiences as a lawyer representing listed people in this dialogue process.

In 2014 one of my clients was asked to participate in a ‘dialogue meeting’ with the Ombudsperson in Tunisia. Letters were exchanged prior to the meeting in an attempt to narrow down and clarify the key issues to be determined, as is the norm with pre-action

454 Dyzenhaus (n 150) 215.
455 S/RES/1904 (n 4) Annex II, paras. 1 - 4. During this initial four-month period, ‘members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant UN bodies, and any other States deemed relevant by the Ombudsperson’ are asked to provide information relevant to the delisting request and their views on whether the request should be granted (para. 2). The Monitoring Team are also engaged by the Ombudsperson to scrutinise the delisting request, provide relevant information from the Monitoring Team’s own extensive records and provide ‘questions or requests for clarification’ that the Ombudsperson should ask (para. 3). The information gathering period can be extended by an additional two-months if needed (para. 4).
456 Prost (n 401) 422.
457 Prost and Wilmshurst (n 407) 6.
458 Prost (n 401) 422.
459 Dominic Hoerauf, ‘United Nations Al-Qaida Sanctions Regime after UN Resolution 1989: Due Process Still Overdue’, (2012) 26(2) Temple International and Comparative Law Journal, 213, 227 - 228. See also Prost and Wilmshurst (n 407) 6: ‘The Ombudsperson noted that it was very striking how much this meeting means for the petitioners. On several occasions she has been told by petitioners that it is the first time after many years of being on the list that anyone has listened to their side of the story’.

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correspondence between lawyers. My client had been subjected to domestic criminal proceedings for alleged association with terrorism more than ten years prior to the meeting. These criminal proceedings had been based on conduct occurring five years before the trial – that is, almost fifteen years before the Ombudsperson dialogue meeting. In the end, my client was cleared of these terrorism charges by the Court for want of evidence. We had therefore assumed that his listing must have been based upon some other supposed allegations and were pushing the Ombudsperson to disclose the underlying basis of his UN terrorist designation to us so that we might adequately respond. Yet over the course of our correspondence it slowly became clear that the UN’s determination of terrorist association in respect of my client was indeed primarily based on the domestic judicial findings that had already found those same allegations to be unfounded. How could this possibly be correct?

Moreover, many of the allegations advanced by the Ombudsperson as to why my client was ‘associated with’ Al-Qaida were drawn from the very preliminary stage of the criminal investigation against him in which he had not formally participated or been able to put forward a defence. That is, the allegation that my client constituted a threat to international peace and security under Chapter VII of the UN Charter was largely based on submissions prepared by a local prosecutor for an investigating magistrate to decide (in secret) whether there was sufficient circumstantial evidence and prima facie grounds to order pre-trial detention in my client’s criminal case. Many of the findings made by this investigating magistrate were either later dismissed by the appellate courts or were not ultimately pursued in trial. Yet they were nonetheless recycled by the Ombudsperson in ‘dialogue’ more than ten years later to try and show why my client was an international terrorist.

When we made our concerns plain and explained to the Ombudsperson that many of these initial findings had been drawn from closed in absentia proceedings and had either been later overturned following detailed examination or otherwise abandoned, we were told that ‘for all judicial or administrative decisions it is the underlying information revealed by it, as opposed to the conclusions or reasoning, which is of significance’, that the Ombudsperson’s analysis ‘will ultimately consider the cumulated material and the inferences to be drawn from the same’ and, again, that the list was preventative in nature. This is one part of the ‘dialogue’ where the speculative evidential standards of the Ombudsperson can be put to coercive effect as a jurisdictional device. Material used as evidence in domestic proceedings to try and show terrorist association in accordance with conventional legal standards and burdens of proof can effectively be rerun at the global level in accordance with the extremely broad and unique standards crafted by the Ombudsperson. In this context, there is no double jeopardy rule and judicial findings or considerations of evidence are ‘not in any way determinative’, even if they end up in acquittal. Rather, what matters are the correlations that can potentially be drawn anew in the Ombudsperson’s fresh assessment of the ‘underlying information’.

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460 Letter from the UN 1267 Ombudsperson (dated 15 August 2013). Copy on file with author.
461 According to Mariana Valverde, jurisdiction is best understood as a kind of sorting process that divides events into different classes to make things amenable to legal governance and ensure the ‘smooth functioning of law’. It is not only about grounding authority claims. It also ‘conceals from view the qualitative differences in governance that the discussion of scale has canvassed’ and transforms disputes about ‘the qualitative features of governance ... into seemingly mundane and technical questions’. Jurisdiction doesn’t only decide who governs a particular situation, but ‘also determines how something is to be governed’ and so retains a ‘magical power to depoliticize governance’ – Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge 2015) 83 - 84. It is in this sense that the Ombudsperson’s delisting standards operate as a jurisdictional device. They rescale localised trial material to a global site whilst altering its temporal orientation in critical ways - from alleged past criminal activities to uncertain future threats - through technical means.
462 Ombudsperson letter (n 460).
One week before our meeting the Ombudsperson out forward a new allegation against my client: ‘There is evidence that Mr X recently met with a Tunisian extremist’.\(^{463}\) Our requests for more information about this allegation - for example, who did he meet with, when and in what circumstances, what was the alleged purpose of the meeting - were all rebuffed: ‘I am unable to disclose the source’.\(^{464}\) And yet an inference was being clearly drawn from this unsourced allegation that my client was ‘associated with’ terrorism. Given the vagueness of the claim, we were unable to take instructions and present a counter-argument capable of interfering with the inference. What should one do as a defence lawyer in such extraordinary circumstances, duty bound to advance the best interests of your client? In the end we refused to respond to this ‘spectral evidence’, whilst pushing for an assurance that no adverse inferences would be drawn as a result (which was duly provided).\(^{465}\) But if our client had answered by guessing, then anyone mentioned would likely, by inference and association, be flagged as a potential terrorist, end up on a no-fly list or otherwise become a person of security interest. Here ‘dialogue’ is a means of generating new intelligence. And it is this generative capacity that may help explain why the Council have been so encouraging of the Ombudsperson to reach out and engage with the listed in this way.

It is worth recalling that the material purportedly underlying the listing is never seen by targeted individuals. Since 2008, there have been Narrative Summaries, but they are expressly designed to exclude all confidential information and are too vague to enable an effective challenge to be launched.\(^{466}\) The Ombudsperson seeks to improve this process by putting questions to the listed during the ‘dialogue’ phase that aim to work what she knows of the classified material into the background. According to the Ombudsperson, this process - which is closely vetted by the states involved - allows listed individuals to know ‘the contours of the case’ whilst assuaging the concerns of targeting states by excluding the relevant ‘details’ and ‘particulars’.\(^{467}\)

In practice this means that ‘dialogue meetings’ can be spent trying to rebut adverse inferences drawn from unseen material in accordance with the broadest and most elastic of associational standards. In my client’s case, this involved responding to claims by the Ombudsperson built on allegations previously made by prosecutors using fragmented telephone intercept material that was more than fifteen years old and that had in many instances already been deemed to be of little probative value by the Courts. Neither the original intercept material or transcripts were provided, and so the basis and context for the inferences being put to my client were often left entirely unclear, thus reducing his capacity to defend himself and exacerbating the unfairness of the whole process. Our dialogue meeting lasted over eight hours. The more unseen intercept material the Ombudsperson relied upon throughout the course of the day, the stronger the inferences seemed to become. Although much of the information used was openly acknowledged by the Ombudsperson to be ‘broad and vague [in] nature’\(^{468}\) and could be explained individually, when the fragments and scraps were associated together a cumulative inference of potential terrorist threat could be drawn.

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\(^{463}\) Letter from the UN 1267 Ombudsperson (4 September 2013), Copy on file with author.

\(^{464}\) Ibid

\(^{465}\) Spectral evidence is evidence based on dreams and apparitions. It was first rendered admissible in English courts during the Bury St Edmunds Witch Trials in Suffolk during the seventeenth century and was then famously deployed during the Salem Witch trials in Massachusetts, USA during the same period. I am indebted to my friend and colleague, Amir Attaran, for drawing the analogy between the use of spectral evidence in witch trials and the use of speculative material in the Ombudsperson delisting procedures.

\(^{466}\) Kadi (n 69) paras. 157, 177.

\(^{467}\) Interview K. According to the Ombudsperson: ‘sometimes they will say, “This is the only way we would allow that information to be put” or I might say “I’m going to ask this question, is that okay?”’.

\(^{468}\) Ombudsperson letter (n 460).
My client consistently denied all knowledge of and links with terrorism, as he had done before the courts many years before, but this dialogue was an altogether different kind of process. When one infers from inferences and associates upon associations using possibilistic standards and logics it is very difficult to mount what most jurists would consider a proper defence. In my experience, these ‘dialogue meetings’ demanded a particular form of speculative security lawyering that bore little resemblance to the judicial review litigation to which I was accustomed. This wasn’t ‘de facto judicial review’ or an opportunity for my client to share his side of the story, but a thoroughly inquisitorial and exceptional procedure more akin to a post-modern Star Chamber.\footnote{The Star Chamber was an English Royal Prerogative court active from the 15th - 17th centuries. It was infamous for its secrecy, inquisitorial methods, use of torture and reliance on involuntary confessions. As such the Star Chamber has become synonymous with the worst excesses of exceptional medieval justice and is often used by common law jurists to account for the constitutional origins of due process principles and procedural justice.} Comparable domestic mechanisms of secret justice (such as Closed Material Procedures before SIAC) at least have special advocates who can attempt to mitigate this gross inequality of arms by accessing the underlying material and making submissions on the defendant’s behalf. No such mechanism exists here. There is only Ombudsperson dialogue. As Lord Bingham has observed: ‘It is inconsistent with the most rudimentary notions of fairness to blindfold a man [sic] and then impose a standard which only the sighted could hope to meet.’\footnote{Emma Dunlop, ‘Globalization and Sovereignty: global threats and international security’, in Sabino Cassesse (ed.), Research Handbook on Global Administrative Law (Edward Elgar Publishing, 2016) 468.} Yet requiring the listed to explain themselves to an inferential standard applied by the Ombudsperson in secret to material that they will never see is, in my experience, precisely what defines this dialogue.

Multiplicity and Experimentation in Global Exceptional Governance

Since the end of the Cold War the Security Council’s powers have dramatically expanded to encompass a diverse array of novel and diffuse global threats. UN Sanctions - previously criticised as a ‘blunt instrument’ that engendered widespread humanitarian suffering - were recalibrated as targeted or ‘smart’. The 9/11 attacks accelerated these processes of ‘stretching the international peace and security envelope’, with individuals suspected of being nodes in global terrorist networks transformed into objects of legal intervention by the Security Council for the first time. But when IOs ‘pierce the state veil’ and begin exercising coercive powers over individuals, the dynamics of the international system radically change.\footnote{On ‘upward drift’ see: Gráinne de Burca, ‘The EU, the European Court of Justice and the International Legal Order after Kadi’ (2010) 51. Harvard International Law Journal, 1, 3. On ‘global administrative space’ see: Kingsbury, Krisch and Stewart, (n 10) 25 - 27.} Individual rights are interfered with directly without the possibility of redress. Executive decision-making is detached from domestic and regional review mechanisms and ‘drifts upward’ into ‘global administrative space’ where no legal constraints apply.\footnote{On individual rights as a ‘fault line’ in this domain, see: Elspeth Guild, ‘EU Counter-Terrorism Action A fault line between law and politics?’, CEPS Liberty and Security in Europe Series, Brussels (April 2010).} The Al-Qaida list, in other words, has come to entrench a global state of exception. Giving individuals the means to challenge their listing and bring the Security Council to account has thus become the key fault line and litmus test of the global security law-building project.

The creation of the Office of the Ombudsperson in 2009 was designed to resolve this accountability dilemma, and for many it did. Scores of individuals were delisted following recommendations by the Ombudsperson and the Security Council has now moved away from due process concerns towards list implementation issues and fighting ISIL and foreign terrorist fighters. The Ombudsperson has been held up as an accountability success, despite the continued reservations of the courts and the constitutional scholars who support them. The history of the Security Council due process debate has now been effectively written, and
reiterated innumerable times, as one of conflict leading to incremental improvement, institutional learning and responsive global governance. Key actors may have disagreed on the most appropriate response to take and whether the procedural protections offered went far enough. But we can all seemingly agree that this experiment has been a step in the right direction and provided something better than the legal black hole that existed before. As Global Administrative Lawyers, legal pluralists and functionalists keen to get on with the good work of global governance continually remind us, there is no “one size fits all” or “universally applicable” model of procedural fairness for resolving post-national accountability problems. Rights protection needs to be recast onto ‘a more flexible gliding scale’ when we are dealing with global security law norm conflicts. De facto judicial review might not be ideal, but it is good enough. ‘When partial efforts are seen as down payments on a better future’, argues David Kennedy, ‘defects in current practice seem tolerable’. Prefiguration - seeing the origins of a better world in the problem management processes of the present – ‘makes it easy to talk about what everyone might favor in the long term without mentioning whom that will actually favor between now and then’.

This chapter has challenged this teleological narrative and claim that the Ombudsperson is ‘as good as it gets’ by providing a genealogical account of this experiment’s emergence. This approach has allowed me to ‘re-orientate the received narrative of this institution’ as something far more complex and contingent and place the material reproduction of power through practice at the centre of my analysis. It has also helped me highlight divergences between different actors to underscore my first key argument: that the list is a multiple object enacted through the heterogeneous practices of those entangled in the listing assemblage with a stake in this accountability problem. Academic scholar-experts concerned with targeted sanctions and judges in the EU courts vested to protect fundamental rights, for example, produce entirely different notions of what this list is and how its flaws can be resolved. This isn’t just a question of plurality, but crucially also a problem of multiplicity.

Existing accounts acknowledge the differences at play in this domain, but seek to contain them in various ways. For Devika Hovell, for example, the ‘debate about due process in Security Council decision-making has played out for well over a decade’ and ‘increasingly resembles a conversation of the deaf’ - with courts and lawyers on one side and the Security Council on the other talking at cross purposes. Yet for Hovell this persistent ‘intransigence’ is essentially ‘a question of (flawed) methodology’ and thus something that might be resolved. But only if we cease asserting claims to fundamental rights in the international realm and properly embrace a ‘contextual approach’ to due process that aims to ‘support institutional practice’ and enhance the legitimacy of Security Council action. For others, the protracted nature of the list accountability debate reflects the diversity of disciplinary and epistemic frames involved. As one interviewee involved in the Ombudsperson reform process put it:

474 On the idea of the legal black hole, see: Dyzenhaus (n 150).
475 Hovell (n 410) 35.
476 Cuyvers (n 70) 1786.
478 Ibid
479 Rodiles (n 228).
481 Hovell (n 410) 1.
482 Ibid, 2
483 Ibid, 4
There’s a real divide here and this is somewhat disciplinary … There is a law side - and I say that it’s easy for the lawyers because there’s a right and wrong here. But on the other side - the political side, the policy side, the sanctions side - there’s a different kind of logic where, ‘Well, isn’t this close enough to effective remedy?’ There is this fundamental disciplinary [divide] in some of these debates. …. Sometimes the argument gets reduced to: ‘The Americans want this’. No. The lawyers all share an epistemic community and way of thinking about the issues. The political scientists have a different way. The policy practitioners concerned with abuse of power [have another] … So many of the divisions actually fall into almost disciplinary understandings of the problem.\textsuperscript{484}

This is the familiar problem of ‘regime interaction’ or ‘international policy coordination’ discussed in various strands of legal and IR scholarship.\textsuperscript{485} Such accounts tend to adopt a managerial approach to global jurisdictional conflicts, suggesting that differences ‘can be overcome by coordinating and adjusting the operation of single regimes so as to ensure the smooth functioning of the whole’ - as Hovell’s argument outlined above suggests.\textsuperscript{486} The key problem with these accounts of world politics is that they leave their reality fundamentally intact, permitting ‘mutually exclusive perspectives, discrete, existing side by side, in a transparent space. While in the centre the object of many gazes’ - in this case, the list and its persistent accountability problems - ‘remains singular, intangible, untouched’.\textsuperscript{487}

When we foreground the knowledge practices and governance techniques of different actors and empirically follow how and what they enact in conflicts of this kind a more textured and complex topology of the global emerges. Instead of ‘being seen by a diversity of watching eyes while itself remaining untouched in the centre, reality is manipulated by means of various tools in the course of diversity of practices’.\textsuperscript{488} Performing reality through practice, as STS scholars have long pointed out, fractures and multiples it. As I have shown in this chapter by providing a praxiographic account of the listing assemblage in action, the differences between key actors here are not just epistemological, but also ontological. We have a Legal List, a Humanitarian List, a Living List, a Compliant List and a Credibility List all vying to resolve an accountability problem framed in their own terms and bring it within it their control. The ‘politics of redefinition’ that Koskenniemi says is driving jurisdictional conflict in the post-national present, in other words, is not only a question of expert idiom, perspectives and authority.\textsuperscript{489} Because ‘objects come into being … with the practices in which they are manipulated … [and] are not the same from one site to another’, there is also an ontological politics and a great deal of legal assemblage work that must be accounted for to explain how the Law of the List is being sustained.\textsuperscript{490}

Having developed a critical genealogy of the list accountability problem, this chapter then went on to advance a second key argument: that the Ombudsperson is a unique figure of global legal expertise that helps contain multiplicity, absorb conflict and hold the listing assemblage together in the face of ongoing legal and political tension. Drawing largely from interviews with the former post-holder (Ms. Kimberly Prost) and my own experience as a practitioner representing listed individuals, I sought to take the reader beyond the somewhat vapid claim that this mechanism offers ‘fair and clear’ accountability procedures. Three

\textsuperscript{484} Interview G.
\textsuperscript{485} This literature is vast. For an overview, see: Young (n 141); John G. Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’ (1993) 47(01) International Organization, 139; Andreas Antoniades, ‘Epistemic communities, epistemes and the construction of (world) politics’, (2003) 17(1) Global Society 2.
\textsuperscript{486} Koskenniemi (n 141) 305.
\textsuperscript{487} Mol (n 15) 76.
\textsuperscript{488} Ibid, 77.
\textsuperscript{489} Koskenniemi (n 14) 67.
\textsuperscript{490} Mol (n 15).
elements specifically crafted by the Ombudsperson to work in this ‘special’ context were subjected to empirical scrutiny: her decision-making processes, ‘dialogue’ meetings and speculative evidential standards. Each element involves the recombination of existing legal categories usually associated with judicial review (reasoned decision-making, transparency, standards of proof etc.) into novel quasi-juridical forms aimed at entrenching pre-emptive security logics. In my analysis the Ombudsperson works as a translation device or institutional ‘boundary object’, fostering coherence across the ‘intersecting social worlds’ of the list and gluing disparate strands of the assemblage together.\(^{491}\) These findings problematise the pervasive claim that the Ombudsperson simply offers a normatively positive procedural improvement and step in the right direction. Reframing the list as an assemblage allows us to recast this institution as an ongoing and far-reaching experiment in global emergency law and governance.

In 2016 the Watson Institute scholars finally conceded that the Al Qaida listing regime in which they had invested so much effort in reforming and defending over the years had ‘evolved into the realm of the permanent exception’.\(^ {492}\) This follows the Special Rapporteur’s observation that the list is now a ‘permanent tool ... more closely resembling a system of international law enforcement than [the] temporary political measure’ it was originally designed as.\(^ {493}\) In this chapter I have shown how the Office of the Ombudsperson both attenuates and fortifies this global exception in important ways. It can best be characterised as what David Dyzenhaus terms a ‘legal grey hole’ - an ‘imaginative experiment in institutional design’ that provides a ‘façade’ of legal accountability but without ‘any substantive protections’.\(^ {494}\) Yet the Ombudsperson delisting procedure is no mere ‘rubber stamping’ exercise. Pointing out that the Ombudsperson fails to adhere to international human rights norms - as much of the legal literature does – is to state the obvious and fails to capture what is stake. This mechanism should be understood not only by what it lacks, but also through what it produces. The Ombudsperson is a form of productive power assembling this body of global security law and stretching it in innovative and dangerous ways.

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\(^{491}\) Star and Greisemer (n 109).
\(^{493}\) A/67/396 (n 259) para. 12.
\(^{494}\) Dyzenhaus (n 150) 215, 3.
4. Complexity in the Courts: Mapping the Spatiotemporal Dynamics of the List*

Given the difficulties of sharing intelligence ... the UN is inherently a highly limited mechanism for conducting counter-terrorism operations ... On the other hand, the UN’s global reach and the Security Council’s Chapter VII authority are valuable assets ... [G]oing forward, the US has a two-fold task - to improve the current UN system and use it more effectively as a weapon in the war against terrorism.

US Embassy Cable, War on Terrorism - The Security Council's Role - Making it Work for the US.¹

Previous chapters have analysed listing expertise across various sites to show the complex, contingent and contradictory ways it produces global security law. Chapter 2 showed how the mundane technical work of the Al-Qa'ida Monitoring Team and the technology of the list itself conditions this regime in crucially important ways. Chapter 3 provided a detailed genealogical account of the Ombudsperson’s emergence and showed how this unique experiment seeks to resolve accountability conflicts but ends up embedding pre-emptive logics and security practices. Each chapter has followed the list and its protagonists to particular sites to show how the problems negotiated there produce this domain of global security law in distinctive ways. The Law of the List, as I have shown, is more than the Security Council edicts that bestow it with formal authority. It is an assemblage of norms, knowledges and techniques produced and held together by an array of localised practices at different sites and scales.

But what might it mean to think of this listing assemblage as a novel kind of global legal weapon, as the Cable above suggests? Something formally tethered to rules of international law but deployed in radical new ways to incapacitate individuals who might pose a threat in the future. What qualities might make the list work ‘more effectively’ in these terms? And how might existing legal principles and judicial practices be rearranged to better realise its potential coercive effects? What happens when the pre-emptive security logics and governance of radical uncertainty embedded in the list meets the principles of judicial proof and procedural justice long used and protected by the courts? How do the courts perform judicial review when there is no executive ‘decision’ to review? What legal and political changes can be made to resolve or accommodate fundamental conflicts of this kind? And what might these transformations tell us about how global security law works in action?

This chapter probes these problems by bringing the latent spatiotemporal dynamics of the list to the analytical surface. It follows the list to the site of the EU courts trying to undertake judicial review of this unique legal weapon.² Drawing from interviews with judges, sanctions officials and classified US Embassy Cables, I analyse the EU courts as a localised site deeply entangled in the production of global security law.³ My key argument is that the technology

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¹ US Embassy Cable 06USUNEWYORK1609 (dated 22 August 2006).

² Technically the EU courts do not review the Al-Qa’ida list, because they cannot review Ch. VII measures of the Security Council. Rather, they review the EU decision to implement the UN list into the EU legal order.


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of the list is driven by dynamics of non-synchrony and dis-location and a mosaic epistemology. Understanding how these elements work is crucially important because they are operating underneath the radar of formal law to generate legal conflict and stretch the scope of this exceptional governance regime in practice. Building on previous chapters, I argue that detailed micro-level empirical analysis of how listing conflicts are negotiated reveals important insights into how this global security regime is assembled.

Time and space have long been recognised as central vectors of globalisation. Yet they remain almost entirely neglected in global legal scholarship, which continues to posit law in normative positivist terms abstracted from time and space. This reductionism impoverishes our conceptions of what global law is and funnels legal scholarship into a zero-sum debate and ethical choice between the One (global constitutionalism) and the Many (global legal pluralism). This chapter instead draws on the sociological research of Saskia Sassen, who argues that globalisation proceeds through the emergence of novel spatiotemporal assemblages that stimulate legal fragmentation and conflict. But whereas Sassen’s work is pitched at a macro-level of historical change, this chapter maps dynamics and effects operating at a more granular scale – contributing to debates on the transformations of law under conditions of globalisation by showing how global security regimes are being built.

To develop these claims the chapter is divided into two interrelated sections. The first section (Non-synchronous Law) highlights the temporal dynamics of the list by exploring problems associated with using intelligence-as-evidence as the basis for listing decisions. The idea of non-synchronicity draws on the ground-breaking work of Boaventura de Sousa Santos who argues that law is never singular but always an effect of the ‘interaction and intersection among legal spaces’ or interlegality. For Santos, law is ‘a highly dynamic process’ because the sites and networks that clash and constitute it ‘are non-synchronic and thus result in uneven and unstable mixings of legal codes’. This chapter extends this insight to the empirical study of conflicting legal temporalities. In my account, non-synchronous law is best thought of as a form of legality composed of divergent temporal logics that are literally ‘out of sync’. I argue that the Al-Qaida list is a paradigmatic example of non-synchronous law because of the ways it interfaces different temporal logics and epistemic practices associated with intelligence and evidence together into productive relation.

To show how this relation plays out in practice I focus my analysis on the EU courts. But instead of adding to the already voluminous literature on the Kadi case I examine the recent reform of the General Court’s procedural rules to allow the European judiciary to handle closed, security-sensitive material for the first time. This mundane reform process has hardly been discussed in the legal literature to date. Yet I argue that these minor technical changes on evidential rules are extremely important. The key question I ask is: How was a court vested

\begin{itemize}
\item \textit{Inside Out} (University of Michigan Press, 2001); Sally Engle Merry, ‘New legal realism and the ethnography of transnational law’ (2006) 31(4) \textit{Law & Social Inquiry} 975.
\item The global constitutionalism and legal pluralism debates were discussed in the introductory chapter. Framing these debates as the One and the Many is loosely drawn from: Desmond Manderson, ‘Beyond the Provincial: Space, Aesthetics and Modernist Legal Theory’ (1995-6) 20 \textit{Melbourne University Law Review} 1049, 1060.
\item Ibid, 298
\end{itemize}
to protect fundamental rights so readily enlisted to build, what is in effect, a legally authorised state of exception? The answers I provide don’t look towards some sovereign decision or inexorable pre-emptive turn, but to the bona fide efforts of the judiciary to try and ameliorate practical problems of legal governance. I argue that the spatiotemporal dynamics and mosaic epistemology of the list are in friction with conventional legal practices (like judicial review) and forms of inductive reasoning that underpin the principles of legal proof. But managing these problems stimulates new recombinant legal practices and forms of reasoning that were not possible before. The list is altering, at a very granular level, the ways judges produce ‘legal truth’ and is taking judicial reasoning into the uncertain terrain of the contemporary security mosaic, with its logic of correspondences and associations.

The common view - in security studies and criminology concerned with risk governance - is that with the increasing shift towards pre-emption and governing of future threats, conventional legal principles and practices stand to be abandoned. So we need either radical new forms of jurisprudence and politics or a renewed commitment to liberal legality to protect ourselves from the perils of ‘Future Law’ and restrain the inexorable rise of the preventative state. This chapter contributes to these debates by showing that when pre-emption and rule of law come into contact, one does not necessarily supplant the other. Risk and pre-emption, in other words, are not monolithic or emanating from the logic of late modernity in ways that herald an epochal shift. Instead, legal knowledges and modes of governance are reorganised in different ways through this encounter and global sociolegal scholarship must be empirically attentive to the forms this reorganisation takes if we want to understand the complexities of law in the present.

The second section of this chapter (Dis-located law) examines how this non-synchronicity confounds and reorders the spatial dynamics of judicial review. The prevailing literature suggests that the EU courts have robustly defended the rule of law against this UN listing regime. Yet in my analysis the list is both reordering how the EU judiciary produces legal knowledge and altering the review process itself in potentially far-reaching ways. Judicial review is usually retrospectively orientated towards the ‘decision’ of the authority under challenge. But I show how using intelligence-as-evidence for terrorism listing effectively defers this space of decision and challenges the judicial process because the decision supposedly under review is, strictly speaking, not there. I use the term ‘dis-located law’ to try and capture this dynamic process, because it draws attention to both the location of legal process and the sense of legal fracture occasioned through this deferral. My empirical analysis highlights this process of evacuation and shows how key sites of formal decision-making across the listing assemblage are rendered substantively baseless as a result. When the list is analysed through the lens of the Security Council resolutions that constitute it, the global is projected as something ‘broadly encompassing, seamless and mobile’ and representative of the ‘international community’. But my micro analysis of how pre-emptive security problems are being mediated by the courts shows that this global security regime is something far more ‘patchy’, ‘partial and situated’ than most accounts suggest.

I analyse two recent listing case decisions by the EU courts to show these dynamics at work and highlight the confusion that they are generating in the courts. The first case (Kadi II) tries to locate a listing decision for the purposes of review by bringing it forward in time and into the litigation process itself. I argue that this stands to transform the EU judicial review process

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10 Stephen J. Collier and Aihwa Ong, ‘Global Assemblages, Anthropological Problems’ in Ong and Collier (n 3) 12.

11 Ibid
into something much more plastic and fluid than has usually been the case. The second decision (Abdulrahim) moves in an altogether opposite direction, by looking backwards towards a listing decision presumed to have taken place in the past. Whilst the prevailing literature suggests that the EU courts are robustly defending the rule of law from attack via this UN listing regime, my analysis suggests that the relation between the two is more is more complicated and co-productive in practice. I show that through this encounter the list is modulating and reordering, in potentially far-reaching ways, the EU judicial review process itself. This isn’t merely a matter of ‘force yield[ing] place to law’ or vice versa, but of pre-emptive security governance techniques reassembling the ways that justice is done.\(^1\)

The spatiotemporal dynamics of the list are deeply entangled in assembling a novel form of global exceptional governance. One that carries the weight of the UN collective security system yet remains without foundation. A legal weapon that enables listing authorities to wield legal violence over individuals without any real consideration as to why. An exception that mutates and expands through legal efforts (however well-intentioned) to ameliorate its worst effects, defying attempts to fill its ‘legal black holes’\(^2\) with law. Building on the tradition of critical legal and security scholarship that emphasises the co-production of law and emergency politics,\(^3\) this chapter shows that empirically mapping the fragmented spatiotemporal dimensions of legal governance provides important insights into how global emergencies come to be normalised, stretched and rendered durable through law.

Non-synchronous Law and the Use of Intelligence-as-Evidence

Evidence is integral to the production of legal knowledge. It is collected in relation to specific acts alleged to have taken place in the past and ordinarily used to ‘aid the court in establishing the probability of past events into which it must inquire’.\(^4\) Legal evidence is therefore retrospectively orientated, as it comes to be used to ‘establish that a version of what occurred has an acceptable probability of being correct’.\(^5\) In judicial review emphasis is placed upon ‘evidence which was before, or available to, the public body at the time of its impugned action’\(^6\) - that is, relevant evidential questions are intimately tied to the nature of the executive decision-making under challenge. Legal evidence is evaluated publicly by judges in accordance with established forensic standards of proof - usually to either determine guilt beyond reasonable doubt (the criminal standard) or liability on the balance of probabilities.


\(^{15}\) Richard Glover, Murphy on Evidence (Oxford University Press, 14th edn 2015) 3. See also William Twining, ‘Evidence as a Multi-disciplinary Subject’ (2003) 2 Law, Probability and Risk 91: ‘disputed trials are typically concerned with inquiries into past events in which the hypotheses are defined in advance by law’ (at 103).

\(^{16}\) Glover, ibid. 3. My discussion here is introductory, focused on evidence in law rather than evidence more generally and aimed at differentiating evidence and intelligence as typologies of knowledge to assist in my analysis of the Al-Qaeda listing regime. It is beyond the scope of this chapter to analyse the logic of proof and the complex relations between evidence, inference and proof in the detail it deserves. For an excellent study on these issues, see: Terence Anderson, David Schum and William Twining, Analysis of Evidence (Cambridge University Press, 2nd edn 2005).

(the civil standard).\textsuperscript{18} To rely on evidence in court certain rules must be satisfied – for example, hearsay cannot ordinarily be relied upon - yet evidential rules differ significantly depending on the legal systems where they are used.\textsuperscript{19} Whilst common law systems use exclusionary rules to prohibit reliance upon certain types of evidence, civil law systems tend to admit evidence more freely and accord weaker material less probative value or weight. Evidence, the sources used to obtain it and any exculpatory material must all usually be disclosed so that litigants can undertake cross-examination or mount an effective defence, and judges evaluate the probative value of the material to make evidence-based findings of fact.

Intelligence, however, is a rather different form of knowledge.\textsuperscript{20} Although evidence and intelligence are both species of inferential reasoning, intelligence is primarily concerned with future threats and risk possibilities rather than specific acts undertaken in the past. It is orientated speculatively rather than retrospectively.\textsuperscript{21} Intelligence is kept secret to protect the sources and methods used to obtain it and is internally evaluated in relation to the importance of the risk rather than being externally and publicly verified in accordance with a forensic standard of proof. Intelligence is therefore a much more conjectural form of knowledge than that of evidence.\textsuperscript{22} It openly admits opinion and hearsay and allows loose correlations from a disparate array of unverified data sources to be freely relied upon.

During the Cold War intelligence usually involved inductive processes of ‘puzzle-solving’ and ‘looking for additional pieces to fill out a mosaic of understanding whose broad shape was already given’.\textsuperscript{23} It tended to deal with probabilistic risks and problems that could be solved with a degree of certainty given access to the right information.\textsuperscript{24} Yet in the post-9/11 period of the global war on terror, the nature of risks and threats, and therefore that of intelligence, have dramatically changed. The shift from targeting states to targeting transnational non-state actor networks that traverse domestic and international boundaries, for example, presents ‘mysteries’ that lack both ‘a shared story that would facilitate analysis and communication’ and a definable location because transnational terrorist networks are dynamic and both ‘here’ at home as well as ‘over there’ or abroad.\textsuperscript{25} So the risks of global terrorism are experienced as more amorphous and unbounded than those of the Cold War. Donald Rumsfeld’s invocation of ‘unknown unknowns’ speaks to this heightened epistemic complexity, as does 9/11 Commission’s finding that the US intelligence community’s failure to

\begin{flushleft}
\textsuperscript{18} Whilst I use the English legal system as the typology here, degrees of proof are acknowledged within both standards in that context.
\textsuperscript{19} Hearsay is excluded in a general sense but evidential rules on this issue are of course more differentiated and complex than presented here. In the US, for example, hearsay evidence is generally excluded in both civil and criminal matters. In the UK hearsay is expressly admissible in civil proceedings (see \textit{Civil Procedure Rules}, Part 33 and \textit{Civil Evidence Act} 1995, s. 2) and admissible on exceptional grounds in certain criminal matters (see \textit{Criminal Procedure Rules}, Part 34 and \textit{Criminal Justice Act} 2003, s. 114). Article 6(3) (d) of the European Convention on Human Rights generally prohibits the use of hearsay in criminal matters, stating that those charged have the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’. However, this right has been limited in recent case law - see, for example: \textit{Al-Khawaja and Tahery v United Kingdom} App. Nos. 26766/05 and 22228/06 (ECtHR, 15 December 2011).
\textsuperscript{20} I draw upon the valuable work of Kent Roach on this issue. See Kent Roach, ‘The eroding distinction between intelligence and evidence in terrorism investigations’ in Andrew Lynch, Nicola McGarrity and George Williams (eds.) \textit{Counter-Terrorism and Beyond} (Routledge, 2010) 48.
\textsuperscript{21} Twining (n 15) 104. On the speculative, see: Marieke de Goede, \textit{Speculative security: The politics of pursuing terrorist monies} (University of Minnesota Press, 2012).
\textsuperscript{22} On conjectural reasoning in the war on terror, see Claudia Aradau and Rens van Munster, \textit{Politics of Catastrophe: Genealogies of the Unknown} (Routledge, 2011).
\textsuperscript{23} Gregory F. Treverton, \textit{Intelligence for an Age of Terror} (Cambridge University Press, 2009) 3. Treverton is the Director of RAND Corporation’s \textit{Center for Global Risk and Security}.
\textsuperscript{24} Ibid
\textsuperscript{25} Ibid, 4, 28
\end{flushleft}
properly ‘connect the dots’ contributed to the 11 September 2001 terrorist attacks. More recently, in response to the mass surveillance and data mining techniques exposed by Edward Snowden, this idea of dot connecting has been reposed in the era of big data as the problem of ‘finding the needle in a haystack’ of electronic communications. But unlike the traditional detective work of finding particular clues and using them to unveil the whole, here intelligence agencies ‘argue that the hay field - all the data - is needed to derive both expectations about normality and the anomalous elements. Big data is the new whole’. The contemporary security mosaic, in other words, presupposes a very different epistemology than the inductive reasoning that marked earlier forms of intelligence analysis. It relies on logics of potential association and correspondence and practices of pattern-discovery through ‘drawing things together’ in order to identify unknown future terrorists.

The Al-Qaida list is a form of global security law that collapses the distinction between intelligence and evidence. Its format is one of the most archaic ordering devices. But it is a governance technology produced by the epistemology of the contemporary security mosaic. On the one hand, the list is a pre-emptive security instrument designed to counter potential terrorist threats before they emerge and act in advance of any legal determination of culpability through risk-based techniques of ‘disruption, restriction and incapacitation’. Criminal due process standards are inapplicable in this domain because these sanctions have been deemed to be preventative, rather than punitive, measures. According to the guidelines of the 1267 Sanctions Committee, for example: ‘A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventative in nature’. In practice, this means that listing decisions formally taken by the UN 1267 Sanctions Committee are based on disparate forms of closed intelligence suggesting that the targeted


28 Ibid


30 For recent discussion of the preventative/punitive classification of counterterrorism sanctions, see Case T-85/09, Kadi v Commission [2010] ECR II 5177, at para. 150:

> It might even be asked whether – given that now nearly 10 years have passed since the applicant’s funds were originally frozen – it is not now time to call into question the finding of this Court … [that] the freezing of funds is a temporary precautionary measure … The same is true of the statement of the Security Council … that the measures in question ‘are preventative in nature and are not reliant upon criminal standards set out under national law’. In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one.

31 Al-Qaida Sanctions Committee, Guidelines of the Committee for the Conduct of its Work (30 November 2011) [para. 6(d)]. See also S/RES/1822 (2008), Preamble.
individual or group is in some way ‘associated with’ Al-Qaida or their associates. Furthermore, as discussed in Chapter 2, this underlying material is produced diffusely and transnationally through an array of different security agencies, counterterrorism experts and state institutional actors. On the other hand, the UN list is not self-enforcing and must be implemented. And it is a core principle of the rule of law that when individuals are targeted by executive action they are entitled to certain due process protections, such as the right to an effective remedy. But to exercise these rights in any meaningful way, one must be informed of the material underpinning the accusation. So listing decisions are formally taken by the UN 1267 Sanctions Committee, putatively on the basis of closed intelligence, but are implemented by Member States and regional bodies (such as the EU) in circumstances where individuals are usually entitled to disclosable evidence. The Al-Qaida list therefore works as a hybrid legal technology by using intelligence-as-evidence, collapsing these traditionally distinct forms of knowledge and generating conflict between international security and human rights law in the process.

The use of intelligence-as-evidence is of course not unique to the Al-Qaida listing regime, but rather one of the defining features of post-9/11 counterterrorism law. There are two broad approaches to resolving the problems associated with using intelligence-as-evidence: either change the nature of the intelligence purportedly underneath the list so it can be used in court proceedings or change the nature of court proceedings so that this material can be relied upon without disclosure.

As discussed at length in the previous chapter, the various decisions taken by the EU courts in the Kadi case - and much of the subsequent European sanctions case law annulling listing decisions for violating defence rights - have tended to endorse the first approach to resolving this problem. In the 2010 Kadi decision, for example, the European General Court (EGC) held that the Narrative Summary of Reasons put forward as the grounds for justifying the listing decision was composed of ‘vague and imprecise allegations’ that prevented Mr Kadi from knowing and effectively contesting the case against him. The court held that listed individuals were entitled to an ‘in principle, full review’, extending to ‘the substantive assessments of the Sanctions Committee itself and the evidence underlying’ their decision. On appeal, in 2013 the European Court of Justice (ECJ) confirmed that judicial review could only be based on evidence that has been disclosed. According to the Court, ‘in principle, full review’ required judicial ‘verification of the allegations’ to enable an assessment of ‘the probative value of the information or evidence’ and a determination as to whether the underlying reasons, ‘or at the very least, one of those reasons’, could be ‘substantiated’. That is, only disclosure of the closed material underneath the listing decisions (to the Court, if not the listed parties) can ultimately remedy the intelligence-as-evidence problem.

33 S/RES/2083 (2012) broadened the targeting standard to include association with anyone already on the UN 1267 list - that is, being ‘associated with’ someone ‘associated with’ Al-Qaida and associated groups is now sufficient grounds to justify being listed.
34 For an overview see: ICJ (n 29) 67 – 90; Justice, Secret Evidence (2009). For a cross-jurisdictional analysis, see: Cole, Fabbrini and Vedaschi (n 12).
35 On analysing legal governance through problematisation, see: Nikolas Rose and Mariana Valverde, ‘Governed by Law?’ (1998) 7(4) Social & Legal Studies 541: ‘While it might seem obvious to begin by asking ‘what does law govern?’, from the perspective of government we would not start from law at all. Instead we would start from problems or problematizations – [that is] ... ways[s] in which experience is offered to thought in the form of a problem requiring attention’ (at 545).
36 Kadi 2010 (n 30) paras. 173 - 174 and 129 – 133.
These decisions sent shockwaves through world capitals and the international legal community for effectively challenging the supreme authority of the UN Security Council. Leaked US Embassy Cables warned that, ‘we cannot risk losing the use of one of our few non-military coercive tools because the EU courts believe that they are somehow illegitimate’ and called for a ‘coordinated US interagency strategy’ targeting EU leaders to ‘protect these policies from legal challenge’. 37 Targeted sanctions experts and advocates despaired that these decisions eroded the legitimacy of the Security Council’s use of Chapter VII UN Charter powers 38 and thus undermined ‘the legal authority of the Security Council in all matters, not just in the imposition of sanctions’. 39 If the Al-Qaeda list was to survive scrutiny by the EU courts then something clearly had to give. And eventually, something did.

Whilst robustly protecting fundamental rights in these high-profile cases, the EU courts discretely developed other initiatives that threatened to undermine them. Between 2012 and 2015 the EGC worked with the European Commission and Council in dialogue with the ECJ to review their procedural rules so that judges could handle intelligence without disclosure to targeted individuals – that is, they quietly pursued the second strategy for resolving the intelligence-as-evidence problem. These changes passed unnoticed to most scholars working on this issue because they frame legal conflicts through the prism of legal doctrine. But an assemblage lens shifts the analytical focus towards the prosaic sites of legal practice operating underneath the radar of formal law. The following section examines this reform process through interviews undertaken with key actors as the proposals were being negotiated. As I show below, these reforms are jurisgenerative and reveal some of the key spatiotemporal complexities of this form of global security law.

(i) Procedural Exceptions, Institutional Divergences and the Forging of Alignments

Until recently, using evidence in the EU courts required full disclosure. Article 67(3) of the Procedural Rules of the EGC stated that only documents provided to all parties could be relied on as evidence, enshrining what is known as the ‘adversarial principle’. 40 The reforms specifically amend this provision ‘by laying down a special procedural regime for situations in which the security of the Union or of its Member States or the conduct of their international relations is at issue’. 41 Now, in exceptional circumstances, the executive and judiciary can see underlying closed material deemed essential for determining the case but those targeted by intelligence that bring legal challenges cannot. The reforms refrain from setting up mechanisms (like Special Advocates procedures) 42 to compensate for the adverse effects of

37 US Embassy Cable 09BRUSSELS616 (dated 29 April 2009).
38 For Biersteker and Eckert: ‘There is a real, and growing, political problem associated with the legitimacy, not only of the instrument of targeted sanctions, but increasingly of actions taken under Chapter VII by the UN Security Council itself. This is a fundamental challenge to an essential instrument of the international community to counter threats to international peace and security’ [emphasis added] - Thomas Biersteker and Sue Eckert, Addressing Challenges to Targeted Sanctions: An Update of the ‘Watson Report’ (2009) 4.
40 A similar rule applies to ECJ proceedings [Article 54a, Rules of Procedure of the Court of Justice (OJ C 177, 2.7.2010)].
41 ST 7795 2014 INIT, Draft Rules of Procedure of the General Court, 14 March 2014 (Article 101). Although the changes are designed to meet the problems generated by sanctions litigation, they extend beyond this domain to all matters where the security of the EU, its Member States and/or their international relations are in issue. 42 Special advocates are security-vetted lawyers who can see the classified material and make submissions to the Court about it, but are prevented from disclosing it to listed parties. For discussion of the viability of special advocates in this context, see Cian Murphy, ‘Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?’ in Cole, Fabbri and Vedaschi (n 12); and Christina Eckes, ‘Decision-making in the Dark? - Autonomous EU Sanctions and National Classification’ Amsterdam Law School Legal Studies Research Paper No. 2012-64.
Instead, the Court has simply said it will ‘take account of the fact that a main party has not been able to make his views on [the secret material] known’ and therefore ‘has not been fully able to exercise his rights of defence’ when they ‘weigh up’ the different elements to ‘make a reasoned order specifying the procedures to be adopted’.

This exception, according to the Court, constitutes a ‘significant innovation’. In February 2015, with the UK government abstaining, the EU Council of Ministers finally approved these reforms. The EGC signed off on the changes shortly thereafter and the new court rules finally entered into force on 1 July 2015.

There is little available information that explains the rationale for this exception to the longstanding principle of open justice or that sheds light on the political and legal complexities underneath these reforms. Until the Council of the EU posted the final draft amendments online in March 2014, the reform process remained almost entirely opaque and shrouded in confidentiality. The proposals recently approved by the EGC suggest a fairly innocuous process of procedural adjustment. But my empirical analysis reveals a much more complicated negotiation process involving a wide range of actors navigating deep-seated underlying conflicts and problems.

This complexity has been rendered partly visible through listing litigation. EU court cases overturning listing decisions for violating fundamental rights have been a key catalyst for these reforms. The core problems of using intelligence-as-evidence in this domain were identified by the EGC as early as 2006 in Organisation des Modjahedines du peuple d’Iran v Council (‘the OMPI case’) - a case involving an Iranian group’s challenge to their inclusion on the EU autonomous terrorism list on the basis of material the French government refused to disclose to either the group or the Court. In their decision, the EGC (then Court of First Instance) acknowledged that the use of confidential information may be necessary when national security is at stake but said that that this did not free executive bodies from judicial review in terrorism-related matters. The Community Courts, the EGC held, must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

Yet precisely how this imperative of review could be realised in relation to the

44 Draft Rules (n 40) Art. 104 and 102.
46 Ibid, Art. 104.
47 The UK government abstained for two reasons. First, concern that once intelligence material was admitted as evidence it might not be able to be withdrawn at any later stage. Second, there were not procedures in place for EU court judgments and orders made using intelligence-as-evidence to be vetted by the security services. See Comments by Rt Hon D. Lidington MP, Minister for Europe, House of Lords Select Committee on the European Union Sub-Committee E, Plans for New Court Rules and Conduct of EU Sanctions (2 March 2015). Available at: http://bit.ly/190118.
52 Ibid, para. 156.
53 Ibid, para. 155 (emphasis added)
list was left unclear. Closed material might be provided to the Court ‘in accordance with a procedure that remains to be defined’, but the issue was ultimately deferred.54

The possibility of attenuating this problem through procedural design was again revisited by the ECJ in their famous 2008 Kadi decision. Echoing the sentiments of the EGC in the OMPI case, the ECJ acknowledged that in terrorism listing ‘overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned’.55 But as they went on to state, ‘that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature’.56 Instead, in such exceptional circumstances, the Court should be able to apply special ‘techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account ... and, on the other, the need to accord the individual a sufficient measure of procedural justice’.57 So although the problem was identified, it was again left unresolved. What such ‘techniques’ for handling intelligence-as-evidence might look like was again left as an open question by the Court.

The Kadi case, however, provoked a massive wave of EU listing litigation, increasing the risk that UN and autonomous sanctions might not be implemented in the EU. According to one member of the Commission Legal Service, providing intelligence to EU judges was critical to stemming this flood of litigation and protecting terrorist listing policies from further attack:

Commission: The problem that we have ... [is that] we are seeing hundreds of cases that we lost [sic] approaching. And we think that these cases could have been won if there was the information. But Member States say it is classified and they cannot give it to the Council ... And [so] we start from the end (the end is the court), by trying to introduce rules of the court that will allow the court to receive classified information.

GS: Presumably the Commission are hoping that re-drafting the rules will allow states to feel more confident to disclose. But ... if states are reluctant to even share [closed material] with Council at the moment in a confidential working party, what would make you think that they would share it with the court if confidential rules apply?

Commission: The fact ... that they will lose a hundred and fifty cases. And if they lose a hundred and fifty cases then the regime will fall apart (any regime would fall apart) .... Fortunately we don't have any UN listing challenges at the court right now ... If the UN is challenged it is sure ... that they will lose it and then it will have the effect of a [House of Cards].58

This threat of regime ‘collapse’ was widely shared by listing experts within the UN Security Council and powerful states outside the EU, such as the US. As one former member of the UN Al-Qaïda Monitoring Team put the impact of the ECJ’s 2008 Kadi decision:

If EU isn't going to implement, no one is going to implement. Come on, why should Africa or the Middle East implement? So you'd be left with a permanent members implementing and

54 Ibid, para. 158
56 Ibid, para. 343
57 Ibid, para 344
58 Interview with member of European Commission Legal Service, Brussels, November 2012 ('Interview M'). These comments were given before the 2013 Kadi II decision. It is unclear whether that case provides a more optimistic outlook for EU institutions.
moaning that nobody else is. What’s the point of having a ... regime like that? So these court decisions are incredibly important, they’re fundamental to survival of the sanctions regime.  

Leaked Embassy Cables reveal the extent of US government concerns about EU judicial review of terrorism listing and suggest that the US have been deeply involved behind the scenes pushing for EU procedural reform on this issue. In one Cable entitled 1267: Saving the Al-Qaeda/Taliban Sanctions Regime US National Security Adviser Susan Rice warned: ‘Bold action is needed to salvage the UN’s 1267 al-Qaeda ... targeted sanctions regime ... [which] has been seriously undermined by criticisms - and adverse European court rulings - asserting that procedures for listing and delisting ... are not adequately fair and clear’. According to another Cable:

We cannot risk losing the use of one of our few non-military coercive tools because EU courts believe that they are somehow illegitimate ... The US has an interest in actively engaging the EU to overcome the gap that is developing between us on this issue. We must support and supplement existing EU sanctions ... by sharing substantive information on our ... targets ... and comparing strategies to protect these policies from legal challenge .... Without the political will and commitment of EU leaders in the coming year, and a coordinated US interagency strategy to effect this, we will fall short of our intended mark on vital national security and foreign policy goals.

Another Cable dispatched after the ECJ’s 2008 Kadi decision stressed how EU judicial review is adversely affecting ‘USG proposals to the EU for listings and terrorist sanctions’ and suggested new methods of US-EU intelligence sharing might resolve the issue:

EU ... courts are rendering judgments that may hinder our ability to secure EU-wide designations of terrorist entities. The new problem for us is the higher standards of evidence and the judicial review of the sufficiency of that evidence, that will make the EU and its member States less responsive to our request for terrorist designations and accompanying asset freezes. As we pursue the valuable foreign and security policy tool of terrorist designations, we may need to ramp up our intelligence sharing on terrorist entities against which we seek EU action. ... We must confront the possibility that working with the Council on designations may entail enabling the EU court to access unclassified or even classified information to review the legality of the EU listing by a standard yet to be fully determined.

Such intelligence sharing has long been a key talking point in collaborative US-EU work on listing policy. One Cable - entitled EU Intelligence and Classified Information Sharing - documents a meeting in Brussels in February 2010 between US inter-agency sanctions officials and the European Commission Legal Service which aimed to identify how the EU and US could best work together to strategically offset the adverse effects of the (then) upcoming decision of the EGC in the Kadi case. In its action points the Cable states:

Intelligence and classified information sharing between EU institutions and Member States is among the most sensitive and least developed areas of EU policy and procedure, a last bastion of national sovereignty. EU level implementation of UN and autonomous counterterrorism sanctions is testing the limits of how long the EU can hold out against confronting the practical implications of handling these issues ... Given U.S. security and foreign policy equities in EU sanctions and other counter-terrorism policies, we should expand

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59 Interview with former member of the UN 1267 Monitoring Team, New York, November 2012 (‘Interview A’).
60 US Embassy Cable 09USUNNEWYORK818 (dated 4 September 2009), para. 4.
61 US Embassy Cable 09BRUSSELS616 (dated 29 April 2009), emphasis added.
63 US Embassy Cable 10USEUBRUSSELS212 (dated 24 February 2010).
U.S.-EU legal expert discussions ... addressing the institutional underpinnings necessary to preserve EU measures before their courts.64

It was against such a political backdrop that ECJ Advocate General (AG) Sharpston issued her opinion in the case of French Republic v PMOI suggesting that ‘serious consideration’ be given to amending the Court’s procedural rules to allow for ‘the production of evidence that is truly confidential’.65 In her opinion, AG Sharpston - who has previously represented the British government in national security cases before the Special Immigration Appeal Commission (SIAC)66 - outlined a broad range of reform scenarios, intimating that special advocates and closed material procedures might provide the key to resolving the intelligence-as-evidence problem.67 Her opinion - which aimed ‘to assist those who will have to engage with the question of how precisely to deal with this conundrum’68 - proved highly influential. According to one EGC judge, it really ‘pushed us to talk about these things’ and helped influence the court’s initial decision to review their rules of procedure on this issue.69

Finally, in July 2013 the ECJ delivered their long awaited appeal decision in the Kadi case on the appropriate standard of review to be adopted by the EU courts in sanctions cases.70 As discussed, the EGC had previously held the EU courts must undertake an, ‘in principle, full review’ of listing decisions that included judicial access to the underlying evidential material relied upon. The ECJ’s decision, however, overturned this approach and laid out a novel formula for handling the intelligence-as-evidence problem in listing cases. Instead of ‘full review’, the EU courts only needed one substantiated ground for listing disclosed to them for judicial review.71 In language that closely mirrors the draft procedural reforms the courts had been negotiating in private with the Commission and Council, the ECJ noted that in listing cases ‘overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned’.72 When confronted with such security-sensitive dilemmas, the court must:

... apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights.73

Just what such ‘techniques’ might mean, however, was left unclear. Beyond echoing their earlier pronouncements in the 2008 Kadi decision, the only possibility entertained by the ECJ was ‘disclosure of a summary outlining the information’s content or that of the evidence in question’.74 It would be up to the courts to ‘assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned’ would affect ‘the probative value of the confidential evidence’.75

64 Ibid (emphasis added)
67 AG Sharpston (n 65) paras. 171 - 186, 244. For discussion on this opinion see: Murphy (n 42).
68 Ibid, para. 190
69 Interview with member of the European General Court, Luxembourg, March 2013 (‘Interview N’).
70 Kadi II, (n 36).
71 Ibid, para. 130
72 Ibid, para. 125
73 Ibid
74 Ibid, para. 129
75 Ibid
The procedural reforms enabling the judicial handling of intelligence provide the missing piece to this puzzle, effectively ‘codifying the approach’ taken by the ECJ in the Kadi appeal.\textsuperscript{76} Interestingly, the initiative for EU judges to review intelligence-as-evidence originated as a proposal made by the EGC itself.\textsuperscript{77} The Commission then wrote to the Court in the context of their procedural review requesting that serious consideration be given to making the necessary amendments for handling classified material.\textsuperscript{78} On the Commission’s view, the reform process was envisaged as something fairly straightforward. First, they wrote to the EGC leaving it open to them to lead on this issue by suggesting how they would best like to handle the matter, but asking them to consider the viability of an EU Special Advocate regime and mechanisms for using closed material like those used in the UK.\textsuperscript{79} Following internal discussion and debate it was then thought the Court would formulate their specific options for reform. Finally, once the Court had made their views known, ‘it will become a Council Regulation’.\textsuperscript{80} For Commission lawyers, the reforms aimed at resolving the problem of using intelligence-as-evidence in sanctions cases – which was seen as ‘the most difficult decision of all’ for the EU Courts to grapple with following the Kadi decision.\textsuperscript{81}

But members of the EU judiciary interviewed on this issue expressed quite different understandings of the complexities involved and had very real concerns about the how the reform process ought best be handled. As one member of the EGC explained in early 2013:

\begin{quote}
We are currently in the throes of a review of our rules of procedure covering a whole range of measures. And one of the issues that has come up is the existence of the present rule which says that as between the principal parties everything has to be made available to everyone ... Although no final decision has been taken ... I think the current attitude is that we could envisage an exception to that rule being made.\textsuperscript{82}
\end{quote}

For the courts, however, this reform process was anything but straightforward. Proactively designing techniques for handling intelligence potentially compromises the Court’s role as guardian of fundamental rights, raising the thorny problem of judicial independence:

\begin{quote}
Where one is going to be formulating a set of procedural rules which are probably at the upstream stage going to involve limiting ... the procedural rights of the applicant ... it’s absolutely clear that we are going to be faced with arguments that this involves infringements of fundamental rights guaranteed by the Charter ... [So] we are going to have to be slightly careful here because we don’t want to find ourselves in a position whereby we have implicitly approved a model which is then challenged ... and we find that our hands are notionally tied - having said that this is an excellent idea and then we do something else.\textsuperscript{83}
\end{quote}

As one member of the ECJ explained, who crafts the exception is critically important: ‘I don’t want to have to design their architecture for them because I might have to ... [determine] whether it is sufficient ... [But] I am a bit nervous about people designing architecture who ... don’t realise what the implications are of judicial scrutiny’.\textsuperscript{84} If the process was left for the executive to resolve the end result would likely violate fundamental rights. But being too

\textsuperscript{76} Cuyvers (n 43).
\textsuperscript{77} ‘The Court made a suggestion: is this worth looking into? And so the Commission began looking into it’: Interview with member of the European External Action Service (EEAS), Brussels, March 2013 (‘Interview O’).
\textsuperscript{78} Interview M.
\textsuperscript{79} Ibid
\textsuperscript{80} Ibid
\textsuperscript{81} Ibid
\textsuperscript{82} Ibid
\textsuperscript{83} Interview N.
\textsuperscript{84} Ibid
\textsuperscript{85} Interview with member of European Court of Justice, Luxembourg, March 2013 (‘Interview P’).
involved in designing this exception could unwittingly place the courts in a conflicting and constitutionally compromising position.\textsuperscript{85}

The reforms were also difficult for the courts because they foregrounded problems of multilateral intelligence sharing. As one EGC judge put it: ‘When the Commission takes a decision, does that mean that all members of the Commission are going to have the right of access to that material, or their Chef du Cabinet? How is the security clearance going to be done and so on. You can see all these problems’.\textsuperscript{86} Providing underlying material to the Council was seen as even more problematic because it would likely require confidential material to be shared amongst the executives of 28 EU Member States. This threat of disclosure was a critical determinant for sanctions officials interviewed in the EEAS, who predicted that any reforms requiring closed material to be shared amongst the Council would be vociferously opposed by the UK and France – who, as P5 members, have long guarded UN Security Council prerogatives within the EU.\textsuperscript{87}

(ii) Reassembling the Courts and the Epistemology of the Security Mosaic

Given these complexities, how did the EU courts actually end up forging these amendments? What techniques enabled these changes to unfold and what are their likely governance effects? How was a court vested to protect fundamental rights so readily enlisted to build, what is in effect, a legally authorised state of exception? And why - when the Kadi case has been ‘one of the most discussed judgments in ECJ history’\textsuperscript{88} - have legal and security scholars paid so little attention to the potentially far-reaching consequences of these reforms?

As detailed in the introductory chapter, most literature on the Al-Qaida sanctions focuses on the normative conflict between UN counterterrorism law and EU human rights law epitomised in cases like Kadi and how this conflict supports competing claims about the structure of global law. But the tension these reforms aim to resolve is more than just a clash of competing norms. I argue that it is also a problem of the conflicting temporal dynamics embedded in the list: one, reactive, evidence-led, disclosure-driven and based on a ‘past-present axis’ and the other proactive, intelligence-led, secret and based on a ‘present-future axis’.\textsuperscript{89} Using intelligence-as-evidence entangles pre-emptive and retrospective logics together and produces this list as non-synchronous or ‘asynchronous’ law.\textsuperscript{90} And it is these divergent legal temporalities and their disordering capabilities that the procedural reforms seek to manage. Consider how one member of the ECJ explained the distinction they thought ought to be drawn between intelligence and evidence to resolve problems generated by the list:

I want to make a distinction between intelligence/surveillance material and material underpinning a decision that is going to be susceptible to judicial review. In terms of

\textsuperscript{85} This judicial uncertainty was the focal point of resistance by a number of influential legal and human rights advocacy organisations – including the Law Society and Bar Council of England and Wales, Justice and Liberty - who were in private correspondence with the EU courts in an effort to persuade them to engage in public consultation on the proposals. See, variously, Letter to the President of the Court of Justice of the EU (21 May 2013); Letter to the Chairman of the Bar Council of England and Wales (18 June 2013); Letter to the President of the Court of Justice of the EU (22 July 2013) [Copies with Author]. This group argued that the proposals could have ‘a serious substantive impact on the rule of law and rights of defence, which may affect the validity and legality of the amendments’ (letter dated 22 July 2013).

\textsuperscript{86} Interview N.

\textsuperscript{87} Interview O.

\textsuperscript{88} Murphy (n 42) 115.


\textsuperscript{90} Delmas Marty (n 4) 119 – 132.
surveillance, anything you can get your paws on is good. You evaluate its credibility, its weight etc. But you have not got problems about admissibility or challenge. Because... surveillance material is kind of like a sponge ... you get [it] in and the problem is then working out what is right, what is wrong, what is false lead, what is deliberately misleading.

I think ... that is sharply to be distinguished from: ‘I am going to take an executive decision, which is going to have certain adverse consequences for that person. I know before I take that decision ... that the system under the rule of law of which I’m part is going to afford that person the right to challenge my decision’.  

If I know all of that, then I need to be asking myself, upstream of taking the decision, ‘What is the material on which I’m going to base that decision’? And I need to ask ... whether I think that material will stand up scrutiny. And at that moment I mustn’t confuse which hat I’m wearing. It is not the same as looking at surveillance material and deciding that X is probably a bad egg and needs watching. It’s not the same, ... it’s a completely different function ...

The problem is: [this] distinction ... is one that needs to be accepted. And, therefore, needs to inform what goes in upstream into the process of making the decision. You can’t unmake the omelette starting from this end.  

Demanding the demarcation of intelligence and evidence as something that ‘needs be accepted’ to resolve the problem tells us that the opposite is, in fact, likely to be the case. For the judiciary, the conflation and use of intelligence-as-evidence is driving normative conflicts in this domain. We are told that this problem should be properly dealt with by the executive further ‘upstream’ - and the Ombudsperson experiment discussed in the previous chapter is certainly one effort in that direction. But the fact these reforms have been initiated, co-designed and adopted by the judiciary suggests that core principles of the EU justice system are also being altered to ‘unmake’ these conflicts through the courts.

When such problems arise in academic accounts they are usually framed in terms of secrecy and posed as something that can be remedied by the transparency of constitutional law. The locus of the problem, we are told, is one of visibility. If only the ‘gist’ of material hidden behind the classified curtain could be revealed, then a proper defence could be mounted - either in national or regional courts or before some new supranational review mechanism - and the underlying normative conflict resolved.  

But intelligence and evidence don’t just differ in degrees of visibility. They are also distinct knowledge forms with quite different epistemic and temporal qualities. Though hinged together here in the singular format of the list, these are dynamics that cannot easily be made commensurable. They move in different directions and speeds, carrying radically

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91 Interview P.
93 See, for example: Cole, Fabbrini and Vedaschi (n 12).
94 A and others v United Kingdom App. No. 3455/05 (ECHR, 19 February 2009). In this case the Strasbourg court held that individuals ‘must be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate - that is, the ‘gist’ of the underlying allegations (para. 220).
95 For some (like Fabbrini and Hollenberg) the answer lies in decentralised review by domestic courts with mechanisms in place for reviewing secret intelligence without disclosure. For others (like Baehr-Jones) only new mechanisms and universal standards for reviewing intelligence at the UN level can assuage US concerns about handing the secret evidence underneath the Al-Qaida list for review. See, respectively: Hollenberg (n 49); Federico Fabbrini, ‘Global sanctions, state secrets and supranational review: seeking due process in an interconnected world’ in Cole, Fabbrini and Vedaschi (n 12) 284; Baehr-Jones (n 92).
divergent assumptions about the proper relation between suspicion and proof. As the EGC held in the 2010 Kadi decision: ‘the assessments in question here are complex and require an evaluation of the measures necessary to safeguard international and internal security. They require the know-how of the intelligence services and the political acumen which, in the Council’s submission, only governments possess’. Thus as one ECI member explained when discussing the review of listing cases, using intelligence-as-evidence demands legal standards and forms of reasoning altogether more pre-emptive in orientation:

If you say to me this person was involved in violent anti-government demonstrations that is an assertion of fact and... I’m going to want something that I can recognise judicially as evidence... because your building this part of your case on an allegation of a specific fact. If you say to me, ‘The material suggests that they’ve been involved in a number of groups and therefore the inference is that they represent [or are] probably thinking of violent Jihadi tactics’... Well at that stage its not that they were a member of that demonstration. Its much more a chain of little scraps, little mosaic scraps which have led you to the inference. [And] there... I’m going to have a problem, aren’t I? Because I’m not a security agent and I don’t have the training to put it together?29

The mosaic form is an increasingly pervasive feature of contemporary security governance, as discussed earlier in the chapter. It is grounded in a ‘theory of informational synergy’ that assumes that ‘disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information’. From e-borders and targeted killing to global surveillance and datamining initiatives, uncertain future threats are identified and rendered actionable through informational fragments and otherwise innocuous details associated together in novel ways to bring emergent dangerous subjects into view. This mosaic presupposes a very different economy of knowledge and spatiotemporal dynamics than conventional forms of inductive reasoning and logics of proof. As Louise Amoore observes in her analysis of biometric border policing techniques, ‘the lines of association that are drawn here are not linear and causal but temporally and spatially fractured’. For Claudia Aradau the mosaic form is best thought of as a kind of ‘divination rather than detection’ and its epistemology ‘has more in common with the “pseudo-rationality” of astrology than the method of clues’ usually associated with the detective work of intelligence analysis.

But for most security scholars the mosaic’s temporal and epistemic logics remain something exogenous to the law. According to Claudia Aradau and Rens van Munster, as ‘computation of the future... become[s] decisional’ under contemporary conditions of precautionary risk, it becomes untenable for courts to determine liability in terrorism cases through ‘careful

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96 Justice (n 33): 236: ‘It is often assumed that, secrecy aside, the evidence in... [SIAC] cases is no different from that put forward in an ordinary criminal trial or civil hearing. Nothing could be further from the truth’.
97 Kadi 2010 (n 30) para. 106.
98 Interview P.
100 Amoore (n 9).
103 Aradau (n 27).
consideration of evidence’ and the use of ‘burdens of proof’. Fighting terrorism through techniques like administrative detention thus reveal ‘the inadequacy of law to deal with situations of precautionary risk’. ‘What counts’, they suggest, ‘is a coherent scenario of catastrophic risk and imaginary description of the future’.105 In her analysis of SIAC proceedings in the UK Louise Amoore makes a similar argument. Whilst astutely observing how decisions at the border are increasingly ‘drawn through [the] … joining of dots and lines of associated elements’, she argues that ‘decisions on the assembly of the mosaic’ remain ‘untraceable and unrecognizable in the conventions of legal evidence and burdens of proof’.106

And yet here we find the mosaic form embedded right at the heart of the EU justice system guiding the production of legal truth and being used to explain how intelligence-as-evidence is transforming judicial functions. Law is not contained in some privileged rampart here - standing above the turbulent sea of pre-emption, receding in the face of exception107 and incalculable risk108 or set apart from the security practices it seeks to temper. Rather, legal practices and techniques are being put into motion and recalibrated at the most granular of levels so that courts can assess uncertain future risks, possible associations and inferences as judicial evidence.109 Judicially reviewing this body of non-synchronous law brings retrospective evidential standards and pre-emptive security practice into co-productive relation,110 enlisting the judiciary into the radically uncertain process of identifying unknown future terrorists without the training to put the pieces of the security mosaic together.111

These procedural changes may well end up allowing a degree of secret material to be made available for judicial assessment in listing cases and rendering visible some of what has hitherto been kept hidden.112 But core problems associated with non-synchronicity will undoubtedly persist. How can judges decide whether listing decisions are justified by assessing both past acts (using evidence sufficiently detailed to close the gap between suspicion and proof) and radically uncertain future possibilities (assembled from ‘little mosaic scraps’ organised according to pre-emptive logics of potential risk and threat)? How can the proportionality of action taken ‘not in response to but in anticipation of wrongdoing’ be judicially assessed with any kind of legal certainty?113 When can suspicions from past actions become (or cease to become) future threats sufficient to warrant listing and what possible standard of proof (if any) could apply to such non-quantifiable, possibilistic claims?114

Conventional forms of legal knowledge production grounded in inductive reasoning and linear temporality are destabilized and reordered when confronted by a list that governs the

105 Aradau and van Munster (n 9) 106.
106 Amoore (n 9) 85. See, however: Amoore (n. 14) - where the confluence of risk and juridical is underscored.
107 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (University of Chicago Press, 2005)
12.
109 The opinion of Advocate General Bot in the Kadi II appeal is instructive in this regard: ‘the fight against terrorism cannot lead democracies to abandon or dent their founding principles, which include the rule of law. However, it does cause them to make the changes to them that the preservation of the rule of law requires’, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission, Council and United Kingdom v Kadi [2013] Nyr, Opinion of AG Bot, para.6.
111 On the relation between the mosaic form and the ‘emergent subject’, see: Amoore (n 9) 79 - 104. For examples of critical security scholarship highlighting this co-productive relation, see: Marieke de Goede and Beatrice de Graaf, ‘Sentencing risk: temporality and precaution in terrorism trials’, (2013) 7(3) International Political Sociology 313; and Krassman, (n. 13).
112 Under the principles laid out by the ECJ in the 2013 Kadi appeal decision, for example, only one substantiated ground must be provided to justify a listing decision: Kadi II (n 36) para. 130.
113 Zedner (n 9) 198.
114 Cuyvers (n 43) 1770. ‘Possibilistic’ refers to the important work of Louise Amoore on this issue: Amoore (n. 9).
contingencies of the future by acting on the present under epistemic conditions of ‘objective uncertainty’.\(^{115}\)

Unsurprisingly, the revised rules are vague about how judges will actually perform their judicial review functions under heightened conditions of epistemic and temporal complexity. They merely provide the court with broad \textit{ad hoc} discretion to assess listing decisions by weighing up the different interests involved. ‘These are’, as Cuyvers observes, ‘highly factual and complex questions of a rather executive nature … [that] make it difficult for the EU courts to set a clear standard for review’.\(^{116}\) Yet rendering legal standards problematic, as Cuyvers suggests, might be a rather optimistic assessment. According to Lord Hoffmann, it is questionable whether standards play any meaningful role when judges are required to assemble fragments and ‘little mosaic scraps’ as evidence of uncertain future threat:

\[\ldots\text{the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk}…[This] cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment.\(^{117}\)\]

The more profound effects of these procedural reforms are therefore not in what they may or may not make visible, but how the effort of doing so serves to reorder or modulate legal institutions in alignment with broader security rationalities and the epistemologies. By more deeply embedding pre-emptive logics and decision-making techniques into the EU legal system I argue that these reforms stand to change the temporal ordering of the legal system itself by requiring judges to use more associational, inferential practices oriented towards countering future risk. The application of conventional standards of proof, retrospective modes of legal reasoning and the delivering of public judgments are all made more difficult to sustain when the courts are concerned with assembling chains of ‘little mosaic scraps’ and risk fragments to evaluate whether individuals are ‘associated with’ global terrorism.\(^{118}\)

My point here is not to claim that law is being replaced by security or evidence supplanted by intelligence. It is that in bringing intelligence and evidence (and their divergent legal temporalities) together, the list functions \textit{jurisgeneratively} - stimulating new problems and recombinant legal practices that were not possible before. The list is changing, at a very granular level, the ways judges comes to produce ‘legal truth’ in concrete cases and is taking legal reasoning into the very uncertain terrain of the contemporary security mosaic. These effects are not the inevitable end result of law’s decline in the face of pre-emptive security or the rise of risk in late modernity - they are more site-specific and provisional than that. My analysis shows judges in the EU courts doing their best to try and pragmatically resolve a particular legal problem. But doing so requires them to grapple with the radically different episteme of the mosaic that is stimulating changes in the ways they reason and judge.

\(^{116}\) Cuyvers (n 43) 1772-3 and 1774.
\(^{117}\) Rehman (n 66) para. 56 (emphasis added). The case concerned the use of intelligence-as-evidence in Special Immigration Appeals Commission (SIAC) proceedings, which is comparable and relevant for the current context.
\(^{118}\) As detailed earlier, one of the key objections of the British government to these proposals concerned the inability of security services to vet EU judgments for unwarranted disclosure of security-sensitive material - see: Liddington (n 47). In 2013 the UK Supreme Court held that it was appropriate to hear evidence in closed session for the first time on appeal, with serious misgivings expressed by the judiciary. \textit{See Bank Mellat v HM Treasury} [2013] UKSC 38.
As Pat O’Malley points out, analysing risk governance techniques means ‘attending to their natures as the products of contingency and invention’ - not black-boxing them as ‘the effects of an inescapable “logic” of modernity’, as theorists like Ulrich Beck suggest. 119 Similarly, for Foucault, understanding security governance requires analysis of ‘the point[s] where power surmounts the rules of rights that organize and delimit it and extends itself beyond them’ and ‘invests itself in institutions’ and procedures that are then ‘displaced, extended and modified’. 120 Only by mapping how governmental practices emerge, transform and cohere around particular problems at the microphysical level can we properly understand how new forms of power and authority are formed. Similarly, my analysis of this reform process shows how this list works to stretch the terrain of exceptional security politics by reordering established rule of law principles and methods of legal knowledge production.

As discussed earlier in our analysis of the Ombudsperson experiment most scholarship posits law and exception in antithetical terms. States of exception are represented as ‘lawless’ and forged by transferring the power of security intervention and determinations of guilt or innocence from the established conventions of the juridical order to the realm of arbitrary sovereign decision. 121 These reforms highlight the flaws of sweeping claims that explain exceptional politics as ‘suspension[s] of the juridical order itself’. 122 As detailed in Chapter 3, laws and norms are not locked in a zero-sum game but are hybridised through the problematics of government. 123 Or as Foucault put it, law and legal institutions don’t fade into the background under conditions of security but instead come to operate ‘more and more as a norm’ and are ‘increasingly incorporated into a continuum of apparatuses’. 124 These reforms help to show how exceptional governance is made durable through the ‘novel recombination[s] of already existing . . . mechanisms and modalities of power’ and inscribed through the concrete re-articulation of legal practices in accordance with pre-emptive security logics, rather than an abstract movement away from ‘the Law’. 125

Members of the EU judiciary interviewed about these procedural reforms, for example, downplayed the secret review of intelligence-as-evidence by likening it to existing procedures for reviewing legally privileged communications in competition law disputes:

In reality we have, in many contexts, to have discussion with the parties about how to treat various items of evidence in all sorts of situations, [including] commercially confidential material. And in that connection I don’t see why one shouldn’t have discussions as to whether, for the purpose of this particular case, looking at that material how it should be handled in order to preserve confidentiality. 126

Reference was made to procedures that were developed out of earlier EU case law on the confidentiality of documents subject to legal professional privilege. 127 If companies claimed
that written communications were privileged and European Commission antitrust inspectors disagreed, the disputed documents could be sealed and sent to the EGC for determination:

The procedure was improvised. Ok, ... we have problem. Here is a stack of documents. They [ie, the company] are saying this is legal advice and is covered. The Commission is saying, ‘Our inspector wants to see it. We will take those documents and we will ... both watch [while] we put it into an envelope [and] seal it.’ The envelope goes to the court. The court opens the envelope and it assesses the content and nature of each document.128

For the judiciary this example highlighted how the EU courts had previously developed pragmatic techniques for resolving confidentiality problems that parallel those of the present. In this way, changing the rules of the court to handle intelligence-as-evidence could be framed as constitutionally insignificant, and simply ‘a more extreme case of what we have to do in many cases [already] where one has stock market sensitive material’.129

Judges are professionally predisposed to reasoning by analogy. But real differences between assessing commercially confidential material and intelligence-as-evidence are quietly subsumed when these procedural innovations are discursively sutured together in this way. Reviewing privileged communications and intelligence-as-evidence might both require confidentiality. But because of the mosaic epistemology of the list, reviewing intelligence-as-evidence requires temporally complex processes of contingent legal knowledge production. The assessment of privileged communications, moreover, easily fits within the existing judicial review framework. But the assessment of intelligence-as-evidence alters the review process itself in significant ways. And whilst both issues engage questions of fundamental rights, they do so carrying profoundly distinct consequences. Commercially confidential material might prove important in securing a company’s competitive advantage. But listing information is sometimes procured through torture.130 And so when judges assess it without knowledge of its source, they risk embedding torture material within the EU justice system. As Lord Bingham observed in the UK case of A and Others: “despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been “established”.131

When the procedures for reviewing legally privileged communications and intelligence-as-evidence are conflated this way, the judiciary helps to bring preemptive security logics and EU justice principles into practical alignment. Such discursive moves perform important legitimation and legal assemblage work by linking divergent objectives and ‘smoothing out contradictions so that they seem superficial rather than fundamental’.132 The proliferation of exceptional governance is often explained as a ‘migration of anti-constitutionalist ideas’ from the exceptional core (eg, the US, UK or UNSC) to the rule-of-law periphery (such as the EU).133

128 Interview P.
129 Interview N. By way of contrast, the introduction of closed material procedures in the UK (through the Justice and Security Act 2013) was subjected to considerable public and parliamentary debate due to the risks these changes posed to the rule of law, principles of natural justice and the protection of fundamental rights.
131 A and others v Secretary of State for the Home Department (No 2) [2005] UKHL 71 (para. 59, in dissent, emphasis added). On the risk of relying on torture material as a result of these procedural changes, see: Cuyvers (n 42) 1776.
133 As suggested in Cian Murphy, ‘Counter-terrorism and the Culture of Legality: The Case of Special Advocates’. Working Draft. SSRN, 21; following Kim Lane Scheppele, ‘The Migration of Anti-constitutional Ideas: the Post-9/11 Globalisation of Public Law and the International State of Emergency’ in Sujit Choudry (ed.) The Migration of
But these reforms suggest that when it comes to the global war on terror legal agency is much more distributed and multidirectional than that. Just as the Monitoring Team and Ombudsperson examined in earlier chapters embedded and stretched this form of law in novel ways by trying to resolve particular problems of the List, these reforms show the EU courts assembling this domain of global law and exceptional governance in important ways by attempting to ameliorate its worst effects.

Dis-located Law: Taking Listing Decisions Beyond the Vanishing Point of Review

The preceding section examined how the list’s non-synchronous dynamics generate conflicts and introduce complexities into the EU judicial review process. Temporal shifts always enact corresponding spatial changes because ‘time’ and ‘space’ are integrated and inseparable dimensions in legal governance constellations. As Valverde observes ‘different legal times create or shape legal spaces and vice versa ... [and] the spatial location and spatial dynamics of legal processes in turn shape law’s time’.

The challenge for global sociolegal scholarship then is thinking through the ‘temporal and spatial dimensions of governance at the same time’, rather than reifying time-space binaries, privileging one dimension over the other or representing different governance scales as mutually exclusive.

This section accordingly analyses how the spatial dynamics of judicial review are challenged and reordered through the temporalities of intelligence-as-evidence. Administrative ‘decisions’ are almost always the focal point of judicial review, such that it is often claimed that ‘absent a “decision”, judicial review will not lie’. EU annulment proceedings in sanctions cases are similarly decision-orientated and directed at the legality of EU institutional acts. Grounds of administrative legal challenge are therefore usually inextricably tied to the nature and quality of executive decision-making. So what happens when this constitutive relation is substantively emptied out or severed? It is this problem of (dis)location of the listing decision that is explored in the remainder of this chapter.

We have already discussed key divergences in trying to resolve the intelligence-as-evidence problem. To reiterate: one approach (endorsed by the ECJ’s 2008 Kadi decision) suggests that closed material underneath the list should either be declassified or transformed so it can be used as evidence in judicial proceedings. The other approach (implicit in the recent procedural reforms) suggests that EU judicial procedures should themselves be changed to enable reliance on closed material without risk of disclosure. Crucially, both approaches assume that the material underpinning UN listing decisions is actually held by the 1267 Sanctions Committee and so could potentially be disclosed to the European Council, Commission and Courts. But on closer analysis, this assumption - of there being some kind of ‘upstream’ space of substantive assessment or decision-making that reviews the merits of individual listing decisions - appears to actually be unfounded.

(i) Emptiness of the Sanctions Committee Decision-Making process

In his 2013 opinion in the Kadi II appeal Advocate General Bot of the ECJ claimed that ‘the listing and delisting procedures in the Sanctions Committee allow for a careful examination of whether listings are justified and whether or not it is necessary to maintain them’.

Constitutional Ideas (Cambridge University Press, 2007).

135 Ibid, 36
136 Fordham (n 17) 138.
138 A.G. Bot (n 109) para. 86.
that this claim is little more than blind assertion. It shows the extent of mainstream thinking about the Law of the List and just how far removed it is from listing practices.

The UN 1267 Sanctions Committee does not access the classified material that purportedly underpins its own listing decisions. Instead, it is standard practice of the Committee to simply approve proposed designations provided to them by states using a confidential ‘no-objection’ procedure - where ‘if no State has opposed a listing proposal (or has put it “on hold”) within 10 working days, the individual or entity will be added to the list’ that precludes any substantive consideration of the grounds. Whilst the Committee appears to require states to structure their designation requests in a particular format - including basic identifying information and generic allegations of terrorist association (the ‘statement of case’) - the underlying material supposedly supporting the allegations is neither collectively presented nor substantively assessed. As one former member of the Monitoring Team stated in relation to this issue:

> Intelligence sharing always has a limitation as to the level of trust between states. You are never going to get a degree of intelligence sharing within fifteen members, random members more or less, of the international community, which anyone is going to regard as able to protect a secret ... Any idea that the UN could keep a secret let alone share one, I mean, is ridiculous. It just will never happen here ... We've had very bad experiences of people giving intelligence, so-called, to the Security Council, like in the run up to the Iraq war. It's not a mechanism that works, [and] quite frankly ... should be avoided.

(ii) Speculating from Inside the Lacuna: the UN 1267 Office of Ombudsperson

In light of the Committee’s ‘rubber-stamping’ process, some commentators argue that the Ombudsperson mechanism examined in the previous chapter helps fill this decisional void. Whilst Eckert and Biersteker observe that ‘a thorough analysis of all available information is critical for due process’ and securing access to information has been a ‘significant challenge’, they nonetheless argue that ‘with the creation and enhancement of the Office of the Ombudsperson ... the rights of individuals to be informed, have access to, and be heard, appear to have been addressed’. There is a presumption that the Ombudsperson is proximate to the source material underneath the list. As one member of the Commission Legal Service explained in interview: ‘the Ombudsperson is the closest to the decision-taking and therefore ... best placed to make the review ... The review that she does is ... the best one a listed person can have ... We don’t pretend that the Commission makes a more substantive review than the Ombudsperson. It’s the other way round.’

As detailed in the previous chapter, the Ombudsperson also claimed that her decision-making process is fair because it enables listed individuals to know the case against them. These claims to fairness, however, come with two important caveats. First, ‘[W]hen I say that I believe [listed individuals] have been told about the case, it’s the case against them such as

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140 Emmerson (n 130).
142 Interview A.
144 Interview M (emphasis added).
145 For a detailed analysis of the problems associated with the Ombudsperson’s delisting processes, see Sullivan and de Goede (n 125) and discussion in chapter 3.
has been given to me.’

And she acknowledges that she is given is often the summary of reasons compiled by Committee and Monitoring Team ‘and nothing more’. Second, and more importantly for the purposes of this chapter, the Ombudsperson does not actually review the original listing decision, as discussed at length in the previous chapter. For the Ombudsperson reviewing listing decisions would ‘be impossible ... in this context unless you have all the information the agency had that made the decision’.

Bilateral agreements have certainly been forged with particular states for accessing closed material. But the Ombudsperson still has no secure arrangement in place with the US, which is by far the most prolific designating state and the one that presumably retains the most underlying material. And the states with which she does have agreements remain selective about what material they provide to her. ‘Even then’, as one former Monitoring Team member notes, ‘she’s not going to go and interrogate the sources, she’s not going to go and look through the files.’ That is, there’s no assessment of the veracity and reliability of the incriminatory material that supposedly underlies individual list entries. In short, claims that the Ombudsperson fills this gap by undertaking a substantive assessment of the underlying material are problematic and difficult to sustain. As Hollenberg concludes in his analysis of this issue: ‘it is difficult to see how the problem of not sharing confidential information underlying an individual’s designation could ever be solved at the UN level’.

(iii) EU Listing Decisions and the Politics of Executive Box-Ticking

If the material that supposedly justifies the listing decision is not held or assessed at the UN level by the Sanctions Committee or Ombudsperson then it cannot be passed from there to EU executive institutions implementing the list. Contrary to popular assumption, there is no movement of underlying material from supranational ‘core’ to regional ‘periphery’. The same kind of empty decision-making taking place in the UN is replicated, in exacerbated form, in the EU.

Leaked US Embassy cables highlight the extent of this baselessness. One cable documents a February 2010 meeting between US Justice, Treasury and State department officials and senior civil servants from the EU Council and Commission on the dangers that EU judicial review poses to UN Al-Qaeda listing. A key ‘area of high risk’, according to Council lawyers, is the ‘multiple cases involving UN designations’ before the EU courts where ‘EU institutions have little or no [supporting] information’. Other cables between Italian security officials and the US Consulate in Rome explain that ‘on behalf of the US, Italy had proposed numerous candidates for designation’ on the 1267 list ‘about which they knew little’. In the event of EU legal challenge Italy will have difficulty justifying these listing decisions ‘unless they get ... [background] information’ from the US government – even though designating states are ‘generally expected to have reviewed the underlying evidence’ before nominating people to be targeted by the list.

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146 Interview with Kimberly Prost, former UN 1267 Ombudsperson, New York, November 2012 (‘Interview K’, emphasis added). I refer to Ms Prost as the Ombudsperson here despite the fact that her mandate expired in July 2015. The position is currently held by Ms. Catherine Marchi-Uhel.
147 Ibid
148 Ibid
149 Interview A.
150 Ibid
151 Hollenberg (n 49) 63. See also: Forcese and Roach (n 92).
152 Ginsborg and Scheinin (n 139) 18.
154 US Embassy Cable 09ROME652 (dated 9 June 2009).
155 Emmerson (n 130) para. 26.
EU case law on terrorist listing and interviews with key European actors provide further support to the argument that EU listing procedures are bereft in substance. In the 2010 *Kadi* decision the EGC frankly acknowledged that ‘at the hearing, the Commission confirmed ... that it did not have any of the evidence in question’ and that ‘a request for the production of evidence must, in its view, be made to the United Nations States which hold it’. 156 Again, on appeal, the ECJ noted that ‘the Commission was not ... put in possession of evidence other than [the] ... summary of reasons’, 157 before setting out the new review standard they thought ought to be applied in listing cases.

Trying to get underlying information out of the Al-Qaida Sanctions Committee, according to one member of the Commission Legal Service, was ‘very difficult’: ‘it takes a lot of time to get a reply and the reply is telegraphic. Most of the time, there is nothing.’ 158 On the rare occasions when information is forthcoming, the Commission only sees redacted versions of documents at best. Sources and methods used to obtain information remain unknown, posing problems for EU institutions bound to refrain from relying on torture material. 159 In sum, the Commission ‘doesn’t have any institutional role when it comes to classified information. We have access, now and then, ... [but only] because there is an interest from one of the states to win a case. Otherwise we wouldn’t have *any* access at all’. 160 Another official interviewed from the European Council confirmed that ‘there is no dossier of justifying information’ supporting Al-Qaida listing decisions or any kind of substantive decision-making taking place within the EU. Instead, listing decisions are wholly taken within the capitals of key Member States who only share information bilaterally with their trusted partners. 161 According to this official, if the EU Courts keep pushing to see something resembling a proper decision ‘they will not find it’. Such pressure will more likely lead to ‘abandon[ing] the use of targeted sanctions as a [counterterrorism] tool’ altogether. 162

It is precisely this kind of empty decision-making that has confounded the EU judiciary when reviewing terrorist listing cases and driven them to overturn the implementation of UN listing decisions and try and improve EU listing procedures. As a result of the ECJ’s 2008 *Kadi* decision, for example, EU institutions could no longer simply automatically implement the Al-Qaida list into the EU legal order. Instead, they were to undertake an independent assessment of their own to determine whether their implementation was consistent with fundamental rights. In April 2009 a new Council Regulation was introduced to change European listing practice from one of ‘automatic compliance’ to ‘controlled compliance’. 163 Individuals or groups added to the list were to be sent ‘without delay’ a copy of the Statement of Reasons and invited to express their views on the listing decision. The Commission were then obliged to take into these views into account, as well as the opinion of an advisory committee of experts from the Member States, before taking the final decision to designate them on the list. 164

This procedure appears to facilitate some kind of independent EU decision-making but in practice it has continued to remain elusive. One Embassy Cable documenting a 2009 meeting between the US Mission to the EU, Francesco Fini (of the former EU Council Secretariat

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156 Kadi 2010 (n 29) para 95.
157 Kadi II (n 36) para. 110.
158 Interview M.
159 *Ibid*
160 *Ibid*
161 Interview with member of Council of the European Union, Brussels, March 2013 (‘Interview Q’).
162 *Ibid*
164 Those who were already on the EU list implementing Resolution 1267 prior to the *Kadi* judgment were also empowered to ask for a statement of reasons and invited to submit representations that the Commission must take into account before taking their final decision on continued designation.
Directorate General for External and Politico-Military Affairs) and Richard Szostak (of the Council Legal Service) recounts how this novel EU listing procedure was explained to US officials:

Fini and Szostak insisted that the Council would never reject a UN decision, since any Member State obstructing UN sanctions would have to defend itself directly in New York and would not have recourse to the EU de-listing process. In their view, the EU would limit its objections to requests for additional information from UN institutions and Member States. Such exchanges would address EU concerns (e.g., factual inaccuracies), ‘without putting the UN in a difficult situation’.165

Limiting decision-making to requests for basic factual information and fettering discretion because of the political ‘difficulties’ this might pose for the Security Council is quite removed from what is usually thought of as lawful administrative decision-making. The flaws in this procedure were made plain in 2010 when the EGC annulled the Commission’s renewed decision to freeze Mr Kadi’s assets. The Court held that this EU ‘decision’ was patently inadequate and rights-compliant ‘only in the most formal and superficial sense’ because the Commission ‘in actual fact considered itself strictly bound by the Sanctions Committee’s findings and therefore at no time envisaged calling those findings into question in the light of the applicant’s observations.’166 For the Court, the new listing procedure underscored, rather than remedied, the fundamental emptiness of the situation. Following this decision:

... the Regulations broadly remained in place, but now sort of slightly more had been done by way of explaining what had happened. Though the peculiarity is: in what way is it relevant for the Council to be explaining what someone else has done? I mean what does that add to the validity of the legal exercise that the Council, or the Commission, goes through before putting someone on the list?167

An EGC judge involved in this decision explained the Court’s approach in the following terms - reproduced at length, because it’s a rare instance of a judge candidly explaining (outside the confines of formal judgment) the impetus for their decisions in terrorist listing cases:

One of the peculiarities about the situation that was created as a result of the post-9/11 legislation adopted by the EU was that ... it provided ... that the listing of someone by the 1267 Committee was a sufficient basis for the UN to require states under Chapter VII ... to take certain action vis-à-vis those individuals. And the Member States, through the Regulations in question, ... did precisely that. So when in Kadi the issue arose: ‘Well, what was the material that on the basis of which the Council had made its decision to put someone on the list?’—the situation wasn’t one in which it had applied its mind to the underlying material that had led the 1267 Committee to impose the sanctions ... There was no sort of looking at the evidence. It was merely, in its express terms, there was an external obligation to take these measures against these people once this factual condition is fulfilled: [namely] that X’s name appears on the list established by the United Nations.

... I think many of the commentators slightly misunderstood what we were saying in our [2010] judgment. Effectively what we were saying was: ‘We are here as the Administrative Court of the European Union whose task is review the legality of acts of the EU institutions. To do that job properly what we have to do is actually have a look to see what the institutions have, in fact, done and to see whether that accords with whatever legal constraints they may be under’. And from that point of view, what the Council did is effectively no more than simply say, ‘Well where is Mr Kadi’s name? Yes, we see it. It’s on the list. Tick box one … no other boxes to tick. Well that’s it’... The issue wasn’t ... whether we can or can’t review

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165 US Embassy Cable 09BRUSSELS1524 (13 November 2009). Fini is now Head of Sanctions at the EEAS.
166 Kadi 2010 (n 30) para 171.
167 Interview N.
decisions of the Security Council - we clearly can’t, not in any normal sense of review ... This actually went to the *legality* of the base regulation itself: namely ... [does] a measure of this type ... nonetheless require something further beyond the mere box-ticking exercise? ... [it was] the legal regime set up by [the EU Regulation] - which did no more than require that box-ticking process - [that] was arguably the *real vice* in that case.\(^{168}\)

This encounter succinctly highlights some of the problems faced by courts when trying to judicially review global security laws with complex spatiotemporal dynamics. We can see the EU judiciary looking back here to the executive act implementing the Al-Qaida list and rightly asking for the evidence relied on to arrive at that decision, as per their mandate as EU Administrative Court. But what they found was that ‘the decision’ was not really there at all and so ‘there was no ... looking at the evidence’ in the conventional sense. The mosaic method for putting someone’s name on the list had effectively shifted the ‘source’ of decision elsewhere. The non-synchronous and dis-locating dynamics of the list are, in other words, mutually constitutive processes. What’s left for the courts to review is nothing other than a *pro forma* ‘box-ticking exercise’ which enables EU institutions to exercise coercive control over listed individuals without any real consideration as to why.

Unsurprisingly, this situation was viewed by the Court as an intolerable exception in a polity based on the protection of fundamental rights. The quote from the EGC judge above also suggests that the judiciary objected to the loss of power and control to properly determine the issues brought before them as a result of the Security Council’s counterterrorism policies. Yet as even this judge acknowledged, the solution proposed in the case (full substantive review) was optimistic and provisional. Dis-location was seen as an enduring feature of the list and a core problem ‘we are going to have to come back to ... in the context of *Kadi II*, and possibly post- *Kadi II*, when we are saying: ‘Well, what *precisely* is it that the Council is doing? On what material is it going to have to be acting and how then is this material going to be handled?’\(^{169}\)

(iv) *What precisely is it that the [Courts] are doing?*

When the *Kadi II* appeal judgment was delivered in July 2013 the ECJ’s proposed solution to this problem was made clear. Listing decisions were to be re-located by the Court enacting a uniform standard of review applicable to both UN and EU sanctions cases. The case was received as a victory for EU transparency over UN Security Council secrecy. It underscored the unlawfulness of empty decision-making by affirming that EU institutions are ‘under an obligation to examine, carefully and impartially, whether the alleged reasons are well-founded’, taking into account exculpatory material or evidence provided by listed parties and even by seeking information from the Al-Qaida Sanctions Committee or relevant Member States if required.\(^{170}\) Following *Kadi II*, the EU courts are now obliged to review ‘the factual basis of listings, so the relevant authorities will have to provide sufficient evidence to support the reasons given for listing. No evidence means no sanction.’\(^{171}\) Following the decision Commission officials planned high-level meetings in the US with the UN Al-Qaida Sanctions Committee, Ombudsperson and US counterterrorism officials to try and forge classified information-sharing agreements.\(^{172}\) Sanctions officials were predictably shocked by scope of the ECJ’s decision. For the former coordinator of the Al-Qaida Monitoring Team, Richard Barrett, for example:

\(^{168}\) *Ibid*

\(^{169}\) *Ibid*

\(^{170}\) *Kadi II* (n 36) para 114.

\(^{171}\) *Cuyvers* (n 43) 1771.

\(^{172}\) Interview with a member of the Commission Legal Service, Brussels, October 2013 (‘Interview R’).
This ruling presents a direct challenge to the ability and authority of the Security Council to impose targeted sanctions ... [It] means that any individual or institution under Security Council sanction can avoid the consequences within the EU by taking the case to court. The Security Council will not readily submit its decisions in such matters to the second-guessing of the EU courts and may ask what article 103 of the UN Charter actually means.\footnote{Richard Barrett, Comments in relation to \textit{Kadi II} judgment (29 July 2013), Economic Sanctions Listserv \textcopyright{copy with author}.}

Yet whilst pushing toward greater disclosure with one hand, the Court narrowed the potential effects of this move with the other, altering the EU judicial review process in crucially important ways. The EGC had previously held that the listed were entitled to ‘an in principle, full review’ extending to ‘the substantive assessments of the Sanctions Committee itself and the evidence underlying’ their decisions.\footnote{\textit{Kadi II} (n 36) para 79. Whilst in this citation the Court is referring to the submissions of the Commission, Council and United Kingdom, it is clear that this position is implicitly accepted by the Court in its reasoning at paras 117–29 and by its regard for ‘the preventative nature of the restrictive measures at issue’ (para. 130).} In \textit{Kadi II} the ECJ found this review to be too expansive in scope and held that the EGC had erred by failing to consider ‘the many material obstacles that exist to the communication’ of underlying material from the UN to the EU - including that ‘the source of that information and evidence is ... subject to a requirement of confidentiality due to its sensitivity’.\footnote{\textit{Kadi II} (n 36) para 111}

So in what is arguably the most far-reaching aspect of their decision the ECJ held that the only information needed for EU institutions to put or maintain someone on the list was the ‘statement of reasons’ provided by the UN Al-Qaida Sanctions Committee.\footnote{\textit{Kadi II} (n 36) para 130.} That is, the short summary excluding all underlying material, previously dismissed by the EGC as nothing more than ‘general, unsubstantiated [and] vague’ allegations,\footnote{\textit{Kadi II} (n 36) paras. 116 - 118) by insisting that the statement of reasons must be specific and concrete enough to comply with Art 296 Treaty on the Functioning of the European Union (TFEU).} was now accepted as a valid basis for listing. Crucially, it is only when listed individuals commence judicial review proceedings that EU institutions are actually expected to turn their mind to whether the reasons for listing are well founded. And it only then that one substantiated ground must be given to the Court so they can subject the listing decision to judicial review.\footnote{\textit{Kadi II} (n 36) para. 130.}

This judicial innovation produces four important effects. First, it affirms that empty box-tick decision-making is lawful for the overwhelming majority of listed individuals who do not, or cannot, challenge their listing before the EU courts. Second, it frees executives from the burden of having to disclose all relevant material, allowing them to strengthen their hand by strategically cherry-picking what they would like to reveal and hide from the court. This means that if there is torture material justifying the listing decision or material indicating the listed person is not associated with Al-Qaida this can readily be kept outside of the court.\footnote{As Cuyvers points out, allowing the executive to ‘select which evidence is presented and which is withheld ... may undermine the court’s ability to establish the material truth’ by enabling, for example, exculpatory material or material obtained through torture to be excluded from the review process - Cuyvers (n 43) 1775.}

Third, by alleviating EU institutions from having to take reasoned decisions when placing someone on the list and lowering the standard of review, the Court dramatically diminished their own power to challenge the legitimacy of the UN Al-Qaida listing regime. By dissolving the threat of ‘regime collapse’ by watering down what can be expected of the Commission and Council, the ECJ fortified the Al-Qaida list in the EU legal order in ways directly counterposed to their earlier decisions in this case. For one member of the Commission Legal Service
I spoke with this depoliticisation was the most profound effect of the decision. After the EGC’s 2010 Kadi decision I was told that further EU legal challenges by UN listed individuals might cause the listing regime to fall apart. But when we spoke again after the ECJ’s Kadi II decision this official was remarkably upbeat. Whilst ‘there was widespread pessimism after the judgment’ from states like France and the UK, ‘the Commission was, surprisingly, the only one not so pessimistic because we highlighted ... that there are certain positive aspects in the decision’ - including, most importantly, that ‘everything doesn’t collapse’ now in the event of further legal challenge. Now listing litigation, according to this official, will only pose specific problems to be determined ‘on a case by case basis’ - ‘either we will win or we will lose. But the whole regime does not collapse.’ Kadi II was crucial then for diminishing the scope of conflict around the list to a much more manageable ‘battle of one by one.’

Put differently: whatever generative political space the 2008 decision succeeded in prising open on this issue, the 2013 decision effectively closed down.

Finally, this case disrupts the conventional nexus between judicial review and its object (ie, an executive act of administrative decision) and alters the temporal orientation of review by bringing the listing decision forward in time and rendering it more processual. Through this judgment, the site of decision is relocated as something that can unfold during the litigation itself rather than prior to legal proceedings and ‘when the box was ticked’, as had been the case. It’s a discrete temporal move, but one that stands to alter the rationale of EU judicial review in significant ways. Before these reforms and decision, for example, an EGC judge whom I interviewed described their role in listing litigation in the following terms:

Remember we are reviewing what the Commission has done. If the Commission is saying, ‘We are not looking at it’ [ie, intelligence-as-evidence], we are going to say: ‘Excuse me. We are an Administrative Court reviewing the legality of your acts. We are not making our separate assessment of whether if you had looked at that material you could have come to that conclusion. We are just looking at what you say you did and ... the materials that supported you in doing what you were saying you were doing’. ... We are not a first instance court making our own assessment ... We can only review what they have actually done.

Judicial review is represented here in its traditional form as a retrospective process hinged upon a prior act of executive decision and the evidence informing it. But the Kadi II case disaggregates decision and evidence, and brings them both into a more fluid judicial process. The idea of the EU Courts ‘just looking at what you say you did’ no longer holds with respect to the Law of the List. As with cases concerning uncertain future environmental risks where ‘the Court is forced by the grounds invoked to judge the scientific validity and the conclusiveness of the scientific arguments’ raised, so too the EU judiciary must likely now make their own assessments as to whether potential fragments, inferences and ‘little mosaic scraps’ can be assembled in ways that allow the future threats of global terrorism to emerge. Judicial fact-finding, in other words, comes to be concerned with assembling a security mosaic. This spatiotemporal move - performed for the first time in the Kadi II and consolidated via reform of the rules of the Court - translates and embeds pre-emptive security knowledge practices into the core of the judicial review legal fact-finding procedure.

Given the novelty of these changes it’s too early to predict how their shockwaves will be felt.

180 Interview A.
181 Interview R.
182 Ibid
183 Ibid
184 Interview N.
But if the 2015 EGC decision in Abdulrahim provides any reliable indication, we can expect more uncertainty about what the proper judicial role in listing litigation actually is.\(^{186}\) The case, brought by an individual listed as a suspected member of Libyan Islamic Fighting Group (LIFG), was particularly interesting because it provided a testing ground for the new post-Kadi II review procedures to be applied.\(^{187}\) But the EGC’s review was limited because the Summary of Reasons in this case failed to establish that Abdulrahim was ‘associated with’ Al Qaida ‘on the date he was listed’\(^{188}\) and the Commission failed to provide any further relevant underlying material in support of the listing allegations. Crucially, what additional information the Commission did provide – consisting of press articles and academic articles, witness statements from earlier UK legal proceedings and public statements concerning the merger of the LIFG and Al Qaida - was promptly dismissed by the court as:

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\text{a priori of no relevance since, for the most part, they post-date both the listing of Mr Abdulrahim’s name in the Sanctions Committee list and the adoption of Regulation No 1330/2008 and since they consequently could not have been taken into consideration, by either the Sanctions Committee or the Commission, in order to assess whether the freezing of Mr Abdulrahim’s funds was appropriate.}\]^{189}

So whilst in Kadi II the ECJ brought the listing decision forward in time as something assembled during the judicial review process itself, in Abdulrahim the EGC looked back towards material ‘taken into consideration’ by executive actors when putting someone on the list and excluded subsequent material as irrelevant. But the substance could not actually be evaluated because the Court did not know what material was used to take the listing decision. As the decision was not appealed, this divergence is now effectively settled as law.

For the UN Al Qaida Monitoring Team, the Abdulrahim case is significant because it ‘demonstrates that European Union courts have no interest in reversing course following the momentous decision of the Court of Justice of the European Union in Kadi II’.\(^{190}\) But it is also worrying because it signals that the EU courts ‘require more substantial and timely evidence than may have been envisaged following the Kadi II decision’, although ‘it remains to be seen just how much and what type of evidence will be regarded as adequate’.\(^{191}\)

But the issue isn’t merely one of evidential quantity and quality. This confusion points to a much more complicated problem concerning the proper relation between listing decisions, the use of intelligence-as-evidence and the EU judicial review process. Is global terrorist listing something amenable to traditional judicial review or something co-produced by the courts through legal challenge due to its particular spatiotemporal and epistemological features? If the former, how can this retrospective movement be adequately reconciled with the pre-emptive logic of the list and its mosaic epistemology? And if the latter, how does this exceptional practice discretely rearrange the judicial fact-finding function? Unsurprisingly, the EU courts are exploring divergent approaches to these problems and still seem uncertain, in my analysis, about how to pin down and review this complex form of global law.

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\(^{186}\) Case T-127/09 RENV Abdulrahim v Council and Commission [2015] Nyr
\(^{187}\) Ibid, paras 62 - 71
\(^{188}\) Ibid, para. 89
\(^{189}\) Ibid, para. 90
\(^{191}\) Ibid
'Knowledges', as Valverde, Levi and Moore point out, ‘are always circulating, changing, being taken apart and reassembled in new shapes by new actors’ and legal sites provide particularly fertile terrain for novel risk knowledge forms and formats to take root and spread. The aim of global sociolegal scholarship in such conditions is not so much ‘to discover that concept X or norm Y is originally, and hence truly, the property of this or that group or institution’ or to ascertain whether courts ‘are impervious ... or subordinated to science’ or some other extra-legal source of risk, but rather ‘to try and capture this creative movement in our analysis’ by dynamically mapping ‘the different effects of particular circuits of risk information’ that emerge through these hybrid encounters.

One effect of the entanglement of pre-emptive security logics and rule of law practices that my analysis of the EU courts highlights is the process that I describe as ‘dis-location’. Judicial review is usually orientated retrospectively towards the ‘decision’ of the authority under challenge. But using intelligence-as-evidence for terrorism listing shifts this site of decision-making elsewhere and challenges the judicial process, because the decision supposedly under review is, strictly speaking, not there - as the ‘box ticking’ example above succinctly shows. Wherever one looks for some kind of independent list decision-making process, as the EU courts have persistently done, one instead finds emptiness and deferral to some other actor further along the transnational chain and presumably closer to the ‘source’ of the decision. Yet the ‘source’ of the decision is never made plain - either because it is generated through the diffuse knowledge practices of listing experts examined or the apparent use of secret intelligence material as evidence.

I use the term ‘dis-located law’ to refer to this spatiotemporal move and argue that it is a constitutive part of the listing assemblage. This term is intended to both draw attention to the material site of decision-making that is taken elsewhere and denote a sense of fracture with the way things ordinarily work. Judicial review proceedings commonly challenge the legality of executive decisions, for example, on the grounds that irrelevant considerations were taken into account or relevant considerations were not. In so doing the first question the court asks is: ‘What material did the decision-maker have before them at the time that they took their decision’? Did they fail to take something relevant into account? Did they give each element its proper weight etc?’ But when the source of the listing decision is not made apparent this evaluative process starts breaking down. How can judicial review work when answering this most basic of evidentiary questions is obscured through pre-emptive logics and security concerns? The Al-Qaida list, in my account, is a dis-located form of law. List decision-making eludes consideration by the courts. Judicial review persists but is increasingly emptied of substance through a spatiotemporal move. In light of this dis-location, one might well ask: ‘where precisely is the site of decision-making located here?’.

To address this problem I start with comments made by the UK Minister for Europe, David Lidington MP, when explaining why the EU court rules were being changed to allow closed material to be used. Whilst his interlocutors in the House of Lords Select Committee on this issue kept stressing that secrecy of national intelligence was the critical factor justifying these reforms, Lidington pointed towards other crucially important catalysts for procedural change which are elaborated in more detail below:

It would be wrong to think that when we are talking about confidential material we are talking

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193 Ibid
only about material that might have an intelligence origin. Sanctions that have been imposed originally at UN level are quite likely to have been based on information contained in a confidential report from a UN-mandated group of experts. It is very possible that disclosure of that material in detail could lead to witness intimidation or damage international relations. Individuals, Governments or organisations might have given information in confidence to that UN group of experts, and the CMP provisions in Article 105 should help to ensure the secrecy and confidentiality of that UN information.194

Here it is the deformedalised processes of expert-led global listing examined earlier in this book that are identified as providing the critical source of information for the list.195 Not the formal deliberations of the Sanctions Committee P5 states and their foreign ministries in conjunction with national intelligence agencies, as is commonly suggested. As I have shown, these global listing processes are marked by ‘distributed knowledge production’ practices and a ‘diffusion of evaluative labour’.196 If this is what provides the key ‘source’ of decision-making in this domain it is little wonder the EU courts have had such problems locating ‘a decision’ to review. ‘Liquid authority’, as Nico Krisch has observed, ‘is dynamic, difficult to locate and thus hard to grasp for actors who seek to challenge it’. When ‘there is no one point of decision-making, but instead a continuous … process in which standards are made and remade by different actors’, judicial review inevitably ‘suffer[s] from the lack of a suitable target’.197

So despite the legal architecture positing the list at the apex of the global legal order and its representation as an edict emanating from the ‘international community’, it is executive agencies and security officials within select national states and listing experts relatively autonomous from the formal political apparatus of the Security Council that are populating the list with its targets. The listing regime effectively allows pre-emptive security decisions taken by sub-national actors enrolled into new transnational networks to be given the force of global law. This enables national accountability constraints to be weakened, loosens the ‘shackles’ of international security law-making based on sovereign equality and state consent and explains why global security law seen such a remarkable uptake by states around the world.198 The Security Council appears to provide little more than a shell of institutional cover for this rescaling process. But, as discussed earlier, the strategic advantage goes both ways. Aligning disparate actors into a common security program and building a new optic for seeing global terrorism also extends the authority of the Council and the technical expertise administering the list. The net effect of global security law, as Kim Lane Scheppele points out, ‘has been an increase in the power of transnational bodies and an increase in the power of domestic governments at the same time’.199 Security governance capabilities are being stretched at both scales through new legal weapons like the Al-Qaida listing regime.

194 Lidington (n 47) 10.
195 For Koskenniemi, deormalisation, refers to ‘the increasing management of the world’s affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively’: Martti Koskenniemi, ‘Global Governance and Public International Law’, (2004) 37(3) Kritische Justiz 241, 243.
199 Scheppele ibid, 9
Spatiotemporal Dynamics and Global Legal Assemblage

So what can empirically studying legal spatiotemporal dynamics tell us about the kind of global law the Al-Qaïda list is? The first part of this chapter analysed the list as a non-synchronous form of law that uses intelligence-as-evidence and brings divergent temporal dynamics and epistemic practices together into productive relation. Most research on the list foregrounds the normative conflicts between international security and human rights law in cases like *Kadi* and suggests that the legal problems with the list can be adequately resolved through existing constitutional frameworks.\(^{200}\) Whilst this conflict is important I have argued that it is driven and shaped in large part by the temporal complexities of the list and its mosaic epistemology. Intelligence material is orientated towards a radically uncertain future, reframed in the present as dots to be connected and potential associations to be drawn through imaginative, abductive reasoning. Evidence is orientated retrospectively to demonstrate, through inductive reasoning, that an act did or did not take place in accordance with a given standard of proof. Because the list brings intelligence and evidence together, it generates both temporal and epistemological conflict.

I have argued that changing the rules of the EU General Court to allow judges to handle closed material without disclosure is an attempt not only to mitigate the clash of colliding norms (between the EU and UN), but also to attenuate the conflicting temporal dynamics at play that are in important ways driving these legal conflicts. But my interviews with members of the EU judiciary and analysis of recent EU case law shows that this experiment in problem management is not as straightforward as it may seem. And that in trying to ameliorate the worst effects of the Al-Qaïda list, the judiciary are forging recombinant techniques that embed and stretch it in novel ways. One common narrative suggests that the rise of pre-emption brings with it a corresponding decline in the rule of law and that legal and political institutions recede in the face of incalculable risks. But when pre-emptive security is studied empirically as a governmental technology a more textured account of legal assemblages emerges. In my analysis, law does not stand apart from the security practices it seeks to temper, but is rather reorganised at a very granular level as a result of this encounter. Being attentive to these shifts in legal knowledge production and ‘practices of reference’\(^{201}\) can provide important insights into how jurisdictional conflicts are diffused, global security law is enacted and pre-emptive security governance is made more durable and expansive.

The second part of the chapter explored how this non-synchronicity reorientates the spatial dynamics of EU judicial review. Following critical examination of baseless decision-making at key nodes in the assemblage I argue that the mosaic epistemology of the list generates particular spatial effects: namely, it works to perpetually defer or shift the source of formal decision-making elsewhere. The list’s reliance on intelligence-as-evidence, in other words, enacts a corresponding dynamic of dis-location. Two recent EU listing decisions by the EU courts were scrutinised to show these dynamics at work. The first case (*Kadi II*) tried to locate a listing decision for the purposes of review by bringing it *forward in time* and into the litigation process itself. This move stands to transform the conventional rationale for EU judicial review - ie, a retrospective process hinged upon a prior act of executive decision and the evidence informing it - into something more plastic and fluid. The second case (*Abdulrahim*) took a different approach and *looked backwards* towards a listing decision presumed to have taken place in the past. Whilst the prevailing literature suggests that the

\(^{200}\) For Cian Murphy, citing Euripides, ‘the EU rule of law remains robust in the field of targeted sanctions. In the EU, in this field, ‘force yields place to law’’ - Murphy (n 42) 282. For Justice Garlicki the ‘constitutional law of today is better-than-ever prepared to address the challenge of national security, including issues relating to how to handle secret information and intelligence’ - Justice L. Garlicki, ‘Concluding Remarks’ in Cole, Fabbrini and Vedaschi (n 12) 337.

\(^{201}\) Johns (n 14) 23.
EU courts are robustly defending the rule of law from attack via this UN listing regime, my analysis suggests this relation is more complicated in practice. The list is not only changing how the judiciary produces legal knowledge but also modulating and altering, in potentially far-reaching ways, the judicial review process itself.

The empirical findings in this chapter show a global regime that is ‘patchy’, composed through diverse knowledge practices and temporal dynamics and enacted through pre-emptive security networks. Because it uses intelligence-as-evidence the political relations that constitute it are more fragmentated and bilateral than all-encompassing and global. Analysing the Al-Qaida list through the lens of the EU courts trying to attenuate the intelligence-as-evidence problem and perform judicial review reveals a complexity of scale often observed in other transnational governance arrangements. The Law of the List is ‘neither national nor international ... at the same time as being both’202. Or, as Saskia Sassen suggests in her study of global assemblages, it ‘continue[s] to inhabit ... the nation-state and the inter-state system’ but is ‘no longer part’ of both ‘as historically constructed’.203

Realist state-centred approaches to international law and governance therefore fail to adequately capture how the Al-Qaida listing actually regime works. Because the national is not so much engaged here as a sovereign state determinative of relations in a Westphalian international sphere, but as networks of executive actors and experts aligned through a particular governance technology and taking pre-emptive security action ‘that is more across, beyond or through states than it is between or amongst’ them.204 IR scholars have long emphasised how national executives ‘collusively delegate’205 and pool their authority at the supranational level to ‘loosen domestic political constraints’206 and increase their autonomy vis-à-vis other actors in the domestic sphere.207 Network theorists like Anne-Marie Slaughter have argued that the state is not disappearing under globalisation so much as ‘disaggregating into its separate, functionally-distinct parts’ to facilitate transnational cooperation between domestic actors on particular issues.208 But the spatiotemporal dynamics analysed in this chapter do more than redistribute the space for governmental action or underscore the fragmentation of international law into functionally differentiated regimes. I argue that disaggregation and differentiation in this context are linked to the task - as this chapter’s epigraph points out – of using the global law and international organisations ‘more effectively as a weapon in the war against terrorism’.209

The spatiotemporal dynamics of the list have particular epistemic and legal governance effects. They transform existing legal knowledge production processes, dis-locate decision-

203 Sassen 2008 (n 6) 63 and 61.
204 Scott (n 202). As Krisch observes, ‘the UN sanctions regime today bears little resemblance to the classical ways in which international law is created and implemented’: Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford University Press, 2012) 156.
206 Ibid
209 US Embassy Cable 06USUNNEWYORK1609 (dated 22 August 2006). This is not to suggest that international law was not already ‘weaponised’. As David Kennedy argues: ‘Law and force flow into one another. We make war in the shadow of law, and law in the shadow of force’: David Kennedy, Of War and Law (Princeton University Press, 2006) 165. The flipside of ‘weaponising’ international law is to work outside them. The 2010 US National Security Strategy speaks of ‘the shortcomings of international institutions that were developed to deal with the challenges of an earlier time’ and urges the government to instead ‘harness a new diversity of instruments, alliances, and institutions’ (at 3 & 46). Available at: http://j1.usa.gov/1K7r9nRU. The Global Counterterrorism Forum (GCTF) exemplifies this shift towards deformalised global security governance: See: http://bit.ly/1DgUeLZ.
making sites and enable an array of listing authorities to exercise legal violence over
individuals without any consideration as to why. 210 That is, whether by design or unintended
consequence, the spatiotemporal dynamics of this list are deeply entangled in assembling a
form of global exceptional security governance. Exceptional not in terms of some lawless
black hole or sovereign decision but rather as something prosaic and legally assembled. 211

For constitutionalist scholars, like Jean Cohen, such effects comprise the dark logical flipside
of the ‘responsibility to protect’ (R2P) doctrine and the post-Cold War transformation of the
Security Council’s Chapter VII powers into an ‘enforcement model’ grounded in ‘global law
and community values, rather than international peace per se’. 212 For Cohen, going forward.
‘we really only face two choices today: strengthened international law or imperial projects by
existing and future superpowers’. 213 Whilst Martti Koskenniemi disagrees with the
‘conceptual architectonics’ 214 of UN Charter reform, he argues these effects are a
consequence of the ‘fall’ 215 of international law and its replacement by functional regimes
and their idioms of expertise. The key critical legal task ahead involves contesting the
instrumentalism of global governance by redeeming international law’s promise as a project
of critical universalism and ‘placeholder for the vocabularies of justice and goodness’. 216 For
Neil Walker global security law is problematic because it ‘sets aside the symmetrical logic of
both particularism and universalism’ - it struggles both ‘to speak in the name of ... a new
putative global community’ and ‘justify itself ... in the name of timeless universal values’. 217
Whilst this ‘unsettles much of what we imagine the moral and cognitive high ground of law to
be’, it also opens an important ‘threshold debate’ about whether the global security law
issued by the Security Council ‘deserves the title of “legislation”’ or whether it is merely ‘a
centralised form of coercion by influential powers’ executed through legal means. 218

These cosmopolitan turns and lament for the loss of the majesterial in international law may
well be valid concerns. But I argue that new global security law and governance regimes
might just as well be critiqued by better understanding the complexities of how they work.
That is, by ethnographically remapping the particular techniques, spatiotemporal moves, legal
knowledges and practices through which these ensembles achieve their effects. In short, by
delving more deeply into the dynamics of nascent global legal governance arrangements,
rather than flying away from them as some have suggested. Examining how global security
laws are materially assembled in this way is both a descriptive and critical endeavour. It
highlights the ‘frailty’ 219 and contingencies of new arrangements of power, reappraises what
‘existing technical knowledge does ... and what latent possibilities it might hold’ 220 and

210 ‘Public’ is used broadly here with reference to ‘any kind of governance activity ... [which] determines
individuals, private associations, enterprises, states, or other public institution’. Armin Von Bogdandy, Philipp
Dann, and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal
Problems 127, 164. On the legally assembled exception, see: (n 14).
212 Jean Cohen, Globalization and sovereignty: Rethinking legality, legitimacy, and constitutionalism (Cambridge
213 Jean Cohen ‘Whose sovereignty? Empire versus international law’ (2004) 18(3) Ethics & International Affairs 1,
24
214 Martti Koskenniemi, ‘Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism’
215 Martti Koskenniemi, The gentle civilizer of nations: the rise and fall of international law 1870–1960 (Cambridge
University Press, 2001)
217 Walker (n 4) 43.
218 Ibid, 44, 45
219 Latour (n 3) 176.
220 Annelise Riles, Collateral Knowledge: Legal Reasoning in the Global Financial Markets (University of Chicago
empirically charts ‘the transformations that had to take place in order for new structures of knowledge to have emerged’. 221 Studying global legal assemblages, in other words, enables us to ‘experience the international legal field afresh and, potentially, to acquire a new ‘feel’ for the political possibilities available within it’. 222

222 Johns (n 14) 27.
5. Conclusions

The primary aims of this book have been to understand how the UN Al-Qaida listing regime works as a form of global security law and governance and find out what happens when legality becomes entangled with pre-emptive security logics and orientated towards countering uncertain future threats. To that end, each chapter has followed the list to different empirical sites to examine the problems being negotiated there by different actors and analyse the techniques that these actors are forging. My aim has been to show how these practices are producing and sustaining this domain of law in distinctive ways. I have argued that the Law of the List is a unique legal weapon in the global war against terrorism and a far-reaching new form of global security law. It is transforming the relation between national and international legal orders and stretching what the collective security system is capable of doing in practice. It is generating new governance techniques, knowledge practices and mechanisms of pre-emptive security that are reconfiguring how legality works at a granular level. The Al-Qaida list is a permanent and radical new form of global exceptional governance.

This final conclusion chapter is structured in three parts. First, I revisit the key arguments made by providing a brief summary of each chapter. Second, I highlight six original contributions that this book makes to the study of global security law and governance. Finally, I close the book by pointing the way ahead for the Law of the List and highlighting potential areas of further research.

The Law of the List: Key Arguments

Chapter 1 introduced the scope of this study and set out my key research questions. It explained how I first came to this research project as a human rights lawyer representing people on the Al-Qaida list and why I wanted to understand this novel domain of global law as a form of productive power. After highlighting the limitations of existing legal scholarship on this issue, the three key analytical moves of this book were introduced - studying global law as an assemblage, examining risk and pre-emption as practices of governmentality, and rethinking the problem of exceptional governance. I argue that these analytical moves set this sociolegal study of UN terrorism listing apart from the other existing research on this issue. They have also helped generate broader insights about the nature of global law and governance of relevance to those working in different fields - such as international law, sociology, anthropology and critical security studies - as discussed below.

The introduction also positioned this book as a methodological experiment in situated knowledge production. Drawing on STS scholarship, I argue that methods are not just epistemological tools. They are also performative and enact different ontologies. They interfere with and help constitute the worlds they describe and so are intensely political. This led to a discussion about how my own subject positioning within this assemblage as a practising lawyer has conditioned and shaped my findings. But rather than trying to discount this as something that detracts from the veracity of the study - as is the case in social science research which values dispassionate detachment - I argue that my positioning as a practitioner and advocate within the listing regime has helped bring new insights to the fore and fostered a research ethic of situated and sustained engagement. Three distinct methodological moves of this book were highlighted. First, studying the list as a multi-sited research object and the global as ‘an emergent dimension of arguing about the connection between sites’.

Second, empirically examining the crucially important role of practices in

global security law and governance. And finally, using leaked documents to assemble my research fields and unlock the black box of a domain of global law that would have otherwise remained obscured in secrecy.

Chapter 2 examined the crucial role of background listing expertise in global security governance. We followed the list to two specific sites where the UN 1267 Monitoring Team were undertaking list implementation work - in ‘consultation meetings’ with security and intelligence officials aimed at populating the list with potential targets, and in collaboration with other IOs to make the list interoperable with global policing data (Interpol) and the passenger data of the global aviation industry (ICAO and IATA). I argue that these seemingly innocuous practices of list implementation are doing far-reaching global security governance work. They are not just implementing the list but rather are stretching the scope of what the listing regime can do. The mundane technical practices of UN listing expertise, in other words, are important and profoundly jurisgenerative. The Al-Qaida list also emerges from this analysis as a crucial actant of global security law. It exerts agency in its own right, performs important legal assemblage work, builds new ensembles of relations and helps to produce global terrorism of the future as a governable object in the present.

Chapter 2 analysed how the technology of the list works as an inscription device and ‘global optic’ for quantifying and ordering terrorism into something amenable to governmental intervention. We saw how the list enrolled a diverse array of actors into new global preemptive security networks to see the threat in the same way. The list performs crucial governance work in bypassing the vexing problem of having to define what terrorism is before governing it. The list also allows individuals and groups that may ordinarily have no relation to each other to be associated together, made commensurable and governable. Drawing from STS and governmentality scholarship, I argued that list and listing expertise are working together to produce a ‘centre of calculation’ for enabling new forms of ‘government at a distance’ to take place.² The Security Council emerges from this account as an IO that governs trans-boundary problems like terrorism through epistemic techniques and practices, not just through binding Ch. VII counterterrorism resolutions.³ We also saw how UN listing experts aimed to counter unknown future terrorist threats by establishing an ‘equilibrium of possibilities’.⁴ This entailed targeting a very broad potential threat population deemed at risk of radicalisation, which is dramatically at odds with the rhetoric of ‘targeted’ governance usually justifying UN sanctions policy and the notion of ‘concrete threat’ thought to limit Ch. VII intervention to particular situations. This shows how the list works as a hybrid legal form pursuing a novel program of global biopolitical management. My analysis of these ‘consultation meetings’ changes the locus of where we should look to find global security law. It also underscores the urgent need for more empirical research on global governance technologies and the constitutive role of technical practices.

My analysis of list interoperability developed toward the end of chapter 2 also underscored the crucial importance of the politics of formatting. My analysis of the problem of trying to ‘build the third hurdle’ to better implement the list travel ban shows technical reformatting to be a creative, jurisgenerative and profoundly political governance move that performs what STS scholars call a ‘translation’.⁵ It doesn’t simply move the list from context A to context B - it

⁴ Interview with current member of the UN 1267 Monitoring Team, New York, June 2014 (‘Interview B’).
⁵ On translation, see, for example: Michel Callon and Bruno Latour, ‘Unscrewing the Big Leviathan: how actors macro-structure reality and how sociologists help them to do so’ in Aaron V. Cicourel and Karin Knorr-Cetina (eds.)
changes the list in accordance with the new ordering practices and spatiotemporal dynamics that condition the different formats. Translation, in other words, is a legally and politically generative process. My argument is that examining the politics of translation is critically important because it shows us how global security law can be embedded and stretched through listing practice, without attributing agency to powerful actors or deferring to some kind of master-plan. This helps to explain how global security law continues to expand into new governance domains despite sustained criticism by reform orientated states, human rights advocates and the courts.

Chapter 3 shifted our focus to the problem of accountability in global governance and provided a detailed genealogical account of the emergence of the UN1267 Ombudsperson – the procedural mechanism created in 2009 to allow targeted individuals and groups to make delisting requests to the Security Council. Most literature posits the Ombudsperson as an improvement and much needed step in the right direction towards realising ‘fair and clear procedures’ in UN sanctions. My account complicates this teleological narrative of global legal progress and reframes the Office of the Ombudsperson as a governance effect arising from multiple conflicts across the listing assemblage: a composite figure born out of diverse institutional struggles under conditions of legal fragmentation.

Chapter 3 shows that the divergences between actors in this domain run deeper than usually suggested. The list accountability conflict isn’t just about different perspectives being brought to bear on the same problem, in a process ultimately mediated by the Security Council. Drawing on the STS insight that objects are enacted through practice, I argue that the different actors across the assemblage that engage with this conflict, enact fundamentally different versions of the list – including the Legal List of the courts, the Humanitarian List of targeted sanctions scholar-experts, the Living List of listing experts, the Complaint List of the UN Special Rapporteurs on Counterterrorism, and the Credibility List of the Security Council P5 states. As my ‘praxiographic’ study shows, each list frames the accountability conflicts of the Al-Qaida sanctions regime in radically different ways and seeks procedural redress for divergent purposes. My analysis in this chapter reframes the list as a multiple object and reveals the heterogeneity of the listing assemblage.

The latter part of chapter 3 analysed the assemblage work of the UN1267 Ombudsperson as an experimental figure of global legal expertise. Drawing from interviews with the former position holder and my own professional experience representing targeted individuals in delisting proceedings, I examine the novel decision-making processes, ‘dialogue’ meetings and evidential standards that the Ombudsperson has crafted to work in this special environment. I argue that these inventive practices help mute underlying political and legal tensions, contain multiplicity and hold the disparate strands of the listing assemblage together. In my account, the UN 1267 Ombudsperson performs crucially important global legal assemblage work by facilitating convergence between the different versions of the list that might otherwise engender legal fragmentation and political conflict. The particular expertise of the Ombudsperson, moreover, lies in her recombining existing legal categories and practices into novel quasi-juridical forms tailored towards embedding pre-emptive security logics. Existing accounts suggesting that the Ombudsperson provides a mechanism of ‘de facto judicial review’ to listed persons show little understanding of the inequities and

Advances in Social Theory and Methodology: toward an integration of micro and macro-sociologies (Routledge, 1981) 277, 279.
asymmetries this mechanism carves out in practice. So whilst most scholarship frames the Ombudsperson as a procedural improvement and postnational accountability solution, my analysis recasts it as a unique conduit of global exceptional governance and ongoing political and legal problem.

Finally, in chapter 4 we followed the list to the EU courts and examined the practice of judicial review. In this chapter we explored what happens when the pre-emptive security logics and mosaic epistemology of the list meets the principles of judicial proof that the courts have long used to determine legal truth. Most legal scholarship on the Law of the List focuses on the high-profile clash between the EU courts and the UN Security Council in the Kadi case, with global constitutionalists and global legal pluralists battling it out to determine whether the courts got the answers to that conflict ‘right’ or ‘wrong’ and to outline their normative case as to how this conflict ought to best be resolved. My analysis went beneath the legal reasoning of the courts to empirically study their procedural practice, by charting the recent reforms of the General Court’s rules to allow judges to handle intelligence material as evidence without disclosure for the first time.

The key puzzle that chapter 4 sought to understand was how a court vested to protect fundamental rights was so readily enlisted to construct this legally authorised state of exception. This problem was analysed by bringing the latent spatiotemporal dynamics and epistemic qualities of the list to the analytical surface. Drawing on the work of Boaventura de Sousa Santos, I argued that the listing assemblage is a paradigmatic form of non-synchronous law – that is, a legal form composed of divergent temporalities that are literally ‘out of sync’. Using intelligence-as-evidence pulls the Law of the List in radically different directions. In short: the evidence in grounded on a ‘past-present axis’ and tethered to acts undertaken in the past, whilst intelligence is hinged on a ‘present-future axis’ and orientated towards making radically uncertain futures knowable. I argue that bringing these two knowledge formats and temporal logics together puts non-synchronous dynamics in play and this is generating legal conflict. These procedural reforms aim to allow EU judges to manage this conflict, but they are serving to engender further complexity in practice. Judicial review is retrospectively orientated towards a ‘decision’ that has taken place in the past. But in chapter 4 we also saw how reliance on intelligence-as-evidence defers this space of decision and confounds this judicial process because the decision supposed to be under review is not there. The phrase ‘dis-located law’ was used to try and capture this dynamic process of fracture and deferral. My empirical analysis highlighted how this process of dis-location works in practice to render key sites of formal decision-making across the assemblage substantively baseless. I argued that empirically mapping the spatiotemporal dimensions of legal governance can provide important insights into how global emergencies come to be normalised, stretched and made durable through legal means.

When we analyse the Al-Qaida listing regime through the lens of the Security Council resolutions that formally constitute it, global security law might seem to be broadly encompassing and representative of the international community it purports to protect. But empirically analysing how pre-emptive security problems are being mediated by the courts reveals this global security regime to be something far more ‘patchy’, dynamic and fragmented. Because global law is usually posited in abstract normative terms, moreover, spatiotemporal dynamics tend to be discarded as extra-legal. But chapter 4 shows that if we

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want to understand how global law works we need to take the spatiotemporal dynamics of governance much more seriously.

The following section highlights six original contributions that this book brings to the study of global security law and governance. Rather than specifically focusing on the Al-Qaida listing regime and the scholarly debates associated with it, I have underscored elements of this study that readers from related fields (such as post-national law, international organisations studies, global governance, critical security studies, sociolegal scholarship) may find valuable for their own research projects.

Original Contributions of the Study

(i) Global Legal Assemblage

As discussed above, most scholarship in this area examines the relevant UN Security Council resolutions and tracks how they have been indirectly challenged by domestic and regional courts. Normative conflicts are highlighted (such as the Kadi case) and normative theories for resolving those conflicts - global constitutionalism, global legal pluralism, international regime theory, global administrative law - are debated. These debates are important, but this book also shows them to be reductionist. They reveal only a small part of what are more complex legal and political problems and tell us little about why fundamental rights have such limited purchase over this novel form of pre-emptive security governance.

So the first contribution of this study lies in opening a radically different way of understanding global security law. This book has studied the Law of the List as an assemblage of knowledge practices, governance techniques, spatiotemporal dynamics, artefacts and novel legal relations, or what Rose and Valverde call a ‘legal complex’. This approach removes us from the reified terrain of static models and normative debates about whether the courts were ‘right’ or ‘wrong’, and allows us to examine global security law as something very much emergent, expansive and in motion. As I have shown, moving outside legal doctrine, judicial reasoning and the Ch. VII decrees of the UN Security Council allows more variegated and textured conceptions of global security law to come into view. Globalisation is driven by dynamics situated within the interstate and nation-state system that transform old capabilities into new organising logics and governance capabilities. It is not a zero-sum game between the ‘national’ and ‘global’ but something marked by processes of recomposition and rearrangement. Reframing the Al-Qaida list as a legal assemblage helps us to get at these novel processes of re-ordering. What emerges is a global regime that inhabits yet exceeds existing frames of international and national law and that is stretching the UN collective security system in practice.

By honing in on EU judicial review and the problem of assessing intelligence-as-evidence in chapter 4, for example, we were able to see that there are no decisions (in the public law sense) animating this regime, despite its public international law origins. Instead, we have intelligence agencies and executive actors sharing information bilaterally or not at all, on a need to know basis and circulating ‘narrative summaries’ to placate targeted individuals, regime critics and courts. Dis-locating listing decisions in this way has confounded the EU judiciary and prompted far-reaching changes to their evidential rules. Judges accustomed to conventional retrospective processes of judicial proof must now assemble future-orientated security mosaics from informational scraps and inferences. Global security law is thereby

embedded and stretched through micro-processes of reorganisation. And the list is changing the ways that justice is done inside the EU courts. Analysing the Law of the List from this site allowed us to see how fragmented, novel and jurisgenerative it is. The Al-Qaida list is unlike any other UN sanctions regime or international law instrument. It is a unique pre-emptive legal weapon in the global war against terrorism that is generating profound legal and political effects.

Analysing assemblage practices sheds a very different light on how governmental programs are constructed. The key insight that I draw from STS scholarship here is that objects are produced through practice. This means that when we are faced with conflicts in postnational governance about particular institutions, objects or governmental programs we not only dealing with different perspectives on the same problem. Instead, we have multiplicities characterised by overlapping clashes and conflicts between different versions of reality, as discussed above. That is, differences between actors are not just epistemological but ontological as well. This is what makes assemblages heterogeneous and why the hard work of pulling divergent strands together into contingent wholes is so important. Enlisting and aligning different actors into networks, managing conflicting claims, translating the will of others to your own: this is how global security law and governance is materially assembled and reproduced.

Most legal accounts reduce these differences to questions of normative interpretation and compliance. Analyses of the UN 1267 Ombudsperson, for example, argue about whether this institution brings UN sanctions within the remit of international human rights norms or not and whether the courts should show more defence to the Security Council as a result. GAL scholars see the Ombudsperson pre-figuratively and in evolutionary terms, as an important step in the right direction, sanitising its contested history and glossing over its conflicts and problems. But analysing global law as an assemblage allows to grasp differences as something more radical and generative. So when actors clash in post-national legal space its not only a conflict of norms, but also competing versions of reality in friction that are vying for institutional dominance. So as outlined above, chapter 3 analysed the emergence of the UN1267 Ombudsperson through the lens of the Multiple List and traced how different actors in the assemblage enact different versions of the list through their divergent listing practices. Highlighting these divergences helped underscore how the Office of the Ombudsperson does much more comply or not comply with pre-existing norms. It functions as an institutional ‘boundary object’ that aligns different actors, embed pre-emptive security logics, mute political tensions and hold the different versions of the list together. The Ombudsperson, in other words, is a crucial figure of expertise and global legal assemblage.

Numerous scholars have called for more innovative approaches to understand how globalisation and the governance of trans-boundary problems are transforming law. This book has sought to address this call by performing an important analytical reorientation - shifting focus from normative and positivist questions like ‘what is global law’ or ‘what ought global law be’ to the more empirical question of ‘how is global law assembled and sustained’ in the face of ongoing tension. I argue that this shift is important not only for those interested

12 Mol (n 7)
in the Al-Qaida list, but for those engaged with post-national legal problems more generally. When global law is reframed as ‘a practical and contingent achievement’, our attention is drawn to the diverse practices, alignments, translations and techniques involved in making that achievement possible. That is, decentering the Law prompts a much needed ‘expansion of the dimensions of legality’. And I argue that this kind of expansion is critically important if we want to make sense of the complexities of global legal ordering unfolding in the present. We need to broaden our understandings of what law is and experiment with constructing theories from the material conditions and conflicts that global law creates and inhabits. It is this kind of empiricism that allows us to ‘find the conditions under which something new is produced’ and to think about about how new global security regimes might be made otherwise.

(ii) Studying the Global from Structure-Making Sites: the Politics of Scale Production

A second contribution that this book makes concerns the nature of scale. Law is often implicitly spatialised through logics of verticality and encompassment - with the global up on top, the regional and national further below, and the local down the bottom. Because each scale is thought to encompass the other as one ascends the international hierarchy of norms, more of one is usually taken to mean less of the other. And so the local, national and global scales through which legal ordering and governance is arranged ends up being reified and locked into a zero-sum game. If international lawyers and political geographers were asked to explain a particular global problem, for example, they would likely give wildly divergent responses tethered to differing notions of scale. Geographers might talk about logistics chains, algorithmic architectures, geopolitical stacks or flows of infrastructural space. Complex topologies would be outlined showing how ‘heterogeneous techniques, technologies, material elements, and institutional forms are taken up and assembled’. But lawyers will still likely frame the problem jurisdictionally in abstract normative terms, talking about the global as if it is something ‘up there’ and local ‘down here’. Framing law in this way can offer helpful shortcuts and be a useful figure of speech. But global law and the politics of legal scale just aren’t as straightforward as that. And postnational norm conflicts are underscoring just how ill equipped conventional forms of legal analysis are in grappling with fluid global governance problems that are multi-scalar and trans-boundary in nature.

This book addresses this problem of scale by taking ‘the global’ in global security law seriously. It has followed the list to local sites where global structure-making practices are being forged and put into circulation. And it has shown how governance scales are empirical problems that require detailed examination, not a priori conditions that can we can take for granted in our analyses.

As we saw in chapter 2 powerful new forms of global counterterrorism governance are being produced from localised sites through fragile alignments of knowledge practices, techniques,

infrastructures and relations. By aligning diverse actors into pre-emptive security networks through the technology of the list, for example, UN listing experts are constructing new ways of seeing and governing global terrorism. List and listing expertise are working together to build what Bruno Latour has called a ‘centre of calculation’ for enabling ‘action at a distance’ to take place.21 We also saw how making the Al-Qaeda list interoperable with the PNR data used by the global aviation industry dramatically expands its scope. Reformating the list does more than move it from context A to context B. It performs an act of translation that is crucially important, as discussed in more detail below. The list needn’t be applied at national borders any more because it is enacted electronically at points of sale when someone buys an airline ticket.

These examples draw attention to the hard work of making global law operative and powerful. Bringing actor-network theory into this domain helps us to ‘flatten the landscape’ of global security governance.22 The key insight drawn from STS scholarship throughout this book is that ‘global’ actors are not necessarily ‘bigger’ than any other, but are made more powerful by virtue of their relative connectedness and the inscription technologies they use.23 In other words: the Law of the List is made global through scale-producing practices and techniques that can be empirically scrutinised. I argue that when we cease taking governance scales for granted, we can get a much better sense of how they are being rearranged through new forms of legal ordering and governance practice. And this in turn can give us a much richer sense of how law is being transformed through globalisation.

The other effect that this approach to scale brings is more forensic and political in nature. If powerful actors are made powerful precisely through their scale producing activities and making others small in comparison, then empirically charting how these processes work opens space for disturbance or what Michel Callon and Bruno Latour call ‘unscrewing the Big Leviathan’.24 When we show how global structures are produced, we reveal the material conditions through which powerful actors are able to ‘dominate on a large scale’.25 This reminds us that global law and governance are not merely things that powerful global actors hold and wield, but relational effects and material constructions that are much more contingent and potentially reversible than is usually suggested.26 ‘To take the fabrication of various scales as our main center of interest’, as Latour notes, ‘is to place the practical means of achieving power on a firm foundation’.27 By taking scale production seriously, powerful institutional formations and agency in global governance are recast as effects of practice.

(iii) Mapping the Politics of Expertise in Global Law-Making

Much contemporary legal scholarship is concerned with managing the anxieties surrounding international legal fragmentation. This book has shown what the fragmentation and functional differentiation of international law looks like in practice. Analysing how trans-boundary threats of global terrorism are being countered through novel governance techniques and practices has taken us squarely into the politics of expertise. The kind of technical legal assemblage work that we have examined in this book is usually dismissed by legal scholars as something peripheral. But this study suggests that the background workings

21 Latour, Miller and Rose (n 2)
23 Callon and Latour (n 5).
24 Ibid
27 Latour (n 25) 27
of functional expertise needs to be closely examined and taken much more seriously. Because this is where some of the most experimental and expansive global security law-making and pre-emptive security governance is being assembled. So a third key related insight to be drawn from this book is that global security law is not only powerful because it is issued by the Security Council under Chapter VII of the UN Charter. It is made powerful through the assemblage work of functional expertise and the knowledge practices that experts are crafting, so these ‘background’ expert practices require close empirical analysis.

We have seen in chapter 2, for example, how UN listing experts performing seemingly mundane tasks (like enhancing list implementation) are stretching the list in far-reaching ways and transforming it into a powerful global legal weapon. Improving implementation of the travel ban requires altering global aviation standards, building new pre-emptive bordering capabilities and putting new security arrangements in place that stand to affect all air travellers worldwide. This isn’t list implementation so much as global legal ordering and security governance in motion. But because it is seen as mere technical work, the politics of listing expertise goes unnoticed and unchallenged.

In chapter 3 we analysed how academic experts motivated by the possibility of global humanitarian reform became engaged in targeted sanctions policy. After 9/11 these scholars were revalorised as counterterrorism financing experts. I have argued that the assemblage work these scholar-experts have performed has been crucial for the Law of the List. They have enlisted a diverse range of actors into their networks, framed debates about the accountability problems of the list in managerial terms and shaped this domain of global security law in profound yet unacknowledged ways.

For Koskenniemi the main problem with such deferral to expertise is that it instrumentalises law and recasts it in a technical idiom. The key critical task we now face involves redeeming international law as ‘a placeholder for the vocabularies of justice and goodness’ and reclaiming law as a transcendent project that embodies ‘the regulative idea of universal community’.28 For Kennedy there are three ways to challenge the hegemony of expertise in global governance. We must identify the interests animating expert action, render their latent assumptions visible and reframe expertise as something individuals have discretion and political responsibility over. And we must undertake critical analyses that ‘encourage a form of expertise which could experience politics as its vocation’.29

These accounts offer important ways of challenging the rise of expertise in global law-making. But the critical stance adopted in this book operates in a different register and direction. Rather than transcending the technicality of functional expertise by turning towards law’s promise of universality, I argue that we should develop new forms of immanent critique that revalorise the technicalities of expertise as powerful and jurisgenerative. Charting the politics of expertise ethnographically as it unfolds is politically important, because it shows how small shifts in knowledge practices at a micro-level can provide important sources of legal change in powerful macro-organisations like the UN Security Council. And it reveals how institutions become powerful by translating the will of others, building centres of calculation and forging new forms of domination through technical means. As Kennedy notes, ‘we need better maps of expertise’ but ‘mapping the knowledge of experts is complex and technical work’.30 This book contributes to this task by studying the politics of listing expertise and showing how it shapes this domain of global security law.

30 Ibid, 14
A fourth key finding of this study is that the governance technologies used to deal with trans-boundary problems are not just means to an end but are in themselves crucial agents of global law-making. Drawing on governmentality and STS scholarship – and building on the growing literature on global indicators, standards and informal law - I have shown that the Al-Qaida list is a powerful protagonist in this domain, deeply entangled in the knowledge objects that come into being through its use. The problem of defining terrorism - and whether the term should extend to include armed national liberation movements or state terrorism - was one of the key political divides of the decolonising world in the late twentieth century. More than 60 proposed definitions were put forward for international agreement between 1936 and 1981 without success. \(^{31}\) Yet my analysis has shown how this definitional problem has now been effectively bypassed. Terrorism is now something rendered visible and actionable through the technology of the list.

The list is one of the most archaic ordering devices. It is innocuous and simple, yet malleable and - as I have shown throughout this book - capable of performing crucially important governance work. After 9/11 it was the list that helped to ‘quantify a threat that no-one could easily quantify’ and generate actionable results in the global war on terror. \(^{31}\) My analysis showed how the list works as a *performative* technology that enables uncertain future threats to be seen and governed in the present. The list *produces* global terrorism as an object of legal intervention by making diverse threats commensurable, optically consistent and targetable. When global constitutionalists and pluralists argue about how the effects of legal fragmentation can best be normatively contained, the list is either nowhere to be found or relegated to the status of an inert instrument. Drawing on the work of Annelise Riles, Fleur Johns, Sally Engle Merry, Mariana Valverde and others working in the sociology of knowledge tradition, I have argued that legal technicalities and tools should be reappraised as important agents of legal change in their own right. As I have shown, technologies of governance are not just appendages of powerful actors that organise pre-existing phenomenon, but actants that help constitute, condition and delimit the very problems they purport to represent or target.

So whilst debates about the lack of a definition of terrorism are important, this book suggests they are somewhat missing the point. In the current era, global terrorism is listed, not defined. Failure to define terrorism is not a source of lack but a condition of possibility. Those interested in global counterterrorism law might benefit from closely analysing how listing works as a knowledge production and ordering technique. So the fourth insight to be gleaned from this study is that understanding global law requires paying close empirical attention to the governance technologies through which it is enacted. This means using analytical tools that can break down conventional distinctions between subjects and objects and structure and agency. A key lesson to be learned from this study is that non-human things - artefacts, technologies, instruments - actively participate in the making of legal and political relations. Objects carry practices and practices carry knowledge that allow new forms of government to emerge and intervene. Understanding the power asymmetries and violence of contemporary global security governance requires more than attributing influence to hegemonic world powers (like the US and other P5 states). It also requires empirical analysis of the inscriptions and technologies being used to make new forms of action at a distance possible - that is, more detailed study of the seemingly mundane technicalities of global legal work.\(^{33}\)


\(^{32}\) Interview with former member of the UN1267 Monitoring Team, New York, November 2012 (‘Interview A’).

Highlighting the agency of things also helps make the politics of translation visible. That is, the ways that objects, techniques, practices and relations are aligned in particular ways to make new security knowledge and governance possible. Lawyers and political scientists are accustomed to look for causative mechanisms to explain the governance phenomenon that they study. The focus is placed on norms, institutions and the authority of powerful actors. But as shown in this book, this misses much of how global law and governance unfolds in practice. And the ways extending practices and moving objects across different empirical sites and domains generates new knowledge and governance possibilities, as each chapter in this book showed. Studying how potential threats from around the world are collected, transported and sedimented through the technology of the list to enable global terrorism to be calculated and governed, shows how new regimes of global power are constructed and made durable through diffuse translation practices that operate underneath the radar of formal law and authority. When the list is reformatted and made interoperable with PNR data, moreover, it does not stay the same. Changing the material conditions and practices through which the list performs its security work changes the list as well – or rather, renders it multiple - and opens new avenues of intervention.

If power and agency are effects of such practices - and not only effects of institutional authority - then the politics of translation and the agency of governance technologies needs to be rigorously examined. This book has contributed to this task by studying the ways things (like lists and formats and inscription practices) make global security law and governance possible and by arguing that we need to not only study the Law but also the conditions of emergent causality. Michel Foucault showed us that the state was constituted ‘on the basis of multiple and very diverse processes which gradually coagulate[d] and form[ed] an effect’ – that is, through governmental practices. 34 Timothy Mitchell has shown how ‘the economy did not come about as a new name for the processes of exchange that economists had always studied’ but rather through ‘the reorganization and transformation of those and other processes into an object that had not previously existed’. 35 This book has sought to bring something similar to the study of global security law and governance by deepening our understanding of what difference the technology of the list can make.

(v) Pre-emptive Security Logics and Novel Rearrangements of Legal Practice

This book has analysed the Al-Qaida listing regime to better understand how pre-emptive security logics affect conventional legal practices and principles when the two inevitably come into conflict. There has been little empirical study on how law is transformed through countering unknown risks and future threats. Most accounts suggest that pre-emption is supplanting liberal principles of legality and that we need a new jurisprudence of Future law to grapple with the problems that it generates. 36 The prevailing assumption - in sociology, criminology, and critical security studies - is that law is receding in the face of radically uncertain risks. This has led to calls to defend liberal legality and the rule of law from undue encroachment by pre-emptive security politics.

As a human rights lawyer who has represented targeted individuals in this domain I am sympathetic to the argument that legal protections of listed persons ought to be

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36 See, for example: Lucia Zedner, ‘Preventative Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60(1) Current Legal Problems 174.
strengthened. As discussed in chapter 3, for example, in my experience the Ombudsperson mechanism is not a form of ‘de facto judicial review’ that allows for ‘fair and clear procedures’ as is often suggested, but an experiment in global exceptional governance more akin to a postmodern Star Chamber of our times. Yet as I have shown throughout this book, pre-emption is not supplanting existing legal practices and principles so much as rearranging them into novel hybrids and amalgams. In chapter 4, for example, we saw how EU judges changed their procedural rules to handle intelligence-as-evidence for the first time. We observed how the future-orientated mosaic epistemology of the list and ordinary retrospective processes of judicial proof were becoming comingled into new knowledge production practices in order to judicially review the list. Moreover, the outcome of this process is not something pre-ordained but rather more contingent and uncertain. Global security law is certainly putting principles of liberal legality into motion. But it is stimulating processes of legal reordering - new ways of assessing intelligence-as-evidence (chapter 4), novel mechanisms for reviewing listing decisions and bringing IOs to account (chapter 3), and new techniques for governing global travel (chapter 2). It is not eroding foundational principles of liberal legality, but modulating them in new ways.

Analysing risk and pre-emption as practices of governmentality, as we have done in this book, helps us chart these novel recombinations and grasp how global security law works as a productive power. It provides a useful antidote to the epochal claims made about law’s inexorable disappearance in the face of risk, and prompts us to theorise global security law and governance immanently from the empirical problems and problem-management techniques it is generating. Showing global governance effects to be contingent to the problems also underscores the fact that things could be otherwise. The novel practices that are being forged, and that I have highlighted in this study, may end up being critical in enabling new forms of global intervention to become embedded or inconsequential. My broader point here is that if we want to understand global security law we need to empirically examine how it is being materially conditioned. We cannot rely on static models or normative theories to define what global security law is or ought to be. We need to theorise from the empirical problems and fragmented international legal landscape that we are situated within.

(vi) Rethinking the Global Exception

The sixth contribution that this study makes is to rethink the problem of the exception. The Al-Qaida listing regime is formally built upon resolutions of the UN Security Council adopted pursuant to emergency provisions contained in Ch. VII of the UN Charter. As Ch. VII measures, listing decisions cannot be reviewed and they must be strictly implemented by Member States even if they come into conflict with domestic or constitutional requirements. The regime ‘provides a ready means by which individual states can make executive decisions with far reaching consequences, apparently unconstrained by domestic judicial review or the international human rights treaties by which they are bound’ 37 Listed individuals are targeted for things that designating states believe they might do in the future and are not afforded any real opportunity contest the allegations supposedly made against them. The listing regime, in other words, functions as a novel form of global exceptional governance- albeit one that does not easily fit in the existing ways that exceptions are understood. 38

This book has argued that if we want to understand the violence of security governance and the ways that exceptions become the norm in postnational space we need to think more innovatively about how emergency law and politics is unfolding. Instead of looking for ‘states’ of emergency declared by sovereign decisions and defined by the absence of law, I have suggested throughout this study that exceptions should be studied empirically as processes and networks of relations that are materially and legally assembled, often through relatively banal techniques and security practices. Humanitarians working on ‘smart sanctions’ and deflecting political critique of the regime (chapter 3); EU court officials developing procedures for judges to handle secret intelligence-as-evidence (chapter 4); security experts creating new techniques for translating ‘global terrorism’ into novel fields of intervention and global aviation officials trying to implement the list by forging new far-reaching techniques for preemptively targeting ‘inadmissible passengers’ (chapter 2). On their own, each of these examples may not amount to much. But when sutured together as an assemblage of co-functioning elements, I argue that we can see a variegated topology of global exceptional governance emerging. One that is provisional and diffuse yet dense, jurisgenerative and powerful.

The adverse effects of global governance are often framed as deficits of (democratic) accountability. But in the global security domain - where security actors work secretly through opaque transnational networks and IOs to target individual terrorism suspects in ways that may be unlawful or unconstitutional if pursued domestically - democratic deficit discourse cannot adequately capture the politics of what is at stake. As the Edward Snowden revelations plainly revealed, we desperately need new ways of conceptualising global emergency rule - not only in relation to global mass surveillance, but also with other transnational security arrangements like targeted killing, counter-radicalisation governance and global terrorism listing regimes. Human rights advocates, civil libertarians and those seeking to challenge the global war on terror usually think and act within their own national jurisdictional silos. But global security governance traverses and redefines these boundaries and works diffusely, beyond the reach of any one particular jurisdiction or site of control.

I argue that reframing exceptional governance as assemblages of relations can help us to rethink global emergency rule and open up potential new avenues of contestation. This book makes three contributions to that project. First, it shows how uncoupling the exception from sovereignty allows us to better analyse how global emergencies unfold. With their shared emphasis on national sovereign decision, neither Schmitt nor Agamben (nor the bodies of emergency scholarship they have spawned) offer much help in thinking through postnational exceptional politics. If we are always looking for ‘decisions’ then we easily miss how exceptions are forged through practice. But when we analyse the practices that ‘make a difference’ in any given domain - that is, if we take an assemblage approach to agency in global security governance - a more dynamic and textured field of exceptional law and politics emerges.39 I have argued in this study that analysing how such fields are stabilised and stretched is critical for understanding how exceptions are materially reproduced.

Second, foregrounding assemblage practices in this way allows us to see how the well-intentioned activities of different actors situated at different sites and scales can work together to produce dangerous results. As I have shown throughout this book, exceptions aren’t just effects of sovereign rule. Different actors working in good faith to resolve problems of list administration have forged new techniques that enable the listing regime to grow in novel and inventive ways. Judges, technical experts, academics have all engaged the

39 According to Latour, an actor or actant is any thing that ‘makes a difference’: ‘The questions to ask about any agent are simply the following: does it make a difference in the course of some other agent’s action or not?’ – Latour (n 22) 71.
list with good intentions. But the problem-management techniques and practices they have constructed have allowed the list to evolve into new amalgams and made these actors important conduits of exceptional governance. So thinking about the exception as something globally assembled has the advantage of prompting us to look for emergency politics in unexpected places and asking different sorts of research questions: How are the techniques and practices being constructed to resolve particular security problems embedding new forms of pre-emptive security? How are sites of contestation and challenge to global security regimes neutralised or muted to make them more durable or achieve more effective results? How are different domains brought together into productive relation or rendered commensurable in ways that enable emergencies powers to become more entrenched, transform and grow? Asking these kinds of assemblage questions opens the exception up as a problem that needs investigation.

Finally, this approach helps us think about the exception in material, rather than normative, terms. Most legal scholarship on the state of exception aims to identify the legal limits or constraints that ought to be used to properly contain emergency rule. The key question pursued in that work is how to reconcile and balance illiberal security governance with liberal principles of legality. This work is interesting from the perspective of normative theory, but it does not sufficiently enhance our understanding of how global exceptional governance unfolds and might be challenged in practice. What we need, in other words, is to rethink problems of exceptional governance more concretely. This book contributes to this task and adds to the growing body of scholarship analysing emergencies empirically through the material effects and practices they produce. In chapter 4, for example, we saw how the spatiotemporal dynamics and epistemic qualities of the list constructed a global exception. We analysed how the use of intelligence-as-evidence and dis-location of decision-making worked together to make the list globally powerful yet substantively baseless and beyond the scope of judicial review. That is, empirically analysing the dynamics and material conditions of the list produced a more textured account of how it works to enact new forms of exceptional governance. As I have shown throughout this book, global exceptions are not lawless black holes, but saturated and conditioned by legality. To paraphrase Walter Benjamin, we must attain to a conception of global legality that is in keeping with this insight.40

**From Al-Qaida to ISIL: The Global Law of Endless War**

This study began in 2011 shortly after Osama bin Laden was killed by US Special Forces in Pakistan. At that time, there was speculation that Bin Laden’s death and the weakening of ‘Al-Qaida central’ might prompt post-9/11 legal measures aimed at countering Al-Qaida to be wound down. The global war on terror, so the argument went, had now realised its key objectives. So the state of emergency used to fight that war could finally be brought to an end and a state of normality could be restored.

Two weeks after Bin Laden’s death, however, the Security Council issued a press release making it plain that the Al-Qaida sanctions regime would be continuing on regardless. According to Peter Wittig, then chair of the UN1267 Sanctions Committee, whilst Bin Laden’s death was a turning point ‘it is neither the end of Al-Qaida nor the end of terrorism’.41 As I have suggested in this book the Law of the List will never be wound down. It is a unique global counterterrorism tool with the enduring capacity to align the Security Council P5 states against a diffuse yet common enemy. Because the list defines and produces the object of global terrorism that it targets, it has a plasticity that allows it to be radically transformed and modified to fight emerging global security threats in the years ahead. It is not driven by

41 UN Doc. SC/10252 (dated 16 May 2011).
meeting objectives or other instrumental criteria like other policy measures. The Law of the List is now solidified as a permanent exceptional feature of the global security law landscape.

In May 2013 the UN Security Council quietly amended its listing of Al-Qaida in Iraq (AQI), first designated in October 2004, to include two new AKA’s: Al-Nusrah Front for the People of Levant (ANF) and the Islamic State in Iraq and the Levant (ISIL). The following year this listing was modified again to separate AQI and ANF into two distinct entries. So by the time the Security Council adopted Resolution 2170 in September 2014, the two groups controlling much of Syria and Iraq had already been listed by the UN1267 Sanctions Committee as being ‘associated with’ Al-Qaida. In December 2015 the 1267 regime was formally renamed the ‘ISIL (Da’esh) & Al-Qaida Sanctions List’. So via minor list modifications undertaken incrementally over a two-year period, the global war against Osama bin Laden and Al-Qaida was repurposed to combat a new threat and enemy of humanity: the movement of foreign terrorist fighters (FTFs) from around the world joining ISIL and ANF in Syria.

Many of the measures introduced to combat foreign terrorist fighters stretch and reorder features of the Al-Qaida list. As we saw in chapter 2, for example, the travel ban on listed individuals (long criticised for being wholly ineffective) is now being recalibrated to build a ‘third hurdle’ to stem the flow of FTF travel. The threat of ISIL is opening up new avenues for the Law of the List to grow and constituting new domains to secure and govern. In 2006 – 2007 the US sought to extend the list to target Islamists providing ideological support to terrorism through the ‘radical ideologue initiative’. But countries trying to co-opt radical imams and turn them into informants or monitoring radical forums to map potential terrorist networks and undertake sting operations were worried that listing extremists as global terrorists and de facto members of Al-Qaida would prove counterproductive. Yet the new global regime against foreign terrorist fighters conflates these targeting categories. Being ‘associated with’ Al-Qaida for the purposes of UN terrorism listing, for example, now extends to include those who express support for ISIL and the movement of FTFs on the internet and social media.

The distinction between extremism and terrorism, or material and ideological support, is being actively dismantled.

This book has analysed the UN Al-Qaida list at a particular historical conjuncture, but the insights it develops can help us navigate the fragmented terrain of global security law and governance more broadly. The war against foreign terrorist fighters is authorising new forms of expertise, generating new mechanisms of informal governance and novel re-combinations of preemptive security and legality. Yet the Law of the List remains the standard-setter for delimiting what kind of security governance is possible in this area. And a precedent that shows how powerful global measures rendering uncertain future threats amenable to intervention in the present can be built and sustained despite ongoing legal conflict and political tensions. If the global war on terrorism is indeed an endless war and the Law of the List a permanent exception within it, then this ethnographic study and experiment in historical ontology aspires to offer readers something forensically valuable and politically generative - both in present and the years ahead.

I came into this study as a disenchanted human rights lawyer eager to know how this form of global security law might be challenged. This book hasn’t given a silver bullet answer to that
question. But it has deepened our understanding of the Al-Qaida list. It has provoked us to ‘experience the international legal field afresh’ by studying how this domain of global security law is assembled. And by providing a granular empirical account of legal conflict and change it has allowed us ‘to acquire a new “feel” for the political possibilities’ within it. As Michel Foucault reminds us, ‘the role for theory today ... [is] not to formulate the global systematic theory which holds everything in place, but to analyse the specificity of mechanisms of power, to locate the connections and extensions [and] to build little by little a strategic knowledge’. This book is an experiment in strategic knowledge production and an invitation for more situated and critical forms of global legal analysis.

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48 Johns (n 33) 27.
49 Ibid
50 Foucault (n 26) 145.


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The Law of the List: Summary (English)

The United Nations was first created after World War II as an intergovernmental organisation of states. Economic sanctions were conceived as political measures for disciplining recalcitrant states deemed threats to international peace and security. They offered a means of intervention ‘between words and war’\(^1\) for the Council to ‘deter individual states from taking matters into their own hands’.\(^2\) But with the end of the Cold War the Security Council began governing the transboundary threats of terrorism for the first time. And the UN collective security system was re-orientated away from inter-state war towards targeting suspected nodes in diffuse global terrorist networks.

After the 1998 Al-Qaida attacks on US embassies in Kenya and Tanzania, the Security Council adopted Resolution 1267 (1999) which required all states to ‘freeze the funds and other financial resources, either directly belonging to or indirectly benefitting, the Taliban’.\(^3\) The original aim was to pressure the Afghan regime to extradite Osama bin Laden. To facilitate this, a Sanctions Committee was set up - composed of the permanent members of the Security Council - to draft and administer a list of individuals and entities associated with the Taliban. After the bombing of the USS Cole in Yemen in 2000, the regime was broadened to anyone deemed ‘associated with’ Osama bin Laden or Al-Qaida.\(^4\) Following the 9/11 terrorist attacks in 2001, the need for any geographic connection with Afghan territory was removed, allowing the sanctions to be applied to \textit{whoever} was listed \textit{wherever} they were located in the world. Time-limits were abolished, allowing listing decisions to be applied for an unlimited duration.\(^5\) Within three years the UN Al-Qaida list was radically repurposed into a pre-emptive legal weapon for disrupting global terrorist networks and their supporters worldwide, with unprecedented powers (temporally and spatially unlimited in scope) for the Council to target individual terrorism suspects using secret material allegedly showing ‘association with’ Al-Qaida.

This book critically examines the UN Al-Qaida counterterrorism listing regime as a novel form of global security law. It shows how the list works as an ordering device to render the uncertain future threats of global terrorism amenable to legal intervention in the present. I argue that the Law of the List is altering the relationship between national and international law and is best understood as a global legal assemblage. It is also generating new knowledge practices, governance techniques and mechanisms of pre-emptive security that are reconfiguring how legality works at a granular level. Understanding how law is transformed through globalisation, or how the governance of uncertainty transforms legal practice, requires grappling with the politics of expertise and seemingly mundane technical practices of problem management. This book shows how studying global security law empirically from local sites provides a more dynamic and nuanced account of emergency in motion.

The core research questions of this study include the following: How does the Al-Qaida list work as form of global security law and governance? What kind of global law is it and how is it being made powerful? How does global security listing enable the Security Council’s power to emerge, congeal and grow? How, in other words, is ‘the global’ in global security law produced? Is the list altering national and international legal orders - if so, in what ways and

\(^1\) Peter Wallensteen and Carina Staibano (eds.) \textit{International Sanctions: Between Words and Wars in the Global System} (Frank Cass, 2005)
\(^3\) S/RES/1267 (1999), para. 4(b).
\(^4\) S/RES/1333 (2000), para. 8(c).
with what effects? Does it easily inhabit the inter-state and international legal system or depart from it – and, if so, what alternative frameworks might we use to describe it and understand the problems it poses? How is the global governance of trans-boundary problems like terrorist networks changing the role of expertise in international law and decision-making? And what can UN terrorism listing practices tell us about how law and collective security is transforming under conditions of globalisation?

The Al-Qaida list isn’t just a novel form of global law, however, it is also a weapon of pre-emptive warfare. Whilst the turn towards pre-emption and exceptional governance in contemporary security has been widely examined, the implications of this shift for legal practice is inadequately understood. So this project also studies the Al-Qaida list to understand what happens to legality when it gets tangled up with pre-emptive security logics and orientated towards the governance of uncertain future threats. How are pre-emptive security measures like the list materially assembled and what can this assemblage tell us about how law is changing in the face of unknown risks and threats? What legal and political tensions are created by using pre-emptive measures and how are these problems negotiated or neutralised? How are exceptional governance techniques (like security listing) normalised, made durable and stretched through practice? And what can such practices tell us about the role of international law and organisations in creating global states of emergency?

The aim of this book is to open up novel ways of thinking about global security law and governance by providing a detailed sociolegal account of the listing assemblage in motion. The book is structured around three empirical chapters that examine the listing assemblage from different sites. Each chapter engages with a particular problem and traces how it is negotiated by a range of different actors to help me address the key research questions. There is no overarching narrative linking the different parts into a coherent whole, but key concepts run transversally across the text are are iterated at the different sites under study. The book is primarily written as a global law text with a focus on the politics of counterterrorism. But it aims to have interdisciplinary appeal for those interested in sociolegal studies, global governance and human rights, STS and sociology of knowledge, the ‘practice turn’ in international relations, ethnographies of globalisation, humanitarian governance, international and transnational law, and critical security studies.

Chapter 1 introduces the scope of this study and sets out my key research questions, as outlined above. It explains how I first came to this research project as a human rights lawyer representing people on the Al-Qaida list and why I wanted to understand this novel domain of global law as a form of productive power. After highlighting the limitations of existing legal scholarship on this issue, I introduce the three key analytical moves of this book - studying global law as a legal assemblage, examining risk and pre-emption as practices of governmentality, and rethinking the problem of exceptional governance. The introductory chapter also positions this book as a methodological experiment in situated knowledge production. Drawing on Science and Technology Studies (STS) scholarship, I argue that methods are performative. They enact and interfere with the worlds they describe and so are intensely political. This leads to a discussion about how my own positioning within this assemblage as a practising lawyer conditions and shapes my findings. But rather than trying to discount this as something that detracts from the veracity of the study, I argue that my background as a practitioner and advocate within the listing regime helps to develop new insights and foster a research ethic of situated engagement. Three distinct methodological moves of this book are also highlighted - studying the list as a multi-sited research object and the global as ‘an emergent dimension of arguing about the connection between sites’;6

empirically examining the role of practices in global security law and governance; and using leaked documents to assemble my research fields and study a domain of global law that would otherwise be obscured in secrecy.

Chapter 2 focuses on the UN1267 Al-Qaida Analytical Support and Sanctions Monitoring Team - an expert group supporting the Sanctions Committee (made up of the Security Council P5 states) to administer the list. This chapter engages with the practical problem of how to target ‘global terrorism’ - an issue that has eluded all earlier attempts at definition and that is shrouded in political and epistemic uncertainty. Drawing from actor-network theory and governmentality scholarship, I show how the technology of the list itself plays a crucial role in rendering this elusive problem governable – by building a ‘global optic’ for seeing dispersed terrorist networks and ordering an otherwise dis-organised global threat. I analyse the practice of UN listing experts engaged at two specific sites – in ‘consultation meetings’ with national security and intelligence officials directed at populating the list with potential targets and in collaboration with experts from other international organisations to make the list interoperable with global policing data (Interpol) and the passenger data held by the global aviation industry (ICAO and IATA). These seemingly innocuous technical practices that aim at better implementing the list have escaped academic attention. But this chapter shows how analysing expert knowledge practices can reveal important insights into how global security law is being made into something powerful, durable and global. If we are interested in understanding how new forms of global administrative violence are forged in the shadows of formal law and the Security Council’s Chapter VII authority, then empirically studying the techniques and practices of listing expertise is something critically important.

Chapter 3 shifts the focus to the enduring problem of accountability in global governance and follows what happens when UN sanctioning powers originally designed to discipline recalcitrant states deemed threats to international peace are recalibrated to directly target individuals suspected of being nodes in global terrorist networks. It provides a detailed genealogical account of the emergence of the UN1267 Office of the Ombudsperson - a novel procedural mechanism created by the Security Council in 2009 to provide redress to listed individuals who believe that they have been wrongly targeted. This conflict about ‘fair and clear procedures’ in Security Council sanctions has animated the Al-Qaida listing regime since its inception. All the key actors across the listing assemblage debated this critical issue for the better part of a decade. Whilst there is still disagreement as to whether the Ombudsperson goes far enough to protect due process rights, everyone tends to agree that it is an important step in the right direction towards greater human rights compliance.

My analysis challenges this narrative of global legal progress and complicates the claim that the Ombudsperson provides ‘fair and clear’ procedures. I show how the Ombudsperson is a composite figure of expertise born out of diverse institutional struggles under conditions of international legal fragmentation. My key argument is that different actors in the listing assemblage enact fundamentally different versions of the list through their practice – that is, that the Al-Qaida list is best thought of as what STS scholars call a ‘multiple object’. When the accountability problem is reposed in this way, we can see that Ombudsperson functions as a kind of institutional glue or ‘boundary object’ that helps to align the different actors, mute underlying political tensions and hold the different versions of the list together in a relatively stable yet uneasy relation. Drawing from interviews with the Ombudsperson and my own experiences representing individuals in UN delisting proceedings, I critique the claim that this innovation offers ‘de facto judicial review’. In my account, these unique delisting practices and techniques are concerned with embedding new forms of pre-emptive security and rendering the the list durable as a global exceptional governance device.
Chapter 4 follows the list into the EU courts and the practice of judicial review. It explores what happens when the pre-emptive security logics and governance of radical uncertainty embedded in the technology of the list meets the principles of judicial proof and evidence long used and protected by the courts. The chapter empirically examines the recent reform of the procedural rules of the General Court of the EU to allow judges to rely on intelligence material without disclosure for the first time. These reforms are explored as an attempt to resolve the complexities associated with judicially reviewing a list grounded in the use of intelligence-as-evidence and eliminate the kinds of norm conflicts one sees in the *Kadi* case.

Most global law scholarship disregards issues of time and space, even though they are widely regarded as key vectors of globalisation across other academic disciplines. Chapter 4 speaks to this problem by highlighting the spatiotemporal dynamics and epistemic qualities embedded in the list. I argue that the listing assemblage is driven by dynamics of ‘non-synchrony’ and ‘dis-location’ and animated by a mosaic epistemology wherein seemingly insignificant details are associated together to infer potential correlations and future threats. Non-synchronous law is legality ‘out of sync’, composed of divergent temporal logics. By using intelligence-as-evidence the list brings retrospective and pre-emptive logics together into productive relation, which is generating legal conflict. The EU procedural reforms aim to give judges the tools necessary to manage this problem, but they engender further complexity. Furthermore, judicial review is usually orientated towards a ‘decision’ that has taken place in the past. But my analysis shows how using intelligence-as-evidence defers this space of decision and confounds this judicial process because the decision that is supposed to be under review is not there. I use the term ‘dis-located law’ to capture this dynamic process of fracture and deferral and suggest that it is critical to how the Law of the List governs.

The conclusion of the book draws together the key findings of this project and points the way ahead toward global security problems that require further investigation and research. In my analysis pre-emptive security is not supplanting existing legal practices, but rather reorganising them in novel ways that demand empirical attention if we want to understand how global security law is governing the uncertain future threats of terrorism in the present. Global security law is not the brave new world that many lawyers claim it to be. It is something far more fragmented, heterogeneous and complex. Securing the world from trans-boundary terrorist threats is transforming domestic and international legal ordering in far-reaching ways and consolidating new forms of exceptional governance. This book maps these transformations and provides a detailed forensic account of global emergency law in motion. It doesn’t end by spelling out a corrective program of legal or political reform. But I argue that showing how security problems are being governed and global legal regimes assembled through the list is an important critical project in its own right. It brings the economies of power and conditions of possibility of the list to the analytical surface, shows them as something historically situated and contingent and offers insights into how things might be made otherwise. It is an approach that aims to offer what Michel Foucault calls a ‘historical ontology of ourselves’ - where ‘the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them’.7

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The Law of the List: Samenvatting (Nederlands)

De Verenigde Naties zijn na de Tweede Wereldoorlog in het leven geroepen als een intergouvernementele organisatie van staten. Economische sancties werden uitgedacht als politieke maatregelen om weerspannige staten te weerspannige staten tot de orde te roepen, die geacht werden een bedreiging te vormen voor internationale vrede en veiligheid. Ze boden de Raad een mogelijkheid om te grijpen ‘tussen woorden en oorlog’¹, om ‘afzonderlijke staten ervan te weerhouden zaken in eigen handen te nemen’.² Maar met het einde van de Koude Oorlog begon de Veiligheidsraad voor het eerst met beheersen van grensoverschrijdende bedreigingen van terrorisme. De oriëntatie van het gezamenlijke veiligheidssysteem van de VN verplaatste zich van oorlogvoering tussen staten naar verdachte knooppunten in over de gehele wereld verspreide terroristische netwerken.

Na de aanvallen van Al-Qaeda in 1998 op de ambassades van de VS in Kenia en Tanzania nam de Veiligheidsraad Resolutie 1267 (1999) aan, die alle sancties verplichtte ‘het geld en andere financiële middelen te bevriezen, die direct aan de Taliban toebehoorden of hen indirect voordelen boden’.³ De oorspronkelijke bedoeling was om het Afghaanse regime er onder druk toe te bewegen Osama bin Laden uit te leveren. Omdat te kunnen bewerkstelligen werd er een Sanctiecomité ingesteld – bestaande uit de permanenten van de Veiligheidsraad – dat een lijst moest opmaken en beheersen van individuen en eenheden, die een binding hadden met de Taliban. Nadat de USS Cole in 2000 in Jemen werd gebombardeerd, werd de doelgroep uitgebreid tot iedereen, die geacht werd ‘een binding te hebben’ met Osama bin Laden of Al-Qaeda.⁴ Na de terroristische aanslagen van 11 September 2001 werd de noodzaak voor een geografische verbinding met Afghaans gebied losgelaten, waarna de sancties konden worden toegepast op eenieder, die op de lijst stond en dien een binding hadden met de Taliban. Nadat de USS Cole in 2000 in Jemen werd gebombardeerd, werd de doelgroep uitgebreid tot iedereen, die geacht werd ‘een binding te hebben’ met Osama bin Laden of Al-Qaeda.⁵ Binnen drie jaar werd de Al-Qaeda-lijst van de VN radicaal omgezet in een preventie juridisch wapen voor het ontwrichten van mondiale terroristische netwerken met bijbehorende voorvechters, met ongekende (temporale en spatiaal onbeperkte) mogelijkheden voor de Raad om zich te richten op individuele verdachten van terrorisme en daarbij gebruik te maken van geheime informatie die zogezegd ‘binding met’ Al-Qaeda zou aantonen.

In dit boek wordt een kritische blik geworpen op de manier waarop de VN Al-Qaeda op de contraterrorismelijst zet als een verrassend nieuwe vorm van mondiale veiligheidswetgeving. Er wordt in aangegeven hoe de lijst werkt als een opdrachtmechanisme om de onzeker toekomstige bedreigingen van mondiaal terrorisme onderhevig te maken aan hedendaagse juridische tussenkomst. Ik beweer, dat de Wet van de Lijst veranderingen aanbrengt in de verhouding tussen nationaal en internationaal recht, het beste gezien als een mondiaal assemblage van wetgevingen. Het brengt nieuwe inzichten op kennis, beheerstechnieken en preventieve mechanismen voor veiligheid toeweg, die wijzigingen aanbrengen in hoe wetgeving in detail functioneert. Om te kunnen begrijpen hoe de wet wordt omgevormd door globalisatie of hoe omgaan met onzekerheden de toepassing van de wet verandert, is het nodig om te kijken naar de politiek van deskundigheid en de schijnbaar alledaagse technische manieren waarop met problemen wordt omgegaan. In dit boek wordt beschreven hoe bestuderen van mondiale wetgeving met betrekking tot veiligheid in het licht van plaatselijke ervaringen, een dynamischer en genuanceerder inzicht verschaf aan zich ontwikkelende noodsituaties.

¹ Peter Wallensteen en Carina Staibano (auteurs) International Sanctions: Between Words and Wars in the Global System (Frank Cass, 2005).
³ Veiligheidsraadresolutie 1267 (1999), paragraaf 4 (b).
⁴ Veiligheidsraadresolutie 1333 (2000), paragraaf 8 (c).
⁵ Veiligheidsraadresolutie 1390 (2002).
De vragen in dit onderzoek omvatten vooral: Hoe werkt de Al-Qaeda-lijst als vorm van mondiaal veiligheidswetgeving en -beheer? Wat voor soort mondiale wetgeving is het en hoe wordt daar een krachtige werking aan verleend? Hoe maakt de mondiaal veiligheidslijst het mogelijk de invloed van de Veiligheidsraad tot stand te doen komen, te bevestigen en te doen groeien? Met ander woorden, hoe wordt ‘het mondiaal’ in mondiaal veiligheidswetgeving tot stand gebracht? Zorgt de lijst voor veranderingen in de nationale en internationale rechtsorde – en als dat zo is, hoe en met welke gevolgen? Kan de lijst zich gemakkelijk vestigen in het interstatale en internationale rechtssysteem of zich daaruit losmaken – en als dat zo is, welke alternatieve kaders zouden we kunnen gebruiken om het te beschrijven en de daaruit voortvloeiende problemen te begrijpen? Hoe verandert de manier van omgaan in de wereld met grensoverschrijdende problemen zoals terroristische netwerken de rol van deskundigheid in internationaal recht en besluitvorming? En wat kunnen de praktijken van de VN ten aanzien van terroristemijslijsten ons vertellen over de verandering in wetgeving en gezamenlijke veiligheid onder omstandigheden van mondialisering?

De Al-Qaeda-lijst is niet alleen een verrassend nieuwe vorm van mondiaal wetgeving, maar het is tevens een wapen voor preventieve oorlogsvoering. Hoewel er veel aandacht is besteed aan preventie en uitzonderlijk beheer van hedendaagse veiligheid, worden de gevolgen van die verschuiving in toepassing van de wet onvoldoende begrepen. Dus, in dit project wordt de Al-Qaeda-lijst ook bestudeerd met het oogmerk om te begrijpen wat er gebeurt met wettigheid, wanneer die verstrikt geraakt in de logica van preventieve veiligheid en zich richt op het omgaan met onzekere, toekomstige bedreigingen. Hoe worden preventieve veiligheidsmaatregelen zoals de lijst in essentie samengesteld en wat kan die assemblage ons vertellen over veranderingen in wetgeving ten aanzien van onberekende risico’s en bedreigingen? Welke wettelijke politieke spanningen ontstaan er als gevolg van het treffen van preventieve maatregelen en hoe wordt er met die problemen omgegaan en hoe worden ze opgelost? Hoe worden uitzonderlijke bestuurstechnieken (zoals veiligheidslijsten) genormaliseerd en duurzaam gemaakt en in de praktijk gerespecteerd? En wat kunnen dergelijke praktijken ons vertellen over de rol van internationaal recht en internationale organisaties met betrekking tot mondiaal noodtoestanden?

De bedoeling van dit boek is het inslaan van nieuwe wegen met betrekking tot denken over mondiaal veiligheidswetgeving- en beheer door op een sociaaljuridische manier rekenschap te geven van het in de praktijk samenstellen van de lijsten. Dit boek is gestructureerd om drie op ervaring gebaseerde hoofdstukken, waarin het samenstellen van de lijsten van verschillende kanten wordt bekeken. Elk hoofdstuk gaat over een bepaald probleem en daarin wordt nagegaan hoe een verscheidenheid aan betrokkenen ermee is omgegaan, om mij te helpen bij het ingaan op de wezenlijke punten, die moeten worden onderzocht. Er is geen overkoepelend verhaal, dat de verschillende delen tot een samenhangend geheel samenbindt, maar de wezenlijke noties zijn in alle teksten aanwezig en worden bij de verscheidene bestudeerde punten herhaald. Dit boek is voornamelijk geschreven als tekst over mondiale wetgeving, waarbij de klemtoon ligt op de politiek aangaande contraterrorisme. Toch is het ook bedoeld om diegenen aan te spreken, die interdisciplinaire belangstelling hebben voor sociaaljuridisch onderzoek, mondiaal bestuursrecht en de rechten van de mens, wetenschapsdynamica en de sociologie van kennis, de ‘praktijk’ in internationale betrekkingen, etnografieën van mondialisering, sociaalvoelend bestuur, internationaal en transnationaal recht en kritisch onderzoek naar veiligheid.

In hoofdstuk 1 volgt een inleiding tot de reikwijdte van dit onderzoek en worden mijn voornaamste vragen, zoals hierboven geschetst, uiteengezet. Er wordt uitgelegd hoe ik, als mensenrechtenadvocaat, die mensen op de Al-Qaeda-lijst vertegenwoordigt, ertoe ben gekomen dit onderzoek te doen en waarom ik dit verrassend nieuwe domein van mondiaal recht wilde begrijpen als een vorm van productieve macht. Na het schenken van aandacht aan de beperkingen van de
bestaande rechtsleer met betrekking tot dit onderwerp wend ik mij tot de drie belangrijkste analytische aspecten van dit boek – het bestuderen van mondiaal recht als assemblage van wetten, het onderzoeken van risico en preventie als bestuursrechtelijke praktijken en het heroverwegen van het probleem van uitzonderlijk bestuur. Het inleidende hoofdstuk plaatst dit boek ook als methodologisch experiment in geplaatste productie van kennis. Gebaseerd op de wetenschappelijkheid van wetenschapsdynamica (Engels: STS [Science and Technology Studies]), beweer ik dat methoden performatief zijn. Ze bepalen de wereld, die ze beschrijven en grijpen erin in, en zijn derhalve intens politiek. Dat leidt tot een discussie over hoe mijn eigen positie als praktiserend advocaat binnen deze assemblage mijn bevindingen beïnvloedt en vormgeeft. Maar in plaats van dat af te doen als iets dat afleidt van de geloofwaardigheid van het onderzoek, stel ik dat mijn achtergrond als beoefenaar en advocaat binnen het stelsel van lijsten, helpt met het ontwikkelen van nieuwe inzichten en het koesteren van een onderzoeksethiek van geplaatste betrokkenheid. Er wordt in dit boek aan aandacht geschonken aan drie onderscheidenlijke methodologische bewegingen – bestuderen van de lijst als op meerdere locaties gebaseerd onderzoeksobject en mondiaal als ‘een opkomende dimensie van twisten over de verbinding tussen locaties’;\(^5\) onderzoeken van de ervaring met de rol van praktijken in mondiaal veiligheidswetgeving en -bestuur; gebruikmaken van gelekte documenten om mijn onderzoeksgebieden samen te brengen en een domain van mondiaal recht te bestuderen, dat anders in geheimen gehuld zou zijn.

In hoofdstuk 2 wordt aandacht geschonken aan het UN1267 Al Qaeda Analytical Support and Sanctions Monitoring Team [VN1267 Analytisch ondersteunings- en sanctiebewakingsteam betreffende Al-Qaeda] – een groep van deskundigen, die het Sanctiecomité (bestaande uit de vijf permanente leden van de Veiligheidsraad) ondersteunen bij het beheren van de lijst. In dat hoofdstuk wordt het praktische probleem behandeld over hoe zich te richten op ‘mondiaal terrorisme’ – een probleem waarvan alle eerdere pogingen het te bepalen hebben gefaald en dat is gehuld in politieke en epistemologische onzekerheid. Puttend uit een theorie van een netwerk van betrokkenen en bestuursrechtelijke wetenschappelijkheid, toon ik aan hoe de technologie van de lijst als zodanig een cruciale rol speelt bij het bestuurbaar maken van dit onvatbare probleem – door een ‘mondiaal optisch filter’ te bouwen, waardoor verspreide terroristische netwerken kunnen worden gezien en orde te scheppen in een anders ontregelde mondiale bedreiging. Ik analyseer de praktijk van in twee specifieke locaties betrokken VN-lijst-deskundigen – in ‘beraadslagend onderhoud’ met agenten van de nationale veiligheids- en geheime diensten met de bedoeling om namen op de lijst van mogelijke doelwitten te plaatsen en in samenwerking met deskundigen van andere internationale organisaties om de lijst uitwisselbaar met mondiale politiedatabases (Interpol) en de passagiersgegevens, die door de mondiale luchtvaartindustrie (ICAO en IATA) worden verzameld. Die ogenschijnlijk onbeduidende technische praktijken, die zijn gericht op het beter verwezenlijken van de lijst, hebben zich niet over academische belangstelling mogen verheugen. Maar in dat hoofdstuk wordt aangetoond, hoe het analyseren van kennis van deskundigen belangrijke inzichten kan verschaffen in hoe de mondiale veiligheidswetgeving wordt gemaakt tot iets machtigs, duurzaams en wereldwijd. Als we erin zijn geïnteresseerd om te begrijpen hoe nieuwe vormen van mondiaal administratief geweld worden gesmeed in de schenen van formeel recht en de bevoegdheid van de Veiligheidsraad uit hoofde van Hoofdstuk VII, dan is het bestuderen van ervaringen met de technieken en praktijken met betrekking tot het deskundig samenstellen van de lijsten van kritiek belang.

In hoofdstuk 3 verschuift de aandacht naar het voortdurende probleem van toerekenbaarheid in mondiaal bestuur en wordt gevolgd wat er gebeurt, wanneer de sanctiebevoegdheden van de VN, die oorspronkelijk waren ontworpen om weerspannige Staten, die geacht werden een bedreiging te vormen voor internationale vrede weer in het gareel te brengen, worden bijgeijkt om zich direct te richten op individuen, die ervan worden verdacht knooppunten te vormen in mondiale terroristische

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netwerken. Het bevat een gedetailleerde genealogische weergave van het ontstaan van het VN 1267 Bureau van de Ombudspersoon – een verrassend nieuw procedureel mechanisme dat in 2009 in het leven was geroepen bij de Veiligheidsraad, opdat individuen op de lijst, die vinden dat ze ten onrecht een doelwit zijn, herstel kunnen zoeken. Dit conflict over ‘eerlijke en duidelijke procedures’ bij het toepassen van sancties van de Veiligheidsraad is al een levendig onderwerp sinds het begin van het stelsel van Al-Qaeda-lijsten. Alle hoofdbetrokkenen bij alle lijsten van de assemblage hebben bijna een decennium lang over dit kritieke aspect gediscussieerd. Terwijl er nog steeds onenigheid heerst over de vraag of de Ombudspersoon ver genoeg gaat in het beschermen van de rechten op een eerlijk proces, neigt iedereen ertoe ermee in te stemmen, dat dit een belangrijke stap is in de juiste richting naar beter voldoen aan de rechten van de mens.

Mijn analyse is een aanvordering van dit verhaal van mondiale juridische vooruitgang en maakt de stelling dat de Ombudspersoon voor ‘eerlijke en duidelijke’ procedures zorgt, ingewikkeld. Ik toon aan, hoe de Ombudspersoon een samengesteld figuur van deskundigheid is, ontsproten aan verschillende institutionele twisten onder omstandigheden van internationale juridische fragmentatie. Mijn belangrijkste argument is dat verschillende betrokkenen bij de assemblage van de lijsten door hun praktijken fundamenteel verschillende versies van de lijst samenstellen – dat wil zeggen dat de Al-Qaeda-lijst hoogstens kan worden gezien als wat wetenschappers in de wetenschapsdynamica een ‘meeromvormig object’ noemen. Wanneer het toerekenbaarheidsprobleem op die manier te ruste wordt gelegd, dan kunnen we zien, dat de Ombudspersoon fungeert als een soort institutionele lijn of ‘grensobject’, die helpt bij het op een lijn brengen van de verschillende betrokkenen, de onderliggende politieke spanningen de mond snoert en de verscheidene versies van de lijst in een relatief stabiele maar niettemin ongemakkelijke relatie samenbindt. Gebaseerd op gesprekken met de Ombudspersoon en mijn eigen ervaringen bij het vertegenwoordigen van individuen in procedures om van de VN-lijst af te komen, uit ik kritiek op de stelling dat deze vernieuwing een ‘de facto juridische herziening’ inhoudt. Zoals ik het zie, zijn deze unieke praktijken en technieken om van de lijst af te komen gericht op het verankeren van nieuwe vormen van preventieve veiligheid en daardoor de lijst duurzaam te maken als een uitzonderlijk, mondiaal bestuursinstrument.

In hoofdstuk 4 wordt de lijst gevolgd in de rechtbanken van de EU en met betrekking tot de praktijk van rechterlijke toetsing. Er wordt nauwkeurig bekeken wat er gebeurt als de logica van preventieve veiligheid en de omgang met radicale onzekerheid, die inherent is aan de technologie van de lijst, in aanraking komt de beginselen van juridisch bewijs en bewijsvoering, zoals lang toegepast en beschermd door de rechtbanken. In dit hoofdstuk wordt op basis van ervaring gekeken naar de recente hervorming van de procedurele regels van het Gerecht van de Europese Unie, waaronder rechters voor de eerste keer mogen vertrouwen op materiaal van inlichtingendiensten zonder dat de bron wordt onthuld. Die hervormingen worden onderzocht in een poging de moeilijkheden op te lossen, die verband houden met rechterlijk toetsen van een lijst, waarvan de bewijsvoering is gebaseerd op bevindingen van inlichtingendiensten en de soort conflicten met betrekking tot standaard uit de weg te ruimen, zoals te zien zijn in de Kadi-zaak.

De meeste wetenschappers in mondial recht kijken niet naar aspecten van tijd en ruimte, alhoewel die veelal gezien worden als richtingbepalend voor mondialisering in meerdere academische disciplines. In hoofdstuk 4 krijgt dit probleem aandacht door de in de lijst geïntegreerde temporale en spatiale dynamiek en de epistemologische kwaliteiten naar voren te halen. Ik stel dat het samenstellen van de lijst wordt aangedreven door de dynamiek van ‘niet synchrone’ behandeling en ‘dislocatie’ en wordt verleendigd door een mozaïsche epistemologie, waarin ongenschijnlijk onbelangrijke details worden samengevoegd, met de bedoeling om daaruit mogelijke samenhangende verbanden en toekomstige bedreigingen af te leiden. Niet synchroon recht is uit de pas lopende wettigheid, die bestaat uit elka bewegende temporale logica. Door gebruik te
maken van bevindingen van inlichtingendiensten als bewijsmateriaal, brengt de lijst terugblikkende en preventieve logica samen in een productieve verhouding, die een juridisch conflict veroorzaakt. De bedoeling van de procedurele hervormingen van de EU is rechters de gereedschappen te geven om met dit probleem om te gaan, maar ze maken het probleem alleen maar ingewikkelder. Bovendien is rechterlijke toetsing normaal gesproken gericht op een ‘beslissing’, die al in het verleden is genomen. Maar mijn analyse toont aan, hoe gebruikmaken van de bevindingen van inlichtingendiensten als bewijsmateriaal die beslissingsruimte uitstelt en het juridische proces verwart, omdat de beslissing die wordt geacht te worden getoetst er niet is. Ik gebruik de uitdrukking ‘misplaatst recht’ om dit dynamische proces van breuk en uitstel vast te leggen en meen te kunnen aannemen, dat dit van kritiek belang is met betrekking tot hoe de Wet van de Lijst zaken bepaalt.

De slotsom van het boek brengt de voornaamste bevindingen van dit project samen en zet de koers voor mondiale veiligheidsproblemen, die meer onderzoek vereisen. In mijn analyse is het niet zo, dat preventieve veiligheid een vervanging is voor bestaande manieren van toepassen van de wet, maar eerder een manier is om die manieren anders te organiseren op zodanige wijze dat aandacht voor ervaring vereist is, als we willen kunnen begrijpen hoe mondiale veiligheidswetgeving gaat over de onzekere toekomstige bedreigingen door hedendaags terrorisme. Mondiale veiligheidswetgeving is niet de stoere nieuwe wereld, die door veel advocaten wordt geproclameerd. Het is iets, dat veel verbrokkelder, heterogeen en ingewikkeld is. De wereld beveiligen tegen grensoverschrijdende terroristische aanvallen leidt tot ingrijpende wijzigingen in de nationale en internationale rechtsorde en tot verstevigen van nieuwe vormen van uitzonderlijk bestuur. In dit boek worden die hervormingen kaart gebracht en wordt een gedetailleerd forensisch overzicht gegeven over hoe de mondiale noodwetgeving ontwikkelt. Het eindigt niet bij het nauwkeurig omschrijven van een corrigerend programma van wettelijke of politieke hervormingen. Maar ik stel, dat aantonen hoe veiligheidsproblemen worden beheerd en mondiale rechtssystemen door de lijst worden samengesteld, een belangrijk kritiek project in zichzelf is. Het plaatst de economieën van de macht en de voorwaarden voor de lijst op de analytische voorgrond, geeft ze weer als iets dat door de geschiedenis is geplaatst and daaruit voorkomt en verschaf inzicht in hoe dingen anders kunnen worden gedaan. Het is een aanpak, die probeert te bieden wat door Michel Foucault een ‘historische zijnleer van onszelf’ wordt genoemd – waar er ‘enerzijds de kritische analyse is van wie we zijn en anderzijds tegelijkertijd de historische analyse van de grenzen, die aan ons worden gesteld en waar we experimenteren met de mogelijkheid om ze overschrijden’.