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The Law of the List

UN counterterrorism sanctions and the politics of global security law

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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.[1] 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'[2] for the Council to 'deter individual states from taking matters into their own hands'.[3] 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extraordinary power was to be limited to specific and concrete threats.[4] When threats receded, the sanctions would be withdrawn.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.[5] 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.[6] 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.[7] 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'.[8] The original aim was to pressure the Afghan regime to extradite Osama bin Laden and stop providing '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.[9] According to the Committee 'A criminal charge or conviction is not a prerequisite for listing

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[1] Martti Koskenniemi (2011) *The Politics of International Law* (Hart Publishing, 2911) 83.
[2] Peter Wallensteen and Carina Staibano (eds.) *International Sanctions: Between Words and Wars in the Global System* (Frank Cass, 2005)
[3] Jeremy Greenstock 'The Security Council in the Post Cold-War World' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds.) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2010) 248.
[4] Paul Szasz, 'The Security Council Starts Legislating' (2002) 96(4) *American Journal of International Law* 901.
[5] Rhodesia [S/RES/232 (1966)] and South Africa [S/RES/418 (1977)].
[6] David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner, 2000) 2.
[7] Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press, 2012) 270.
[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'.[10] 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'.[11] 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'.[12]

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'.[13] 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'.[14] After 9/11 the Al-Qaida 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.[15] 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-Qaida.

This book critically examines the UN Al-Qaida 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-Qaida sanctions regime was. The UN Security Council were developing a unique

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[10] UN1267 Sanctions Committee, *Guidelines of the Committee for the Conduct of its Work* (15 April 2013) para 6(d).

[11] George W. Bush, 'State of the Union Address (20 January 2004). Available at: http://wapo.st/1a0deFd.

[12] George W. Bush, 'Address to Joint Session of Congress and the American People' (21 September 2001). Available at: http://cnn.it/1tw4r5W.

[13] S/RES/1373 (2001). Kim Lane Scheppele, 'The International State of Emergency: Challenges to Constitutionalism after September 11', (21 September 2006) *Yale Legal Theory Workshop* (unpublished manuscript) 1.

[14] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 32.

[15] S/RES/1390 (2002)

global legal weapon, that made individual terrorism suspects 'effectively prisoners of the state' without any political or legal redress.[16] 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'.[17] One official has likened the effect to a 'civil death penalty'.[18] 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.[19] 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 policy-makers 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'.[20] 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.[21] 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

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[16] *HM Treasury v Ahmed and Others* [2010] UKSC 2 (Lord Hope) para. 60.

[17] Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare*. (Public Affairs, 2013).

[18] Dick Marty, Rapporteur for the Council of Europe, cited in Birgit Kruse 'Zivile Todesstrafe' (*Sueddeutsche Zeitung*, 12 November 2007). Available at: http://bit.ly/2aSYF9Z. See also: Marieke de Goede, 'Blacklisting and the Ban: Contesting Targeted Sanctions in Europe'(2011) 42(6) *Security Dialogue* 499.

[19] This process is discussed in more detail later in chapter 3.

[20] Ron Suskind, *The One Percent Doctrine*: *Deep Inside America's Pursuit of Its Enemies Since 9/11* (Simon and Schuster, 2006) 14.

[21] Zarate (n 17) 36.

amount of money blocked', not preparing strong evidence to justify the listings.[22] '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"'.[23] 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]

QDi.092 Name: 1: MEHREZ 2: BEN MAHMOUD 3: BEN SASSI 4: AL-AMDOUNI
Name (original script): محرز بن محمود بن ساسي العمدوني
Title: na **Designation:** na **DOB:** 18 Dec. 1969 **POB:** Asima-Tunis, Tunisia **Good quality a.k.a.: a)** Fabio Fusco born 25 May 1968 in Naples, Italy **b)** Fabio Fusco born 18 Dec. 1968 in Tunisia **c)** Fabio Fusco born 25 May 1968 in Algeria **d)** Mohamed Hassan **e)** Meherez Hamdouni **f)** Amdouni Mehrez ben Tah born 14 Jul. 1969 in Tunisia **g)** Meherez ben Ahdoud ben Amdouni **Low quality a.k.a.:** Abu Thale **Nationality:** Tunisia **Passport no:** Tunisian G737411, issued on 24 Oct. 1990 (expired on 20 Sep. 1997) **National identification no:** na **Address:** Italy **Listed on:** 25 Jun. 2003 (amended on 26 Nov. 2004, 20 Dec. 2005, 17 Oct. 2007, 16 Sep. 2008, 24 Mar. 2009, 12 Jul. 2010, 16 May 2011) **Other information:** Father's name is Mahmoud ben Sasi. Mother's name is Maryam bint al-Tijani. Inadmissible to the Schengen area. Review pursuant to Security Council resolution 1822 (2008) was concluded on 22 Apr. 2010.

QDi.389 Name: 1: ABU UBAYDAH 2: YUSUF 3: AL-ANABI 4: na
Title: na **Designation:** na **DOB:** 7 Feb. 1969 **POB:** Annaba, Algeria **Good quality a.k.a.: a)** Abou Obeida Youssef Al-Annabi **b)** Abu-Ubaydah Yusuf Al-Inabi **Low quality a.k.a.: a)** Mebrak Yazid **b)** Youcef Abu Obeida **c)** Mibrak Yazid **d)** Yousif Abu Obayda Yazid **e)** Yazid Mebrak **f)** Yazid Mabrak **g)** Yusuf Abu Ubaydah **h)** Abou Youcef **Nationality:** Algeria **Passport no:** na **National identification no:** na **Address:** Algeria **Listed on:** 29 Feb. 2016 **Other information:** A leader of the Organization of Al-Qaida in the Islamic Maghreb (AQIM) (QDe.014). Photo available for inclusion in the INTERPOL-UN Security Council Special Notice.

QDi.060 Name: 1: MOHAMED 2: BEN BELGACEM 3: BEN ABDALLAH 4: AL-AOUADI
Name (original script): محمد بن بلقاسم بن عبد الله العوادي
Title: na **Designation:** na **DOB:** 11 Dec. 1974 **POB:** Tunis, Tunisia **Good quality a.k.a.: a)** Mohamed Ben Belkacem Aouadi **b)** Fathi Hannachi **Low quality a.k.a.:** na **Nationality:** Tunisia **Passport no:** (Tunisian passport number L 191609 issued on 28 Feb. 1996, expired on 27 Feb. 2001) **National identification no: a)** (04643632 issued on 18 Jun. 1999) **b)** (Italian Fiscal Code: DAOMMD74T11Z352Z) na **Address:** 50th Street, Number 23, Zehrouni, Tunis, Tunisia **Listed on:** 24 Apr. 2002 (amended on 10 Apr. 2003, 26 Nov. 2004, 9 Sep. 2005, 20 Dec. 2005, 31 Jul. 2006, 7 Jun. 2007, 23 Dec. 2010, 24 Nov. 2014, 23 Feb. 2016) **Other information:** Head of security wing of Ansar al-Shari'a in Tunisia (AAS-T) (QDe.143). Mother's name is Ourida Bint Mohamed. Deported from Italy to Tunisia on 1 Dec. 2004. Arrested in Tunisia in Aug. 2013. Imprisoned in the civilian prison of Burj al-'Amiri on 13 Sep. 2013. Review pursuant to Security Council resolution 1822 (2008) was concluded on 22 Apr. 2010.

QDi.291 Name: 1: IBRAHIM 2: HASSAN 3: TALI 4: AL-ASIRI
Name (original script): إبراهيم حسن طالع العسيري
Title: na **Designation:** na **DOB: a)** 19 Apr. 1982 **b)** 18 Apr. 1982 **c)** (24/06/1402 (Hijri Calendar)) **POB:** Riyadh, Saudi Arabia **Good quality a.k.a.: a)** Ibrahim Hassan Tali Asiri (إبراهيم حسن طالع عسيري) **b)** Ibrahim Hasan Talea Aseeri **c)** Ibrahim Hasan al-Asiri **d)** Ibrahim Hassan Tali Asiri **e)** Ibrahim Hassan Tali Assiri **f)** Ibrahim Hassan Tali'A 'Asiri **g)** Ibrahim Hasan Tali al-'Asiri **h)** Ibrahim al-'Asiri **i)** Ibrahim Hassan Al Asiri **Low quality a.k.a.: a)** Abu Saleh **b)** Abosslah **c)** Abu-Salaah **Nationality:** Saudi Arabia **Passport no:** Saudi Arabia F654645, issued on 30 Apr. 2005 (expired on 7 Mar. 2010. Issue date in Hijri Calendar 24/06/1426. Expiry date in Hijri Calendar 21/03/1431.) **National identification no:** civil identification number 1028745097 **Address:** Yemen **Listed on:** 24 Mar. 2011 (amended on 15 Apr. 2014, 15 Jun. 2015) **Other information:** Operative and principal bomb maker of Al-Qaida in the Arabian Peninsula (AQAP) (QDe.129). Believed to be hiding in Yemen as at Mar. 2011. Wanted by Saudi Arabia. Also associated with Nasir 'abd-al-Karim 'Abdullah Al-Wahishi (QDi.274), Qasim Yahya Mahdi al-Rimi (QDi.282), and Anwar Nasser Abdulla Al-Aulaqi (QDi.283).

Figure 1: Excerpt from the UN1267 Al-Qaida Sanctions List. Available at: http://bit.ly/2evj4GT (© (2016) United Nations. Reprinted with permission from the United Nations).

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

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[22] Sue Eckert, 'The US Regulatory Approach to Terrorist Financing' in Thomas J. Biersteker and Sue E. Eckert (eds.) *Countering the Financing of Terrorism* (Routledge, 2008) 209.
[23] cited in: Ron Suskind, *The Price of Loyalty: George W. Bush, the White House and the Education of Paul O'Neill* (Simon and Schuster, 2004) 193.
[24] Thomas Biersteker, 'Targeted sanctions and individual human rights' (2010) 65(1) *International Journal: Canada's Journal of Global Policy Analysis* 99, 102.

an unspecified crime'.[25] 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.[26] 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'.[27] 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'.[28]

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 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)

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[25] *Abdelrazik v Canada* (Minister of Foreign Affairs) 2009 F.C. 580, para. 53.
[26] Joined Cases C-402 P and 415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I 6351. The *Kadi* litigation is referred to extensively throughout this book and discussed in detail in chapter 3.
[27] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013) 11
[28] Michel Foucault, *Power/Knowledge: Selected interviews and other writings, 1972-1977* (Pantheon, 1980) 136, 96.

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 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.

<div align="center">Four Walls of Scholarship</div>

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'.[29] 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.[30] 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.[31] *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.[32] 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).[33] *Solange*-based approaches

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[29] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51(1) *Harvard International Law Journal* 1, 40.

[30] The notion of containment and transfer comes from: Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2012) 15.

[31] Bardo Fassbender, 'Targeted Sanctions and Due Process' (2006) 3(2) *International Organizations Law Review* 437; Christian Tomuschat, 'The *Kadi* Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' (2009) 28(1) *Yearbook of European Law* 654.

[32] de Búrca (n 29) 42 – 43.

[33] See, for example: de Búrca (n 29); Erika De Wet, 'The role of European courts in the development of a hierarchy of norms within international law: evidence of constitutionalisation?' (2009) 5(2) *European Constitutional Law Review* 284; Turkuler Isiksel, 'Fundamental Rights in the EU after *Kadi* and *Al Barakaat*' (2010) 16(5) *European Law Journal* 551; Armin von Bogdandy, 'Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6(3–4) *International Journal of Constitutional Law* 397, 398.

claim the deficiencies of this global listing regime ought to ultimately be resolved at the UN level.[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.[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.[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'.[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. *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')[38] through which conflicts can be resolved.[39] Here principles of harmonisation and practices of 'mutual embedded openness' are emphasised as means of achieving overall coherence.[40] *Systemic pluralists* take a more robust stance, by positing 'a pluralism that is positioned outside, and is to some extent opposed to, international law'.[41] 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.[42]

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'.[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

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[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.

[35] 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; Ernst-Ulrich Petersmann, 'Do Judges Meet their Constitutional Obligations to Settle Disputes in Conformity with "Principles of Justice and International Law"?' (2007) *European Journal of Legal Studies* 1.

[36] See, for example: Krisch (n 30); Paul Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155.

[37] de Búrca (n 29) 38. Krisch (n 30) 23. For an overview of the global legal pluralist literature, see: Ralf Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Sciences* 243.

[38] Daniel Halberstam, 'LJIL Symposium Vol 25-2: Beyond Constitutionalism? A Comment by Daniel Halberstam'. Available at: http://bit.ly/1saeEHm.

[39] In constitutional pluralism 'there is no hierarchy, no overarching legal system and no single arbiter. But the interaction is shot through with constitutional law and practice. It is both constitutional and plural' (*ibid*). See, for example: Krisch (n 30) 74; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission*, [2008] ECR I 6351, Opinion of AG Poiares Maduro; Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13; Alec Stone-Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1(1) *Journal of Global Constitutionalism* 53; Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press, 2012).

[40] Halberstam (n 38). Constitutional pluralism and soft constitutionalism are therefore quite similar: de Búrca (n 29) 39 - 40.

[41] André Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism' in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013) 94. Krisch provides the foremost systemic pluralist analysis of UN terrorist listing (n 30).

[42] Krisch (n 30) 2. See also: Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999.

[43] Koskenniemi (n 1) 331.

specific problems of international law and normative conflict.[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.[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'.[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'.[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.[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.[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.[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

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[44] Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in Stephen Krasner (ed.) *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.

[45] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press, 2016). See also the various reports of the *Watson Institute on Targeted Sanctions*, discussed at length in Chapter 3, and the approach adopted by the recent *High Level Review of UN Sanctions*, available at: http://bit.ly/2aownY2. For a critique of this review on account its functionalism, see: Alejandro Rodiles, 'The design of UN sanctions and the interplay with informal arrangements' in Larissa van den Herik (ed.) *Research Handbook on International Law and United Nations Sanctions* (Edward Elgar Publishing, forthcoming - copy with author). The quote on 'smooth functioning' comes from: Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A. Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 305.

[46] Larissa van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes', (2014) 19 (3) *Journal of Conflict and Security Law* 427.

[47] Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *European Journal of International Law* 1, 1.

[48] Ben Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 (3/4) *Law and Contemporary Problems* 15, 16. For a good introduction to the GAL literature, see: Sabino Cassese, *Research Handbook on Global Administrative Law* (Edward Elgar Publishing, 2016). Key GAL texts include: Benedict Kingsbury, 'The concept of 'law' in global administrative law' (2009) 20(1) *European Journal of International Law* 23; Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law'(2009) 6 (2) *International Organizations Law Review* 319; Michael S. Barr and Geoffrey P. Miller, 'Global administrative law: the view from Basel' (2006) 17(1) *European Journal of International Law* 15; Simon Chesterman, 'Globalization rules: accountability, power, and the prospects for global administrative law' (2008) 14(1) *Global Governance: A Review of Multilateralism and International Organizations* 39.

[49] Krisch and Kingsbury (n 16) 2.

[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.[51] 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'.[52] 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'.[53]

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'.[54] 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'.[55] 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'.[56]

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'.[57] 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.[58]

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

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[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.

[55] David Kennedy, *A World of Struggle: How Power Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016) 100.

[56] Koskenniemi (n 45) 321.

[57] Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law*, cited in Desmond Manderson, 'Beyond the Provincial: Space, Aesthetics and Modernist Legal Theory' (1995 – 6) 20 *Melbourne University Law Review* 1049.

[58] Gregory Shaffer, 'A Transnational Take on Krisch's Pluralist Structure of Postnational Law (2012) 23(2) *European Journal of International Law* 565, 577.

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.[59] To that end, this book makes three distinct analytical moves.

<div align="center">Studying Global Security Law in Motion</div>

(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.[60] It stems from the philosophy of Gilles Delueze and Felix Guattari, who use it to describe the symbiotic co-functioning of heterogeneous elements across different domains 'linked together to form a whole'.[61] 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'*.[62] 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.[63]

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.[64] It is the forging of these associations and scale producing

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[59] On globalisation decentring the foundational coordinates of law, see: Neil Walker, 'Out of Place and Out of Time: Law's Fading Co-Ordinates', *University of Edinburgh School of Law Working Paper No 2009/01*; and Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Publishing, 2009). On the shift from 'static models to dynamic analyses', see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) 1.

[60] See, for example: Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006); Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press, 2010); Rita Abrahamsen and Michael Williams, *Security Beyond the State: Private Security in International Politics* (Cambridge University Press, 2011); Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke University Press, 2013); Michele Acuto and Simon Curtis (eds), *Reassembling International Theory: Assemblage Thinking and International Relations* (Palgrave Pivot, 2013); Marieke De Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (University of Minnesota Press, 2012); Heather McKeen-Edwards and Tony Porter, *Transnational Financial Associations and the Governance of Global Finance: Assembling Wealth and Power* (Routledge, 2013); Aihwa Ong and Stephen J Collier (eds), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* (Wiley-Blackwell, 2004).

[61] Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, 1987) 406. Martin Müller, 'Assemblages and Actor-networks: Rethinking Socio-material Power, Politics and Space' (2015) 9(1) *Geography Compass* 27; 28.

[62] Gilles Deleuze and Claire Parnet, *Dialogues* (The Athlone Press, 1987) vii.

[63] Tania Murray Li, 'What is Land? Assembling a resource for global investment'(2014) 39(4) *Transactions of the Institute of British Geographers* 589; John Law, *Ordering and Obduracy* (Lancaster University: Centre for Science Studies, 2003).

[64] Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005) 5, 8.

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'.[65] Reframed through this lens, the key research task becomes one of 'following the actors' and performing a 'sociology of associations'.[66] 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'.[67]

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'.[68] 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'.[69] 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'.[70] 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'.[71] 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'.[72] 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.[73] And more engaged with novel 'projects of governance' and particular arrangements of legal techniques and practices that are emergent and historically situated.[74]

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

[65] Michel Callon and Bruno Latour, 'Unscrewing the Big Leviathan: how actors macro-structure reality and how sociologists help them to do so' in **Aaron Victor** Cicourel and Karin Knorr-Cetina (eds.) *Advances in Social Theory and Methodology: toward an integration of micro and macro-sociologies* (Routledge & Kegan Paul, 1981) 277, 280 – 281.

[66] Bruno Latour, *Science in action: How to follow scientists and engineers through society* (Harvard University Press, 1987). On the sociology of associations, see: Latour (n 36) 9.

[67] John Law, 'Collateral Realities' in Fernando Dominguez Rubio and Patrick Baert (eds.) *The Politics of Knowledge* (Routledge, 2012) 157.

[68] Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law', (2006) 31(4) *Law and Social Inquiry* 976.

[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.

[71] Nikolas Rose and Mariana Valverde, 'Governed by Law?' (1998) 7(4) *Social and Legal Studies* 541, 545.

[72] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003) 10.

[73] Nico Krisch, 'The structure of postnational authority' (SSRN 2564579, 2015).

[74] Mariana Valverde, '"Despotism" and Ethical Liberal Governance, (1996) 25(3) *Economy and Society* 357, 358.

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 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'.[75] 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.[76]

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.[77] 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.[78] 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.[79]

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[75] Tania Murray Li, 'Practices of Assemblage and Community Forest Management' (2007) 36(2) *Economy and Society* 263, 264.

[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'.[80] 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.
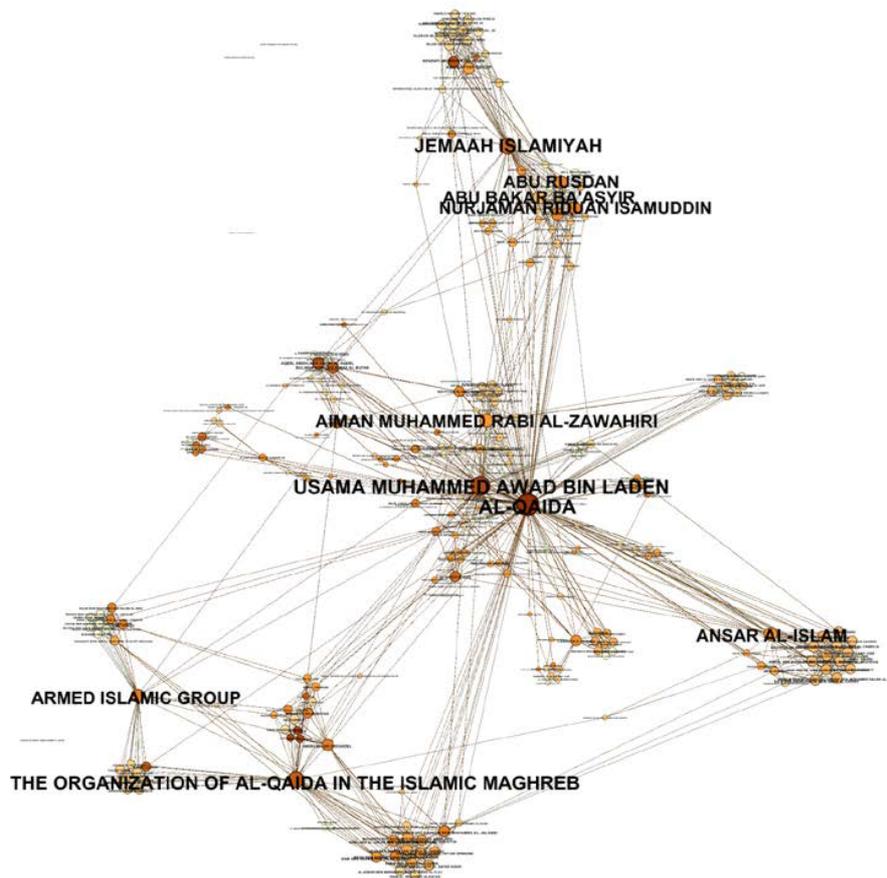

Figure 2: Social Network Map of Al-Qaida
according to the UN1267 list entries.[81]

Strategy, and Heterogeneity' (1992) 5(4) *Systems Practice* 379; Michael Callon, 'Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fisherman of St-Brieuc Bay' in John Law (ed), *Power, Action and Belief: A New Sociology of Knowledge?* (Routledge and Kegan Paul, 1986). The idea of the list as actant is explored in the following chapter.
[80] James Ferguson and Akhil Gupta, 'Spatializing states: toward an ethnography of neoliberal governmentality' (2002) 29(4) *American Ethnologist*, 981.
[81] Eric Stollenwerk, Thomas Dörfler, Julian Schibberges, 'Eyes Wide Shut? Mapping the al-Qaida Network Through the Eyes of the UN Security Council' (Unpublished Draft) Copy with Author. Reprinted with permission from the authors.

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.[82] Whilst these assemblages 'continue to inhabit national institutional and territorial settings', they 'are no longer part of the national as historically constructed'.[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.[84] This transforms the creation of governance scales into an empirical problem to be examined 'through tracing connections and breaks'.[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 *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)   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.[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) *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, *The Global City: New York, London, Tokyo* (Princeton University Press, 2001; Sassen (n 60).

[85] Müller (n 61) 35.

[86] See, for example: International Commission of Jurists, *Assessing the Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009) 91; Claudia Aradau and Rens van Munster, 'Governing terrorism through risk: Taking precautions,(un) knowing the future' (2007) 13(1) *European Journal of International Relations* 89; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006); David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New Press, 2007); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency (*Cambridge University Press, 2006); Benjamin J. Goold and Liora Lazarus (eds.) *Security and Human rights* (Bloomsbury Publishing, 2007); Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management' (2008) 39(2-3) *Security Dialogue* 289; Marieke de Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14(1) *European Journal of International Relations* 161; Louise Amoore, 'Risk before Justice: When Law Contests its Own Suspension' (2008) 21(4) *Leiden Journal of International Law* 847; Didier Bigo, Sergio Carrera, Elspeth Guild and Rob Walker, The changing landscape of European liberty and security: the mid-term report of the CHALLENGE project (2008) 59(192) *International Social Science Journal* 283; Valsamis Mitsilegas, 'The value of

surveillance, since 9/11 the focus of states and IOs has been on risk-based techniques of 'disruption, restriction and incapacitation'.[87] With counterterrorism, the assumption is that 'if we wait for threats to fully materialize we will have waited too long'.[88] 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.[89] 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'.[90] 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'.[91] 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'.[92]

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.[93] For Zedner, 'existing legal categories are dissolving' through the proliferation of 'Future Law' mechanisms, thus warranting 'an entirely new conceptual and procedural framework'.[94] 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.[95]

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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privacy in an era of security: Embedding constitutional limits on preemptive surveillance' (2014) 8(1) *International Political Sociology* 104.

[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.

[89] Ulrich Beck, *Risk Society. Towards a New Modernity* (Sage Publications, 1992); Ulrich Beck, *World Risk Society* (Polity Press, 1999).

[90] Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisted', (2002) 19(4) *Theory, Culture & Society* 39, 41.

[91] Alan M. Dershowitz, *Preemption: A Knife that Cuts Both Ways* (W.W Norton & Company, 2006) 27, 241, 13.

[92] *Ibid*, 237.

[93] Lucia Zedner, "Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin Goold and Liora Lazarus (eds.) Security and Human Rights (Hart Publishing, 2007a) 257, 268; Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007b) 60(1) *Current Legal Problems* 174, 203.

[94] *Ibid* 2007b, 188, 187.

[95] Lucia Zedner, 'Pre-crime and post-criminology' (2007) 11(2) *Theoretical Criminology* 261, 270.

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.[96] 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'.[97] 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'.[98] 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'.[99] 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.[100] Furthermore, because of the centrality of knowledge production, 'government is intrinsically linked to the activities of expertise'.[101] 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.[102]

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[96] See, for example: Aradau and van Munster (n 86); Louise Amoore and Marieke de Goede (eds.) *Risk and the War on Terror* (Routledge, 2008); Susanne Krasmann, 'Law's knowledge: On the susceptibility and resistance of legal practices to security matters' (2012) 16(4) *Theoretical Criminology* 379; Franceso Ragazzi, 'Suspect community or suspect category? The impact of counter-terrorism as "policed multiculturalism"' (2016) 42(5) *Journal of Ethnic and Migration Studies* 724; Wendy Larner and William Walters (eds.) *Global Governmentality: Governing International Spaces* (Routledge, 2004).

[97] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds.) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 87, 102.

[98] Peter Miller and Nikolas Rose, 'Governing Economic Life' (1990) 19(1) *Economy and Society* 1, 3.

[99] Pat O'Malley, *Risk, Uncertainty and Government* (Glasshouse Press, 2004) 7.

[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.

[101] Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43(2) *The British Journal of Sociology* 173, 175.

[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).

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'.[103] 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.[104] Finally, scholar-experts from Brown University's Watson Institute - who have long been some of the 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'.[105]

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.[106] 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'.[107] States of exception are also routinely characterised as 'legal black holes' defined by their absence of law.[108]

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 'depopulat[es] the political stage by sweeping aside its always ambiguous actors', leaving only 'the sheer relation of state power and individual life'.[109] Furthermore, because of the emphasis placed on national sovereign decision, these conventional

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[103] Ben Emmerson QC, *Report of the Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism*, UN Doc A/67/396 (26 September 2012), 5.
[104] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* [2013] Nyr.
[105] Thomas Biersteker, Sue Eckert and Marcos Tourinho (eds.) *Targeted Sanctions*: The Impact and Effectiveness of United Nations Action (Cambridge University Press, 2016) 273.
[106] See, for example: Bruce Ackerman, 'The Emergency Constitution' (2004) 113(5) *The Yale Law Journal* 1029; Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (2000) 21 Cardoza Law Review 1825; Victor V. Ramraj (ed.) *Emergencies and the Limits of Legality* (Cambridge University Press, 2008).
[107] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, 1985) 5 - 6.
[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).
[109] Jacques Ranciere, 'Who is the subject of the Rights of Man?' (2004) 103(2-3) *The South Atlantic Quarterly* 297, 302.

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'.[110] 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.[111]

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'.[112] 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.[113] It is an attempt to rethink problems of exceptional governance in empirical terms outside of the discourse of sovereignty.[114] As Claudia Aradau argues, 'what is important is not the distinction between exception and law, but what practices are deployed and how'.[115] 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.[116]

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[110] Scheppele (n 13) 6.

[111] Nasser Hussain, 'Beyond Norm and Exception: Guantanamo' (2007) 33(4) *Critical Inquiry* 734, 740 - 741.

[112] On banality, see: Louise Amoore and Marieke de Goede, 'Transactions after 9/11: the banal face of the preemptive strike' (2008) 33(2) *Transactions of the Institute of British Geographers* 173. On 'little security nothings', see: Jef Huysmans, 'What's in an act? On security speech acts and little security nothings' (2011) 42(4-5) *Security Dialogue* 371.

[113] Johns (n 27); Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2009); Kim Lane Scheppele, 'International Standardization of National Security Law' (2010) 4 *Journal of National Security Law and Policy* 437; Aradau and van Munster (n 86).

[114] See also: Adi Ophir, 'The Politics of Catastrophization: Emergency and Exception' in Didier Fassin and Mariella Pandolfi (eds.) *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (Zone Books, 2010) 59.

[115] Claudia Aradau, 'Law Transformed: Guantanamo and the 'other' exception (2007) 28(3) *Third World Quarterly* 489, 491.

[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'.[117] 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.[118]

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'.[119] In the social scientific tradition, therefore, methods are like 'free-floating tools in conceptual space'.[120] 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,[121] sociology[122] and Science and Technology studies (STS)[123] 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'.[124] Methods, in other words, are not only *epistemological* tools that 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:

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[117] Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 *American Journal of International Law* 351, 354.
[118] Stephen R. Ratner and Anne Marie Slaughter, 'Appraising the methods of international law: a prospectus for readers' (1999) 93 *American Journal of International Law* 291, 299.
[119] John Law and John Urry, 'Enacting the Social' (2004) 33(3) *Economy and Society* 390, 393.
[120] Dvora Yanow, 'Thinking Interpretively: Philosophical Presuppositions and the Human Sciences' in Dvora Yanow and **Peregrine** Schwartz-Shea (eds.) *Interpretation and Method: Empirical Research Methods and the Interpretive turn* (ME Sharpe, 2006) 8; cited in: Claudia Aradau and Jef Huysmans, 'Critical methods in International Relations: The politics of techniques, devices and acts' (2014) 20(3) *European Journal of International Relations* 596, 597.
[121] Aradau and Huymans *Ibid*; Mark Salter and Can E. Mutlu (eds.) *Research Methods in Critical Security Studies: An Introduction* (Routledge, 2013); Anthony Amicelle, Claudia Aradau and Julien Jeandesboz, 'Questioning security devices: Performativity, resistance, politics' (2015) 46(4) *Security Dialogue* 293.
[122] John Law, *After Method: Mess in Social Science Research* (Routledge, 2004); John Law and Evelyn Ruppert, 'The Social Life of Methods: Devices' (2013) 6(3) *Journal of Cultural Economy* 229; Evelyn Ruppert, John Law and Mike Savage, 'Reassembling social science methods: The challenge of digital devices' (2013) 30(4) *Theory, Culture & Society* 22.
[123] Latour (n 64); Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press, 2002).
[124] Law and Urry (n 119) 393

> … If method is interactively performative, and helps to make realities, then the differences between research findings produced by different methods or in different research traditions have an alternative significance. No longer different *perspectives* on a single reality, they become instead the enactment of different *realities* … It is a shift that moves us from a single world to the idea that the world is multiply produced in diverse and contested social and material relations. The implication is that there is no single 'world'.[125]

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.

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[125] *Ibid*, 397.

[126] Law (n 122) 6.

[127] Michel Foucault, 'The Subject and the Power' in James D. Faubian (ed.) *Essential Works of Foucault 1954 – 1984, Volume 3: Power* (The New Press, 2000)326, 337.

[128] Law (n 67) 157.

[129] *Ibid.*

[130] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge, 1991) 193.

[131] Rebecca Coleman and Jessica Ringrose, 'Introduction: Deleuze and Research Methodologies' in Rebecca Coleman and Jessica Ringrose (eds.) *Deleuze and Research Methodologies* (Edinburgh University Press, 2013) 6.

[132] Annemarie Mol, 'Ontological Politics: A word and some questions' in John Law and John Hassard (eds.) *Actor Network Theory and after* (Blackwell Publishers, 1999) 74. See also: Law and Urry (n 119) 396.

[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'.[134]

(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.[135] 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

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[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'.[136] Or as anthropologist George Marcus puts it: 'The global is an emergent dimension of arguing about the connection among sites'.[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'.[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.[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'.[140] They are heterogeneous, disjunctive and generative of conflict and 'regulatory fractures'.[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'.[142] Multi-sited ethnographies aim to address these dynamics by 'following connections, associations and putative relationships'.[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-

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[136] Latour (n 64) 176.

[137] George E. Marcus, 'Ethnography in/of the world system: The emergence of multi-sited ethnography' (1995) 24 *Annual Review of Anthropology* 95, 99.

[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.

[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.

[140] Arjun Appadurai, 'Grassroots Globalization and the Research Imaginstion' in Arjun Appadurai (ed.) *Globalization* (Duke University Press, 2001) 1, 5.

[141] Saskia Sassen, 'Spatialities and Temporalities of the Global: Elements for a Theorization' - Appadurai *Ibid* 266.

[142] Appadurai (n 140) 7.

[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 objectives[149] 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

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[144] George E. Marcus, 'Multi-sited Ethnography: Notes and Queries' in Mark-Anthony Falzon (ed.) *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research* (Ashgate, 2009) 194.

[145] *Ibid*.

[146] Merje Kuus, 'Foreign policy and ethnography: A sceptical intervention' (2013) 18(1) *Geopolitics* 115, 122.

[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: Franceso Giumelli, *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.

[151] Boaventura de Sousa Santos, 'Law: a Map of Misreading: Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279, 288.

[152] The Vertov analogy is from George E. Marcus, see: Marcus (n 137) 106.

[153] Andrew Barry, *Political Machines: Governing a Technological Society* (The Athlone Press, 2001) 21.

[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 disjunctures between the programmatic statement of policy and the messiness of actuality, the contingency of history and intersections of diverse historical and geographical movements'.[155]

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'.[156] Given this complexity, the authors conclude that 'the conceptual boundaries of how international law may look in the future are [currently] wide open'.[157] 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'.[158] 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.[159] Similarly, Sally Engle Merry calls for a 'deterritorialized ethnography' to 'understand the space of law in the current transnational era'.[160] 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'.[161] In studying the Al-Qaida 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-Qaida 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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Readings in the Philosophy of Social Science (MIT Press, 1994) 213.

[155] Barry (n 153) 24.

[156] Joost Pauwelyn, Ramses A. Wessel and Jan Wouters 'When structures become shackles: stagnation and dynamics in international lawmaking' (2014) 25(3) *European Journal of International Law* 733, 734. See also Peer Zumbansen's work on transnational legal pluralism and argument for 'a shift in perspective … [and] focus on *actors*, *norms* and *processes* as the building blocks of a methodology of transnational law' - Peer Zumbansen, 'Defining the Space for Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21 *Transnational Law and Contemporary Problems* 305, 308.

[157] Pauwelyn, Wessel and Wouters, *Ibid.*

[158] Darian Smith (n 69) 12, 13.

[159] Darian Smith (n 69) 8. On the limits of social science methods vis-à-vis the global, see: Law and Urry (n 119) 390.

[160] Engle Merry (n 68) 993.

[161] *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?[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.[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'.[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.[165] Assemblage, in other words, is both a noun and a verb.[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'.[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.[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'.[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'.[170] Understanding it requires a revalorisation of 'legal technicalities' to examine how legal knowledges are actually formed.[171] Anne Orford's genealogy of the Responsibility to Protect (R2P) doctrine performs a similar methodological

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[162] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Palgrave Macmillan, 2007) 248.
[163] Sassen (n 82) 64.
[164] Miller and Rose (n 98) 10 – 11.
[165] Li (n 75) 265.
[166] Law (n 122) 42. As Tania Murray Li notes: 'assemblage links directly to a practice, to assemble – Li (n 75) 264.
[167] Li (n 75) 264.
[168] Anna Tsing, 'The Global Situation' (2000) 15(3) *Cultural Anthropology* 327, 347.
[169] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011), 230.
[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'.[172] 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'.[173] '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'.[174]

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-Qaida 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.[175] 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'.[176]

(iv)   Secrecy and Leaks: Assembling Actor-Networks in the Security Domain

This listing regime is a more difficult object to empirically study than many others. Because it targets people 'associated with' Al-Qaida 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?[177]

This secrecy problem has forced academic researchers to become methodologically inventive. Some file Freedom of Information Act (FOIA) requests to find the empirical material needed to analyse particular assemblages.[178] Others exploit the eroding public/private divide by interviewing programmers working for firms who build the algorithms that both help companies to identify

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[172] Anne Orford, *International Authority and the Responsibility to Protect*. (Cambridge University Press, 2011) 1.
[173] *Ibid*, 5.
[174] *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.
[175] Mol (n 123).
[176] Callon and Latour (n 65) 277.
[177] 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.
[178] David H. Price, 'Anthropological research and the Freedom of Information Act' (1997) 9(1) *Field Methods* 12; Oliver Belcher and Lauren L. Martin 'Ethnographies of Closed Doors: Conceptualising Openness and Closure in US Immigration and Military Institutions' (2013) 45(4) *Area* 403. See also: Roberto J. González, 'Anthropology and the Covert: Methodological Notes on Researching Military and Intelligence Programmes' (2012) 28(2) *Anthropology Today* 21.

potential new customers and states to target potentially risky travellers at the border.[179] Swathes of seemingly mundane flight log data have been gathered and analysed to map networks of global rendition and torture.[180] Others use high-powered telescopic photography to document secret military bases or forensic techniques to digitally reconstruct the human effects of drone strikes.[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.[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'.[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.[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

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[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.

[180] Sam Raphael, Crofton Black, Ruth Blakeley and Steve Kostas, 'Tracking rendition aircraft as a way to understand CIA secret detention and torture in Europe' (2016) 20(1) *The International Journal of Human Rights* 78. See also *The Rendition Project*, coordinated by Ruth Blakely and Sam Raphael. Available at: http://bit.ly/2ao8T10.

[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/2a8EOmZ.

[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).

[183] Wikileaks Press Release, *Secret US Embassy Cables* (28 November 2010). Available at: http://bit.ly/29H84Du.

[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/29HT18S.

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'.[185] 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.[186] 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.[187] 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.

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[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.
[187] For a succinct introduction to the politics of Five-Eyes intelligence co-operation, see: Privacy International, *Eyes Wide Open: Special Report* (2013). Available at: http://bit.ly/2a3E4jr.

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.[188] 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'.[189] 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.[190] But when 'the blackbox is a locked box', suggest William Walters and Jacqueline Best, the situation is dramatically altered.[191] 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'.[192] 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 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'.[193] But with multiplicities, empiricism 'starts with a completely

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[188] On rapport and research quality see, for example: Paul Ryan and Tony Dundan, 'Case research Interviews: Eliciting Superior Quality Data' (2008) *International Journal of Case Method Research & Application* 443.

[189] Callon and Latour (n 60) 284 - 285.

[190] Latour (n 64) 9.

[191] William Walters and Jacqueline Best, 'Translating the Sociology of Translation', (2013) 7(3) *International Political Sociology* 345, 346. See also: William Walters, 'Secrecy, Publicity and the Milieu of Security' (2015) 5(3) *Dialogues in Human Geography* 287.

[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'.[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.[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

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[194] *Ibid*.
[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, 'Intellectuals 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 61) 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]

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[196] Michel Foucault, 'What is Enlightenment?' in Paul Rabinow (ed.) *The Foucault Reader* (Pantheon Books, 1984) 50.