The Law of the List

UN counterterrorism sanctions and the politics of global security law

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3. The List as Multiple Object: A Critical Genealogy of the UN1267 Ombudsperson*

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

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

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

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

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

4 S/RES/1904 (2009)

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


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

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

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

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14 As Martti Koskenniemi notes, ‘Political intervention is today often a politics of redefinition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.’ - Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 67.
This chapter departs from these accounts in two important ways. First, I suggest that the divergences between actors here are much deeper than usually suggested. This list accountability conflict isn’t just about different perspectives being brought to bear on the same problem, all ultimately mediated and resolved through the authority of the Security Council. Rather, I argue that different actors across the listing assemblage enact multiple realities of what the list is and how its accountability problems should best be dealt with.

Objects, as Annemarie Mol suggests, aren’t passive and ‘waiting to be seen from the point of view of seemingly endless series of perspectives. Instead, objects come into being ... with the practices in which they are manipulated ... [and] are not the same from one site to another’.15 Shifting the focus from norms to situated practices allows me to analyse the list as a multiple object and provide a thick descriptive account of its ontological politics.16 Following Mol I argue that praxiographic analyses - which ethnographically studies practices and ‘locates knowledge primarily in activities ... instruments and procedures’ - allow us to better grasp how the list works and changes as a global legal assemblage.17

Second, the story of the Ombudsperson provided here isn’t purely about how human rights norms do or don’t come to be institutionally embedded. I do not try to normatively assess how this accountability mechanism measures against existing legal standards - there are already more than enough articles in legal journals that do just that.18 Instead, drawing on empirical insights from interviews with various listing experts, leaked US Embassy Cables and my own professional experience as a lawyer engaged in this field I reframe the Office of the Ombudsperson as a contingent achievement - or ‘miracle’, as one Cable described it.19 Highlighting contingency is important in a domain where the final word usually rests with the UN Security Council. As this chapter shows, developing the argument of the previous chapter, global security law is much more than the Chapter VII UN Charter edicts issued by the Security Council from high above. It is something enabled and sustained through diverse epistemic and governance practices and novel forms of expertise that demand close empirical analysis. So whilst the Ombudsperson is often advanced as an ideal accountability solution, this chapter resituates this mechanism as an ongoing political and legal problem.

17 Mol (n 15). For Mol, praxiography ‘does not search for knowledge in subjects who have it in their minds’ but rather ‘locates knowledge primarily in activities, events ... instruments and procedures’ (at 32). The analytical advantage of praxiography, as opposed the IR practice theory literature, is that it ‘takes up the argument that the turn to practice is not primarily about theory, but about the practice of doing research’ – Christian Bueger, ‘Pathways to Practice: Praxiography and International Politics’ (2014) 6(3) European Political Science Review 383, 385. For a critical analysis of the ontological politics of ‘enactment’, see: Steve Woolgar and Javier Lezaun, ‘The Wrong Bin Bag: A Turn to Ontology in Science and Technology Studies?’ (2013) 43(3) Social Studies of Science 321.
19 US Embassy Cable 10USEUBRUSSELS212, (dated 24 February 2010).
The chapter is divided into six sections. Each section focuses on a specific actor within the listing assemblage and highlights the particular idiom and type of list that they enact. My narrative is polycentric, rather than chronological, to better get at the divergent interests, frames and objectives at stake in these conflicts. National and EU courts; academic experts and think tanks; ‘Like-Minded’ reformist states; listing officials; UN Special Rapporteurs, the Security Council P5, legal scholars and human rights NGOs all bring their own discourses, practices and expertise to bear in shaping the accountability problems of the list. My analysis aims to highlight this complexity to provide a detailed documentary account of the Ombudsperson’s conditions of emergence. One that draws out the unresolved tensions that animate this novel institutional body and that enact the Al-Qaida list as a multiple object.

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

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

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

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

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

(i) Sayadi and Vinck (2008)

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

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

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

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

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

![Figure 7: Abousfian Abdelrazik at a press conference in Montreal, 15 June 2011. He is in front of an anti-UN blacklisting banner painted by the Project Fly Home group that helped campaign for his return to Canada and eventual delisting (Source: People’s Commission Network, http://bit.ly/2ejup86).](image)

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


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

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

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

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

(iii) Ahmed and others (2010)

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

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[33] The 1267 Committee regime is ... a situation for a listed person not unlike that of Josef K. in Kafka’s The Trial, who awakens one morning and, for reasons never revealed to him ... is arrested and prosecuted for an unspecified crime’ – Abdelrazik (n 29) para. 53. Abdelrazik was finally taken off the list in November 2011: UN Doc. SC/10467, Security Council Al-Qaida Sanctions Committee Deletes Entry of Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq from its List (30 November 2011). Available at: http://bit.ly/1DrCy6E
[34] Zinn J. states (at para. 53), ‘it is disingenuous ... [to claim] that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court’.
[35] Abdelrazik (n 29) para. 51 (emphasis added).
[36] de Wet 2011 (n 17) 164. Specifically, it excluded ‘airspace’ from the scope of the ‘territory’ that the global travel ban regulates – Abdelrazik (n 29) para. 127.
[37] HM Treasury v Ahmed and Others [2010] UKSC 2. G (Mohamed al-Ghabra) and Hay (Hani El Sayed Sabaei Youssef) had been placed on the UN Al-Qaida list in 2006 and 2005 respectively. A (Mohamed Jabar Ahmed), K (Mohamed Azmir Khan), M (Michael Marteen) had been placed on the UK’s domestic terrorism list implementing S/RES/1373 (2001) in 2007. All of their challenges had been rolled into one joint appeal for the Supreme Court.
these resolutions into UK law - the *Al Qaida and Taliban (UN Measures) Order 2006* (AQO) and the *Terrorism (UN Measures) Order 2006* (TO). Orders giving effect to Security Council resolutions in the UK must be deemed ‘necessary and expedient’. The litigants argued that the AQO and TO failed to meet that criteria because they gravely interfered with their fundamental rights and denied them an effective remedy. When those on the Al-Qaeda list sought to challenge their listing before the UK courts, for example, they became aware that the merits of the UK listing decision could not be contested because it had been taken automatically following their designation at the UN level. Once again, targeted individuals were effectively told that their listing was something out of their government’s hands that could not be subjected to any meaningful judicial review at the domestic level.

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

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

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38 It is a principle of UK constitutional law that parliament can pass laws breaching human rights, but only if they do so unambiguously. See Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115: ‘Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that ... [it] must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words’ (para. 131).
39 Ahmed (n 37) para. 60. Such a severe interference with fundamental rights would require unambiguous statutory language. It could not be implied from the general wording of the authorising Act in this case.
40 Ibid
41 Ibid
42 Ahmed (n 37) para. 78.
43 Ibid, para. 60.
‘devastating’ coercive effects can be given direct effect in UK through executive regulations without any parliamentary oversight.45

(iii)  

**Nada v Switzerland (2012)**

In October 2001 Youssef Nada and his associated business interests were placed on the UN1267 list by the US government, who believed he was a key financier for the Al-Qaida network. Nada was an Egyptian/Italian national resident in tiny Italian tax enclave wholly circumscribed by Swiss territory.46 As a result of the global travel ban flowing from his listing, Nada was prevented from leaving the enclave and so effectively placed under house arrest.

In 2005 he brought legal proceedings in the Swiss courts to strike out the measure implementing the Al-Qaida list into Swiss law, arguing that because Switzerland had determined the allegations of his supposed terrorist association to be unfounded there were no legitimate grounds for keeping him sanctioned.

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

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

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

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

46 Campione is 1.6 square kilometres in area.

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

48 US Embassy Cable 08STATE4740 (dated 15 January 2008) para. 8. US opposition to delisting followed concerns from Italy that they were being pressured by their courts to support his delisting before the Committee. See: US Embassy Cables 07ROME2515 (dated 28 December 2007) and 08ROME190 (dated 11 February 2008).

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

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

51 ibid, paras. 121 - 123

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

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

(iv) The Kadi cases (2005 - 2013)

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

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

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

53 Ibid, paras. 188 - 200
54 Ibid, para. 213.
55 Ibid, paras. 211 - 212. More explicit criticism of the Ombudsperson mechanism was delivered by the ECtHR in the subsequent Iraqi sanctions case of Al Dulimi in which the Court drew heavily on the 2012 report by the UN Special Rapporteur on Counterterrorism (discussed in the ‘Compliant List’ section below) to find that the Ombudsperson fails short of international human rights standards. See: Al-Dulimi and Montana Management Inc. v Switzerland App. No. 5809/08 (ECtHR, 26 November 2013), paras. 118 - 122.
58 de Wet 2013 (n 18) 805.
Council. As such, the Court held that the European Commission and Council exercised ‘circumscribed powers’ and ‘had no autonomous discretion’ in this matter. According to the EGC, EU courts could only indirectly review Security Council resolutions if they violated *jus cogens* norms. But no such violation was found here so the challenge was dismissed.

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

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

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

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

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

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

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

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

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

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

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

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82 Krisch, (n 2) 187 – 188.
85 For Neil Walker these conflicts reveal how global security law ‘struggles to justify itself in universal terms. The object may be unlimited - all who can pose a threat to stability, but it is universal neither in its justification nor in its manifest source’: Neil Walker, ‘Out of Place and Out of Time: Law’s Fading Co-ordinates’ University of Edinburgh School of Law Working Paper 2009/01 (2009), 42.
and significantly altering ‘the legal bases of state action’ in the security field. The Al-Qaida list is not a traditional form of international law with the pretension of universal values, but a far-reaching pre-emptive legal weapon and inchoate mechanism of world government.

The Courts have been crucial actors in creating and shaping the Office of the Ombudsperson. Yet despite the high-profile nature of their decisions, the Legal List they have enacted to measure the Security Council’s Al-Qaida sanctions regime is only one part of the broader assemblage that has enabled this unique experiment to unfold. Another key network of actors, overlapping moral discourse and version of the list has provided a vitally important vector for change in this domain. But to properly understand its governance effects we need to start by revisiting the ethical beginnings of the ‘targeted’ sanctions instrument.

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

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

Targeted sanctions were thus created as a mechanism of ‘humanitarian government’ during the fertile post-Cold War period when ‘human security’ discourse and intervention practices

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86 Schedele (n 45) 1, 5.
88 As Mueller and Mueller observed, ‘economic sanctions may well have been a necessary cause of the deaths of more people in Iraq that have been slain by all so-called weapons of mass destruction throughout history’: John Mueller and Karl Mueller, ‘Sanctions of Mass Destruction’ (1999) 78 Foreign Affairs 43.
89 The term comes from the former UN Secretary General Boutros Boutros-Ghali: ‘Sanctions ... are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects’. See: UN Doc. A/50/60-S/1995/1, Supplement to an Agenda for Peace (3 January 1995) para. 70. See also: UN Doc. SG/SMI7360, Secretary General reviews lessons learned during sanctions decade in remarks to International Peace Academy Seminar (17 April 2000).
like the Responsibility to Protect (R2P) doctrine were starting to take shape. 91 It was a policy instrument formed through the concerted reform efforts of a novel transnational network of scholars, think-tanks, financial regulators, UN officials and security experts brought together by a common desire to reduce civilian suffering. Prominent academics from international relations, political science and peace studies92 have from the outset been critically important nodes in this governance network. Many went on to later advise the Security Council, guide reform efforts and shape political debates on the problems of the Al-Qaeda list. That is, despite ostensible humanitarian objections to war, after 9/11 these humanitarian scholars were elevated and revalorised as global counterterrorism experts. The following section of this chapter analyses their important list assemblage work. It shows how these academics played leading roles both in creating the Office of the Ombudsperson and then later defending their unique institutional experiment from political and legal attack. In my analysis the humanitarian impulse that stimulated targeted sanctions did not end with the 1990s. It remains embodied in the Humanitarian List that these scholar-experts enact and so continues to exert residual effects on how the Law of the List list is arranged and justified.

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

How can UN intervention to counter international threats be reorganised in the post-Cold war era to minimise ‘life threatening suffering’ and realise a New Humanitarian Order?93 What role might UN sanctions play in ‘expanding the legitimate area of international action’ and realising this ambitious global humanitarian reform project?94 During the ‘sanctions decade’ of the 1990s such questions animated debates in global governance and sanctions scholarship. 95 At that time, US scholars Thomas Weiss and Larry Minear worked together on the Humanitarianism and War Project at Brown University’s Watson Institute for International Studies. Together with David Cortright and George A. Lopez of Notre Dame University’s Kroc Institute for International Peace Studies, they co-edited the influential 1997 book Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions.96 This book was significant because it brought two hitherto distinct policy areas into productive relation - namely, ‘the wider use of multilateral economic sanctions and ... [the] more assertive humanitarianism’ characterising UN intervention at that time. It also brought together for the first time the two academic institutions (the Watson Institute and Kroc Institute) that have dominated scholarly-policy debates on targeted sanctions ever since.

92 Including, for example, Thomas Weiss, George A. Lopez, Thomas Biersteker, John Ruggie, Barnett Rubin, David Cortright, Vera Gowlland-Debbas, Margaret Doxey, Larry Minear and Peter Wallenstein.
95 David Cortright and George A. Lopez (eds.) The Sanctions Decade: Assessing UN Strategies in the 1990s (Lynne Rienner Publishers, 2000).
96 Weiss et al (n 94). I use this book here as a device for representing the emergence of targeted sanctions, and not to suggest that it somehow created this policy field in itself. Parallel research and reform projects were also being undertaken in the UK at the time. See, for example: Koenraad van Brabant, Can Sanctions be Smarter? The Current Debate: Report of a Conference held in London, 16 – 17 December 1998 (ODI, 1999). Available at: http://bit.ly/1VZMbRc.
UN sanctions have long been embraced as a more humane and ethical alternative to the use of military force. 97 Civilian populations may indeed suffer through sanctions, but not as much as if their country was embroiled in war. The book problematised this assumption by demonstrating that ‘the short-term humanitarian consequences and the long-term structural effects of economic sanctions are often themselves as harmful as war itself’. 98 Sanctions, it was argued, needed to break the ‘political gain-civilian pain’ nexus – that is, the idea that civilians should suffer to exacerbate political unrest and enhance the prospects of regime change in targeted states. 99 Only a ‘smart sanctions strategy of targeted constraints on the financial assets and capital vulnerabilities of elites’ has the potential to ‘apply ... economic coercion with the requisite finesse and precision’ and realise ‘a more humane and a more effective sanctions policy’. 100

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

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

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

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

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

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

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

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

GS: And not just sanctions related, presumably?

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

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


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

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

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

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

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

Those behind this must be transient, following all and be the person who will be weaving and synthesising ... And the strategy is, first, to be incremental and not to be a full surprise (sic).\textsuperscript{110}

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

\textsuperscript{111} Interview G.


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

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

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

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

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

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

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

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

Figure 8: Participants in Watson Institute Workshop on UN Sanctions Reform, Brown University, 16 - 17 July 2004, including Thomas Biersteker and Sue Eckert (RHS) and Joseph Stephanides (middle). The workshop was hosted by Watson Institute in conjunction with the UN Secretariat, sponsored by

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

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

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

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

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

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

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

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

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

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

But this rearrangement was not merely an effect of political circumstance. It was sought after and fostered by the scholar-experts themselves. ‘We were’, as Interviewee A reflected, ‘probably, in part, opportunistic. We took advantage of the now great interest in the subject and that our work was now relevant and important and useful in some way’.125 These academics found that they could attract more funding and political capital for their targeted sanctions research as counterterrorism experts. Valorisation had the circular effect of ‘skew[ing] the work in that direction’.126 Re-orientating sanctions research towards the dismantling of Al-Qaida meant that ‘we were not looking at other applications [of sanctions] any longer with as much attention or scrutiny’.127 The humanitarian reason that had allowed targeted sanctions to evolve as a global policy instrument was supplanted in the post-9/11 environment by the shared imperative of helping ‘starve the terrorists of funding’.128

But the unfairness of the Al-Qaida list had started to become an issue of political concern, largely as a result of domestic legal challenges and protracted attempts by Member States to secure the delisting of their nationals.129 In September 2005 the UN General Assembly ‘call[ed] upon the Security Council ... to ensure that fair and clear procedures for placing

123 David Cortright, and George A. Lopez (eds.) Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat (MIT Press, 2007) xi.
124 Interview G.
125 Ibid
126 Ibid
128 ‘President Freezes Terrorists’ Assets’, Remarks by the President, Secretary of the Treasury O’Neill and Secretary of State Powell on Executive Order, 24 September 2001. Available at: http://1.usa.gov/1MfZbiX.
129 In November 2001, for example, three Somali Swedes were placed on the 1267 list by the US for alleged association with the Al Barakaat financial network. All three denied the allegations, complained they had no opportunity for redress and asked the Swedish government intervene. Sweden asked the US to provide proof of wrongdoing, but all they were sent was generic news material and background documents about Al-Qaeda and the Al Barakaat network. Sweden thus sought to secure their delisting at the UN level, but were initially rebuffed. 12 members of the Council supported the petition, but the US, UK and Russia objected. In August 2002, the individuals were finally delisted after the Swedish government provided the US Office of Financial Assets Control (OFAC) with evidence showing that there were no connections between these individuals and Al-Qaeda as well as written assurances from the individuals themselves that they would not associate with Al Barakaat. This process emboldened Sweden to critique the inequities of the listing regime and advocate for due-process reforms to be adopted by the Council. See, for example: Bruce Zagaris, ‘Somali Swedes Challenge Terrorism Freeze’, (2002) 18(7) International Enforcement Law Reporter 277; Eric Rosand, ‘The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions’, (2004) 98(4) The American Journal of International Law 745; Juan Zarate, Treasury’s War: The Unleashing of a New Era of Financial Warfare (Public Affairs, 2013) 38 - 39; Iain Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ (2003) 72 Nordic Journal of International Law 159; and Iain Cameron, Targeted Sanctions and Legal Safeguards, Report to the Swedish Foreign Office, October 2002. Available at: http://bit.ly/1VChf85. For German and EU support for reform, see: UN Doc. S/PV.4892 (12 January 2014).
individuals and entities on sanctions lists and removing them’ were implemented. The UN Office of Legal Affairs (OLA) also commissioned the legal scholar, Bardo Fassbender, to prepare a report clarifying whether (and how) the Security Council were obliged to provide due process rights to those targeted by sanctions. It was from this political context that the Watson Institute produced their two most influential policy reports on the Al-Qaida list: *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (2006) and *Addressing Challenges to Targeted Sanctions – An Update of the ‘Watson Report’* (2009).

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

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

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

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131 Bardo Fassbender, ‘Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter’ [Study Commissioned by the United Nations, Office for Legal Affairs - Office of the Legal Counsel 20 (2006)]. The Fassbender report concluded that because UN targeted sanctions have ‘a direct impact on the rights and freedoms of the individual’ they create ‘a legitimate expectation that the UN will observe standards of due process’ (7). See also: Bardo Fassbender, ‘Targeted Sanctions and Due Process’ (2006) 3 *International Organizations Law Review* 437.
136 2006 Watson Report (n 132) 8, 43.
137 These reform options with real decision-making powers were only included in the report due to pressure from the governments who commissioned the research. According to leaked US Embassy cables, for example, one of the co-authors met privately with officials from the US mission to the UN during the report’s public launch in New York. In private, they ‘assured us [i.e, the US government] that the Institute did not endorse the “more extreme options” in the paper, such as an independent arbitral panel to consider delisting proposals or judicial review of UNSC decisions’. Thus despite the report’s technocratic presentation of the different options, the Watson Institute supported ad hoc political, rather than judicial, solutions to this accountability problem. See: US Embassy Cable O6USUNNEWYORK714 (dated 4 April 2006).
comparison, an independently and theoretically derived set of evaluation criteria, and an assessment of the degree to which different options met those criteria. Each option was subjected to a succinct cost-benefit analysis and presented as part of a ‘range of choices from which member states could choose’ to optimally realise fair and clear procedures. The accountability problems of the Al-Qaeda list were thus reposed in technical, apolitical terms. For these scholars ‘the key question’ was a managerial one: ‘to determine what institutional mechanism and combination of elements [best] meet the test of an effective remedy’.

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

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

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

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

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

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

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147 The argument is similar to the one advanced by scholars of the exception that in times of emergency constitutional rights need to be restricted and/or redefined if they are to have any relevance. See, for example: Bruce Ackerman, ‘The Emergency Constitution’ (2004) 133(5) Yale Law Journal 1029; Oren Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ 2003 (122)(5) Yale Law Journal 101; Alan Dershowitz, Why Terrorism Works: Understanding the Threat, Responding to the Challenge (Yale University Press, 2002).


149 Ibid

150 For Dyzenhaus such institutional experiments are ‘legal grey holes’ because they contain ‘the facade or form of the rule of Law rather than any substantive protections’. Yet as I argue in this chapter they are legally embedded forms of global exception and these humanitarian scholar-experts have played a crucial role in their assemblage: David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge University Press, 2006) 3.


152 US Embassy Cable 09USUNNEWYORK818 (dated 4 September 2009).

153 The first report of April 2009 was co-authored with Alistair Millar and Linda Gerber-Stellingwerf and is available at: http://ntrda.me/1OEFhvd. The second report of November 2009 was co-authored with Linda Gerber-Stellingwerf, Eliot Fackler, Sarah Persinger and Joshua Weaver and is available at: http://bit.ly/12FDuev.
The Kroc Institute’s approach was tempered by a pragmatic assessment of ‘the political climate in which any of the proposals will be considered’. The ‘crux of the dilemma’, in their view, is that reforms complying with international human rights standards are ‘politically infeasible’ due to P5 opposition and reforms potentially supportable by the Security Council ‘contain shortcomings’ vis-à-vis accepted international human rights standards. Breaking this ‘impasse’, they suggest, requires adopting a strategy of ‘pursuing incremental change’.

Following the Watson Institute, they advocate in favour of shifting the terms of the accountability debate to ‘focus on developing mechanisms that … provide quasi-judicial review procedures while preserving the prerogatives of the Security Council’. In the counterterrorism domain such experiments often end up embedding states of exception and undermining fundamental rights. But there is little risk of legal violence occurring here because, in the optimistic vision of the Kroc Institute scholars, the Security Council is evolving into a more human rights sensitive institution and ‘the tide is gradually turning’ on this issue:

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

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

Although incipient, the US quickly recognised this initiative’s potential importance and noted that ‘similar informal initiatives in the past have been influential in developing the sanctions tools that the Security Council uses to respond to threats to peace’. Yet it is critical that such initiatives stay within the ‘partition of the sensible’: ‘USUN will continue to urge leading participants to ensure their recommendations are relevant and grounded in political reality. To this end USUN has recommended that the U.S. academics involved in this initiative meet with Washington policymakers at an early stage’.

Engaging scholar-experts to ensure ‘policy relevance’, in other words, is a vehicle of de-politicisation that provides a way of ‘heading off more radical and dangerous proposals’ for reforming the law of the list.

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

Within two months this recommendation would be given the force of global law as a Chapter VII edict of the Security Council. US government support and ‘ownership’ of this reform process was a critical element underpinning this resolution’s adoption. Yet this support did not simply organically emerge from the Obama administration’s more enlightened and ‘comprehensive’ approach to counterterrorism. It was a complex negotiation that the Watson Institute scholars played a key role in proactively facilitating.

As interviewee G explained, in 2009 ‘we crossed the line ... for the first time, we went from analysis to advocacy’. Drawing on the political resources and contacts opened up by their sustained policy engagement and accumulated technical expertise on this issue, these scholar-experts engaged in a multipronged and ultimately successful lobbying offensive to secure their preferred UN procedural reform. The Watson Institute’s academic expertise networks were engaged to push the Ombudsperson option forward within the White House:

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

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

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

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

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

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

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

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

71 Interview G.

72 Ibid. For biographical details on Szubin see: http://1.usa.gov/1M7Vcxd. On the shift from opposition to support by the US, compare US Embassy Cable 06USUNNEWYORK714 (dated 4 April 2006) and US Embassy Cable (n 152).

73 Biersteker (n 112) 144.

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

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

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

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

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The formal intergovernmental domain is, however, only one privileged site where this body of global security law is produced. That is, drafting and adopting The Law is not the same as creating and sustaining legal relations. As Foucault reminds us, power is not a thing that can be held, but rather a relation that ‘functions in the form of a chain’ and ‘something that has to be made’.  

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Or as Latour puts it: ‘those who are powerful are not those who ‘hold’ power in principle, but those who practically define or redefine what ‘holds’ everyone together’.  

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Using an assemblage framework thus allows us to conceptualise legal governance as ‘the consequence of an intense activity of enrolling, convincing and enlisting’ and an effect of diverse practices of translation, not just an external force and the cause of social behaviour.  

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When analysed in terms of its capacity to hold the relations of the list together, scholarly expertise on UN targeted sanctions can be reappraised a crucial element in this domain of global law-making:  

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

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177 David Kennedy, ‘Reassessing International Humanitarianism: The Dark Sides’, The Allen Hope Southey Memorial Lecture, University of Melbourne Law School, (8 June 2004) 2. Available at: http://bit.ly/1H2WQwm. This security-humanitarianism nexus is important not only because of the kinds of expertise that it valorises, but also because when legal violence is made humane it becomes more widely accepted and frequently deployed. See, for example: David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton University Press, 2005); Eyal Weizman, The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza (Verso, 2012); Matt Craven, ‘Humanitarianism and the Quest for Smarter Sanctions’, (2002) 13(1) European Journal of International Law 43.


179 Foucault 2003 (n 11) 29.


181 Ibid, 273

182 Ibid

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

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

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

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

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

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

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

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185 The term ‘obligatory passage point’ (OPP) is used in Actor Network theory (ANT) to refer to a point that all actors are made to pass through in knowledge-production chains. It describes the processes that particular actors use to render themselves indispensable in any given network. As Latour puts it, once an actor has inserted themselves as an OPP, ‘whatever you do and wherever you go, you have to pass through the[ir] ... position and ... help them further their interests - Latour (n 103) 120. See also: John Law and Michel Callon, “Engineering and Sociology in a Military Aircraft Project: A Network Analysis of Technological Change” (1998) 35(3) Social Problems 284; and Star and Griesemer (n 109).

186 Interview G.

187 Michel Foucault, ‘Questions of Method’ in Graham Burchell, Colin Gordon and Peter Miller (eds.) The Foucault Effect: Studies in Governmentality (University of Chicago Press, 1991) 81; cited in Li (n 184). According to Li, the power of discursive technologies and devices to perform ‘extraordinary feats of assembly work ... should not be underestimated’ (593).

188 Biersteker (n 112) 148.
and shaming recalcitrant states for inadequate implementation of the list, the Monitoring Team focused their attention on technical issues thought to be less politically contentious. As part of this shift, under the direction of former MI6 counterterrorism official Richard Barrett (2004 - 2012), list accountability problems became key matters of concern for the team. Many of the procedural reforms they proposed during this period ended up being adopted by the Security Council in one way or another. Yet the Monitoring Team’s motivations for advocating change were not the same as those of the Courts, critics and academics variously analysed in their reports. The version of the list enacted and shaped through their interventions in this accountability conflict was something altogether singular. The following section suggests five reasons why intelligence, defence and government analysts from a small UN expert team with strategic ‘fusion capabilities’ came to champion due process for those ‘associated with’ Al-Qaida and create the conditions for the Ombudsperson to be created. It highlights the crucially important assemblage work of the Monitoring Team that has sustained the Ombudsperson experiment in the face of political and legal tension. I argue that the Monitoring Team’s engagement is animated by a Living List that dynamically evolves to meet new threats and exploit strategic opportunities. The Living List grapples with accountability concerns instrumentally - as a means of forging new security mechanisms, bolstering functional expertise and embedding political authority.

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

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

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

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

189 Interview with former member of the 1267 Monitoring Team, New York (via Skype), June 2014 (‘Interview F’).
190 Interview with former member of the 1267 Monitoring Team, New York, November 2012 (‘Interview A’).
191 Ibid
192 Ibid
193 Ibid
team were taking the longer view, recommending that the Council take the initiative from its critics and ‘get ahead of the law in this area’ by establishing ‘some form of independent review’, suggesting that an Ombudsperson would be the most preferable reform option.\(^{195}\)

Yet their advocacy for ‘fair and clear procedures’ has little to do with protecting human rights or bolstering functional expertise. It is more concerned with nurturing a powerful, yet fragile, political resource that ‘is proving to be a very good test bed and standard setter’ for new forms of collective security action in the future.\(^{196}\)

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

At the same time, due process problems are presented by the Monitoring Team as a potential source of danger and ‘legal risk’ that must be mitigated.\(^ {197}\) The lack of effective remedy at the UN level and correlated rise in judicial review by listed individuals before national and regional courts is repeatedly advanced by the team as a potential threat to the legitimacy and ‘legal authority of the Security Council in all matters, not just in the imposition of sanctions’.\(^ {198}\) The argument is straightforward, primarily informed by analyses of the political implications of EU listing litigation such as the *Kadi* case: ‘If States cannot implement decisions taken by the Council under Chapter VII of the Charter of the United Nations without contravening their own laws, the global community will lose the power to take coordinated action against threats to international peace and security’.

For the Monitoring Team these cases are like canaries in the proverbial coal mine. They are early warnings that show what might happen if the Security Council remained intransigently opposed to the introduction of procedural reforms with capacity to satisfy the courts. Although it has not happened, the ECJ - representing 28 of the most powerful states the world, including 2 of the Security Council P5 - could issue a decision that effectively prevents Member States from applying UN Chapter VII measures in their jurisdiction. ‘And if the EU isn’t going to implement, no-one’s going to implement’, thus introducing an especially massive chink in the chain. Security against transnational terrorism has been characterised as a ‘weakest link’ global public good because it ‘can be rendered futile if only a small group of governments does not cooperate’.\(^ {199}\) ‘So these court decisions’, as one former team member stressed, ‘are incredibly important, they’re fundamental to survival of the sanctions regime’.\(^ {200}\) From this viewpoint, tackling due process problems through some kind of review mechanism ‘that leaves the fundamental Security Council structures intact’ but ‘makes some minor modifications to the Committee’s procedures’ provides an important way of neutering an embryonic threat to the Council’s political authority.\(^ {201}\) Simply put: ‘the more effective the de-listing procedures’ offered at the UN level are ‘the less likely that listed individuals and

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\(^{196}\) Interview F.

\(^{197}\) Interview A.


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

\(^{200}\) Interview A.

entities will choose to launch challenges in national courts.  

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

The Monitoring Team were also at pains to stress that this threat must be dealt with pre-emptively. Even though ‘the law is not clear in this area’ the team argued that the Security Council ‘would be ill-advised to do nothing’. Instead they should take the upper hand ‘and exercise their authority in this matter’ first, by establishing ‘the desired standard of review, rather than effectively cede this role to others’ - that is, by leaving the accountability flaws and remedies to be determined by the courts below. As one former team member put it, ‘the Council should not be a body playing catch-up. It should be getting ahead of problems and dealing with them’.

If they fail to set the reform agenda and instead respond ad hoc to the different Court decisions as they arise then ‘the optics are absolutely terrible’. Because then ‘it looks as though you’re acting in fear’ and being made to act by institutions with less power than you, rather than exercising your absolute authority, ‘and some permanent members take that very seriously’.  

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205 S/2009/502 (n 195) para. 43. The Monitoring Team were the first to make this far-reaching argument. Thereafter, the former Special Rapporteur on countering terrorism (Martin Scheinin) entered the fray by supporting the idea, but only if the Council could ensure that (i) ‘any listing proposal requires the submission of the full set of information that is used as the substantive basis for the listing proposal;’ (ii) ‘the person ... subjected to the listing proposal has the right and practical means to effectively challenge [it];’ (iii) ‘the Delisting Ombudsperson has access to the full set of information used for the listing;’ and (iv) the delisting recommendations by the Ombudsperson or delisting proposals by the designating State are in practice respected, so that they are not overturned through a consensus decision by the 1267 Committee or referred to the full Security Council’. This argument was then stripped of its procedural protections and elaborately extended by Juliane Kokott (an Advocate General of the ECJ) and her legal secretary, Christoph Sobotta in an article published in the lead up to the 2013 ECJ Kadi decision. Their text - which is based on what I suggest to be based on unfounded assumptions about the Ombudsperson delisting process - draws ‘inspiration’ from case law on ‘cooperation between EU institutions and Member States’ and procedural rules of international human rights law to argue that an exhaustion of international remedies rule of this kind could be used ‘to reduce significantly the risk of conflict between UN sanctions and EU judicial protection’ in listing cases. See, respectively: UNOHCHR, Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin (29 June 2011). Available at: http://bit.ly/1QL2gpG; and Juliane Kokott and Christoph Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law - Finding the Balance?’ (2012) 23(4) European Journal of International Law 1015, 1022 - 1024.
206 The Council did ultimately endorse the idea, but it did not seek to make it mandatory. See: S/RES/2083 (17 December 2012) para. 24 - which requests that Member States ‘encourage’ those seeking to challenge their listing to submit applications to the Ombudsperson.
207 S/2009/502 (n 195) 5, para. 42.
208 Ibid
209 Interview A.
210 Ibid
211 Ibid
Accountability as an Obstacle: Due Process as a Time Waster

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

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

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

This fairness-implementation nexus began to be drawn by the Monitoring Team shortly after their inception. This discourse has been crucially important and productive because, as I demonstrate later in this chapter, it taps directly into the Security Council’s prime concern with the obedience of UN Member States. By 2005 the team were reporting to the Council that legal challenges ‘pose a serious impediment to the success of the sanctions regime, not least by discouraging States to add names to the List’. Accountability concerns were preventing States from ‘applying sanctions with the required rigour, thereby undermining the[ir] credibility and effectiveness’. This nexus became a continual refrain in the team reports leading up to the creation of the Ombudsperson. One reason put forward in 2007 to explain why so few states were proposing names to be listed, for example, ‘has to do with the Committee’s procedures, which some States believe are insufficiently in tune with human rights concerns’. Another report from this period notes in a rather circumspect and defeated tone that ‘the regime carries on, but with mixed support’, observing with some frustration how the ‘persistent call’ for improving UN delisting procedures has been largely ignored to date by the Security Council P5:

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

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

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212 Ibid
214 Ibid, para. 54.
of accountability and unfairness.\footnote{I describe this shift as a ‘broader’ effort because the Security Council P5 states, academic experts and the Monitoring Team all change the way they represent this issue in markedly convergent ways in response to the 2012 report by the UN Special Rapporteur on Countering Terrorism (as discussed in the Compliant List section below). For a recent example that partakes in this pragmatic refocusing, see: Larissa van den Herik, ‘Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes’ (2014) 19(3) Journal of Conflict and Security Law 427. As noted in Humanitarian List section of this chapter, van den Herik is a one of the leading scholar-experts working with the Watson Institute on targeted sanctions.} In a 2011 report, for example, the Monitoring Team stated upfront that they would not be recommending further reforms as in the past ‘because the challenge now lies far more with Member State implementation than with refinements of the Committee procedures’ and that ‘the aim of the Security Council must now be to reassure the courts that the sanctions regime established pursuant to Security Council resolution 1267 is fair’.\footnote{Interview A.} Monitoring Team reports, as one team member explained, ‘are reports to the Committee although we write them very much with the public in mind.’\footnote{Interview F. According to this expert, who joined the Team after the creation of the Ombudsperson: ‘I am very clear that my mandate coming into this job was not to neglect due process or fairness … but to really focus a bit more on implementation and growing … the strategic communications of regime … To my mind the ultimate metric is: are these sanctions respected and are they implemented?’}. So as part of this broader messaging effort to assuage the concerns of courts and critics in the lead up to the 2013 ECJ Kadi decision, the team changed how they framed the accountability problems of the list and de-emphasised their political importance.

Due process flaws, for example, were now recast merely as the ‘perception that listed persons continue to lack an effective remedy’.\footnote{S/2011/245 (n 198) para. 36.} In the Monitoring Team’s view, the Al-Qaida list had finally reached ‘a stable, if temporary, equilibrium with respect to due process issues’\footnote{S/2012/968 (n 204) para. 17.} as a result of the Ombudsperson so now ‘Member States have little justification for incomplete compliance with the sanctions measures on the grounds that the regime lacks fairness’.\footnote{S/2012/729 (n 203) para. 23.} Only two remaining issues - the ongoing Kadi litigation (discussed above) and the critical report of the UN Special Rapporteur on Countering Terrorism (discussed above) - carry the potential to ‘upset this balance’\footnote{S/2012/729 (n 203) para. 33.} and ‘distract’ the Security Council ‘from looking forward’\footnote{Interview F. According to this expert, who joined the Team after the creation of the Ombudsperson: ‘I am very clear that my mandate coming into this job was not to neglect due process or fairness … but to really focus a bit more on implementation and growing … the strategic communications of regime … To my mind the ultimate metric is: are these sanctions respected and are they implemented?’} and realising their ‘implementation agenda’.\footnote{Neil Walker ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders’ (2008) 6(3-4) International Journal of Constitutional Law 373.}

In a legal domain exemplifying what Neil Walker describes as ‘the global disorder of normative orders’\footnote{S/2011/245 (n 204) para. 36. S/2012/729 (n 203) para. 23. S/2012/968 (n 204) para. 17. S/2012/729 (n 203) para. 33.} this discursive refocusing towards list implementation and effectiveness is not a neutral move. It brings an overtly ‘managerial approach’\footnote{S/2012/968 (n 204) para. 17. S/2012/729 (n 203) para. 33.} to bear on resolving the problems of the listing assemblage that precludes any serious consideration of its accountability flaws. Assuming that such issues have now been resolved serves to ring-fence and marginalise critics, listed persons and courts contesting the fairness of the list as misguided for failing to embrace the team’s great leap forward and looking back towards ‘abstract’ and ‘structural due process issues’.\footnote{S/2011/245 (n 198) para. 36. S/2012/968 (n 204) para. 17. S/2012/729 (n 203) para. 23. S/2012/968 (n 204) para. 17. S/2012/729 (n 203) para. 33.} In other words, the discourse of effectiveness
is used by the Monitoring Team to forge tighter alignments amongst actors in the listing assemblage about what is important and what is not, whilst deflecting lines of critique and smoothing over deep-seated fractures as somewhat irrelevant. The Ombudsperson mechanism and due process challenges it contains is thus put to work as a kind of James Ferguson calls ‘anti-politics machine’ - a device that ‘depoliticiz[es] everything it touches, everywhere whisking political realities out of sight, all the while performing, almost unnoticed, its own pre-eminently political operation of expanding ... power’. When the ECJ finally issued their verdict in the 2013 Kadi case which effectively contradicted their claims of procedural fairness, the Monitoring Team simply remarked that ‘the Court was not persuaded by arguments that improvements to delisting procedures since 2008 diminished the need for such searching review by European courts’.  

(iv) Relevance: Pruning the List of Low-Hanging Fruit to keep it Calibrated

A fourth rationale embraced and advanced by the Monitoring Team for addressing the problem of list accountability concerns the question of relevance. That is, the need to maintain a credible list that adequately reflects the threat posed by Al Qaida that is operationally relevant for security services to use as an administrative security tool.

As discussed in the introductory chapter, the years immediately following 9/11 saw scores of people hastily nominated for inclusion on the list - mostly by the US, but often in co-sponsored decisions with the UK and other states like Italy - with little to no consideration as to how they were allegedly linked to Al-Qaida. According to insider accounts, US Treasury officials were under considerable pressure to show demonstrable progress in the financial war against Al-Qaida and adding names to the UN1267 list ‘was one of the best indicators’ of success in this regard. ‘It was almost comical’, as former US Treasury General Counsel David Aufhauser later remarked, ‘we just listed out as many of the usual suspects as we could and said, Let’s go freeze some of their assets’. In fact, the extraordinarily loose targeting criteria of ‘associated with’ was only elaborated by the Council in 2005, by which time more than 400 hundred people and groups had been already designated, most of whom are still listed today. As a result, the Al-Qaida list remains stacked with what one former team member described as ‘low-hanging fruit’ that most states and some members of the Security Council may know very little, if anything, about.

Picking low-hanging fruit off and pruning the list, however, has proven to be more difficult than one might think. Taking someone off the list requires the consent of the states that nominated them for inclusion, as well as input from the states where targeted people were born or have been resident. Where multiple states are responsible for the listing, consensus
must be achieved.\textsuperscript{236} But states are reluctant to delist because of the political risk that whoever they take off might turn out to be terrorists. As one former team member put it:

It’s always going to be more difficult to get people off than get people on … Would you as a Home Secretary in the UK be willing to sign a document that says you support the delisting of such and such? Where they might say, ‘Well, this is historic’. But they’re not necessarily convinced that there is no threat. Would you sign that?\textsuperscript{237}

The other related obstacle to getting rid of unfounded or out-of-date listings has less to with risk and more to do with the fact that removal requires the active involvement of states. And as is clear from the Ombudsperson’s reports and my own observations of the delisting procedure discussed later in this chapter, when asked to provide supporting information states have tended to either provide nothing at all or rely on generic assertions of threat.\textsuperscript{238} It is difficult, moreover, for states to support delisting if they don’t know why people were put on the list in the first place, even if they were the country that put them on.\textsuperscript{239} To work around this problem of collective inertia, and get rid of the ‘low hanging fruit’, in 2012 the Monitoring Team proposed a new procedure for the triennial list review process: unless States could explain why someone should remain on the list, the default position should be that they are taken off.\textsuperscript{240} But the Council rejected the proposal\textsuperscript{241} and the dilemma remains.

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

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

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

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

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

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

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

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

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

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

The list targets people speculatively on the basis of what they might do in the future using an extraordinarily broad standard designed more for ‘the sandy foundations of diplomatic negotiation’ than legal challenge as its ordinarily understood.\(^\text{249}\) Dialogue with the Ombudsperson ‘gives petitioners the occasion to express themselves’ and so has been firmly encouraged by the Security Council.\(^\text{250}\) But it also provides an important opportunity for generating new threat information and potential terrorist ‘associations’ - for example, by requiring those listed to explain in what ways (if any) they have ever known or been associated with people on the list or anyone else deemed somehow associated with them. These associations can then be used to either broaden the scope of the pre-emptive security net that the Al-Qaida list casts (by identifying new potential targets or persons of suspicion), deepen it (by providing some kind of derogatory information where non existed previously) or translate it for use in other fora (by moving from ‘a closed material situation into an open information situation’ that ‘can then be used to form judicial proceedings’ as well as ‘by the committee to defend the listing before the Ombudsperson’).\(^\text{251}\)

All information that listed persons provide during dialogue is shared with ‘relevant States, the Committee and the Monitoring Team’, who can then ask any further ‘follow up’ questions of the petitioner in the event of ‘incomplete responses’.\(^\text{252}\) The team then store this information indefinitely in their files (which for each listed person ‘can be up to a few thousand pages’),\(^\text{253}\) using it to help the Ombudsperson draft the report to the Security Council recommending either continued listing or delisting, as well as updating their narrative summaries of terrorist association (as discussed in the previous chapter).\(^\text{254}\) Procedures for reviewing the list thus carry their own strategic benefits. They are a potential intelligence resource and information multiplier that can help expand pre-emptive security governance mechanisms as well as nominally seek to keep them in check. In any event, as one team member explained, you can almost be sure that any listed person prepared to go through the rigmarole of the delisting procedure does not actually pose a security threat:

If someone is willing to hire a lawyer for a thousand dollars an hour, out himself, give his address, come to the European Court in person, then he’s no longer a threat to international peace and security. The mere fact that he writes to the ombudsperson, or that he writes to the European court, alone is a clear indication that he can no longer be as intimately involved with Al-Qaida as he used to be before. He has to divulge so much information, which puts him at such a high risk ... that you can easily, every time you have these kinds of court cases, you can delist him. What’s the threat of that guy? You know how he looks like. You know about his passport is. You know what his address is. You can call him, if you want. Where is the terrorism threat of someone who is that known?\(^\text{255}\)

The five rationales outlined above are far from exhaustive. But they nonetheless help to explain why a small expert team of mostly ex-intelligence and counterterrorism officials have been some of the strongest advocates pushing to make this list more procedurally fair and

\(^{249}\) Statement by Ben Emmerson QC, Special Rapporteur on Countering Terrorism, UN General Assembly (21 November 2012), transcript with author.


\(^{251}\) Interview with former member of the UN1267 Sanctions Committee, New York, June 2014 (‘Interview F’).

\(^{252}\) S/RES/1904 (n 4) Annex II, para. 6.

\(^{253}\) Interview I.

\(^{254}\) S/RES/1904 (n 4) para. 7.

\(^{255}\) Interview F.
accountable. In this section I have highlighted some of the crucially important discursive and assemblage work that the Al–Qaida Monitoring Team have done that has allowed the experiment of the Ombudsperson to unfold and persist in the face of continued criticism. In so doing, I have tried to disturb the standard accounts of the Ombudsperson emergence that disregard the micro-political procedural work of the Monitoring Team and others as incidental bit part-players in a much bigger and more properly powerful macro-political story. In my analysis, the Monitoring Team is an important crucible of knowledge production shaping this domain of global law and sustaining its techniques of governance. They have performed crucial suturing work that has helped to make the Ombudsperson possible.

The Compliant List: Global Constitutionalism and the UN Special Rapporteurs

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

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

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

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

257 Ibid, 348
The Special Rapporteurs play an unusual role and important role within the broader listing assemblage. Whilst they are jurists like the courts analysed earlier in this chapter, they are not restrained by the facts of the cases placed before them. They don’t have to adjudicate or administer justice in specific instances, but are specifically empowered to critique political institutions for their human rights failings. For this reason, their arguments tend to be dismissed by diplomats and listing experts as unduly ‘academic’ because they don’t take the idiosyncrasies of Security Council politics into account. Yet their reports are a world away from the pluralism and fragmentation of international law and the ‘global disorder of normative orders’ that drives much of the contemporary academic legal debate on this issue. The Special Rapporteur’s world is a globally constitutionalist world with clear ground rules that everyone ought to agree on. They are guardians of the Temple of Justice. Here human rights aren’t just one normative order among many others, colliding in transnational space. They are master narrative, grundnorm, foundational. And as shown below, their engagement in this accountability conflict is animated by a legally Compliant List in accordance with international human rights norms.

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

Scheinin signalled his interest in critically engaging with the list early in his mandate. In appointed by HRC on issues as diverse as such as food, child prostitution, self-determination, disabilities, extrajudicial killings and albinism. See: http://bit.ly/1S9vmxy.

For details of the professional backgrounds of Scheinin and Emmerson, see http://bit.ly/1N1eoBy and http://bit.ly/1PRyXBI respectively.


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


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

Special Rapporteurs are usually tasked to ensure compliance by states, not necessarily UN bodies themselves.
what has since become a convention of truth in Special Rapporteur discourse, he acknowledged that ‘the need for preventive action is an important aspect of the fight against terrorism’. But he then noted with concern how the Al-Qaeda ‘listing procedure infringes a number of human rights’ and outlined ‘basic principles and safeguards’ that needed to be respected to make Security Council listing human-rights compliant.

Six specific lines of critique are advanced, each overlapping and building on each other. First, the ‘principle of legality and legal certainty’ — that is, the political problem of defining terrorism, reposed as something legally axiomatic: ‘All international and national executive bodies in charge of including groups or entities on lists should be bound by a clear and precise definition of what constitutes terrorists acts and terrorist groups’. Absent a definition, elastic standards like ‘associated with’ could be used to target ‘improperly’ and arbitrarily.

Second, the principle of proportionality - the idea, as Lord Diplock once put it, ‘that you must not use a steam hammer to crack a nut, if a nutcracker would do’. The Special Rapporteur traced the list’s origins back to the humanitarian targeting of sanctions and the desire to impact ‘as little as possible … the population’. But implicitly rebuking the scholar-experts examined earlier, he argued that just because sanctions are ‘targeted’ does not mean that they are legally proportionate.

Third, he noted that listing was supposed to be a temporary measure, not something ‘open-ended in duration’. Being legally compliant means reviewing the list every 6 - 12 months to ensure all listing decisions remain ‘necessary and supported by evidence’. Fourth, the thorny question about appropriate standard of proof was posed. Is the list ‘civil’, ‘criminal’ or something more preemptive? What is its proper legal ‘nature’ and how does that shape what procedural guarantees ought to apply? But Scheinin turns the issue around and instead starts with the question of impact. If listing decisions apply indefinitely then their impacts must be severe. That makes them punitive - ‘no matter how they are qualified’ by the Monitoring Team and others who claim the list to be something uniquely administrative and preventative in ‘nature’.

‘Another requirement’, according to the Special Rapporteur, is the need to transform UN listing decisions into domestic criminal prosecutions: ‘if such evidence [of association with terrorism] exists … then States should have an obligation to prosecute’ in accordance with ‘normal rules and standards of proof’. Finally, and perhaps most ambitiously, changing this preemptive security list into a criminal charge sheet means ‘transform[ing] intelligence into evidence to be used … in a court of law’. Security listing is thus reframed as a conduit for channelling speculative allegations back to the legal source, where their uncertainty can be properly tested through adversarial challenge.

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

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

In his final report to the General Assembly as Special Rapporteur, Scheinin ratcheted this critique up a few crucial notches. Gone were the acknowledgements of work well done and gentle reminders that the Council needed to act in good faith to ensure rights compliance. Instead, the Special Rapporteur said the list was unlawful vis-à-vis the UN Charter and argued it should rightfully be abolished.  

Citing Koskenniemi’s ‘Police in the Temple’ article, the crucial issues identified now involved questions of legal competence, the proper relation between the Council and the Assembly and the legal limits of Chapter VII targeting. The Council’s use of emergency powers ‘should always be limited to a particular situation and should be interpreted as being of a preliminary rather than a final character’. But modifying the list after 9/11 to target those all ‘associated with’ terrorism around the world made it ‘no longer limited in time or space’ and imbued it with a ‘judicial or quasi-judicial character’. ‘Such powers’, according to the Special Rapporteur, are quite simply, ‘difficult to reconcile with the legal order of the Charter’ - posited here as the ‘constituent instrument ... [that] provides the foundation for and limit to action by the Security Council’.  

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

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280 Mol (n 15).
281 UN Doc. A/65/258, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (6 August 2010) para. 57: ‘the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions in individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter’. Instead, the Council’s counterterrorism resolutions - including 5/RES/1373 (2003) - should be replaced by ‘a single resolution, not adopted under Chapter VII’, and thus not mandatory to implement (2).
282 Ibid, paras. 52, 35
283 Ibid, para. 38
284 A/65/258 (n 282) para. 52.
285 Ibid
286 Ibid, paras. 52, 35
287 Ibid, para. 56
Al-Qaida listing regime altogether for being ultra vires the UN Charter; or (iv) set up a World Court of Human Rights with jurisdiction over decisions of the UN. 289

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

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

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

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

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

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

The Special Rapporteur’s approach to this problem, for example, is animated by the idea of a legally Compliant List. See A/65/258 (n 282) and Martin Scheinin, ‘Towards a world court of human rights’, Agenda for Human Rights: Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (June 2009) Available at: http://bit.ly/1N7HvzO.

295 A/67/396 (n 259) para. 33.
296 Ibid, para. 59.
297 Ibid, paras. 31, 35.
298 Ibid, para. 33.
299 Ibid, para. 34.
300 Ibid, para. 35.
301 Ibid.
... is that it leaves us in a murky process where diplomacy is allowed to take the place of law ... [Yet] at the end of the day there are parts of the world where constitutional law is applied in a manner that requires interferences with fundamental rights to be regulated by law ... and by the bedrock of due process and not shifted to the sandy foundations of diplomatic negotiation.\[304\]

Notice that law is not infringing on diplomacy here. The problem is rather about diplomacy being ‘allowed to take the place of law’. And the locus of analysis is the interference with human rights that listing produces, not the unique prerogatives of UN Security Council politics. This approach clearly resonates with that adopted by the courts - the ECtHR decision in *Al-Dulimi and Montana Management Inc. v Switzerland*, for example, referred to the report’s finding that the Ombudsperson was incompatible with human rights and stated that ‘the Court unreservedly agrees with that conclusion of the UN Special Rapporter’.\[305\] But when regimes clash divergent versions of the list are enacted and held in relation. And because there is no ‘meta-regime, directive or rule’ for ‘determining the frame’ and deciding who ought to decide, a jurisdictional battle ensues with different actors and institutions each trying to claim their list as the authoritative one and embed their structural bias as the norm against which all listing problems are assessed.\[306\]

This process can be most clearly observed from the Watson Institute reaction to the Special Rapporteur’s report.\[307\] In December 2012 they released *Due Process and Targeted Sanctions: An Update of the ‘Watson Report’*, primarily to shape debates associated with the renewal of the Ombudsperson’s mandate. But the report also sought to counter the Special Rapporteur’s claim that the Ombudsperson was unlawful, refocus the narrative of the list in the light of this discursive disturbance and bring the accountability problem back within their particular realm of expertise. After noting the Special Rapporteur’s conclusions, the first move of these scholar-experts was jurisdictional:

> It is useful to recall the context within which this unique Ombudsperson mechanism functions. Targeted sanctions are political measures imposed by a political body, the United Nations Security Council ... Decisions to list individuals or entities are not legal determinations *per se*, but rather political findings of association with Al-Qaida.\[308\]

Having reasserted the appropriate political lens through which this problem ought to be assessed, these scholar-experts could then disregard the Special Rapporteur’s approach and reassess the Ombudsperson mechanism in a different, more favourable, light. Their second move thus sought to reclaim the discursive middle-ground, differentiate their reasonable approach from the unreasonable demands of the Special Rapporteur and embed their particular bias as normal. ‘According formal judicial review by making the Ombudsperson’s decision final might be optimal from the perspective of the courts’ but, according to the Watson Institute scholars, it ‘is not an even-handed approach that respects the Council’s unique prerogatives’.\[309\] Here the Compliant List is denigrated for imposing an ‘excessively narrow and rigid institutional framework of judicial review’ and ‘mechanically transplanting

\[304\] Ibid
\[305\] Al Dulimi (n 55) para. 119.
\[306\] Koskenniemi (n 14) 336.
\[307\] Koskenniemi uses the ‘hegemonic contestation’ to describe those situations in regime conflicts where ‘what is at stake is not only what the general view is, but who is entitled to determine it.’ See: Koskenniemi (n 141) 312.
\[309\] Ibid, 37
national due process standards onto a more complex, postnational political environment.\textsuperscript{310} What the Special Rapporteur fails to realise, according to these scholars, is that this special domain requires ‘a more flexible interpretation’ to be adopted.\textsuperscript{311} One that recognises that ‘the provision of due process has to be balanced with the Council’s responsibility to maintain international peace and security’ and that standards of procedural fairness must ‘be tailored to the unique features of the United Nations system and Security Council prerogatives’, even if they are grounded in fundamental rights.\textsuperscript{312}

Having differentiated flexible ‘due process-lite’ from its more inflexible legalistic version and resituated the protection of fundamental rights onto a sliding scale, the Watson Institute then went on to conclude that ‘the Office of the Ombudsperson should generally be regarded as a success’.\textsuperscript{313} Relying on the Ombudsperson’s self-assessment of her own performance as well as the views of ‘some experts’\textsuperscript{314} such as the Monitoring Team, the Institute argued that the Ombudsperson ‘has addressed critical due process concerns’, created ‘a presumption of de facto authority’ and provides what they call ‘in essence, de facto judicial review’.\textsuperscript{315} Finally, after reframing the list accountability problem these scholars then sought to obscure the politics of this redefinition in a technical idiom and reaffirm their frame as something preordained. ‘Rather than a problem to be solved’, they argue, ‘a more appropriate perspective’ on the regime clash between security and rights in this domain ‘may be that these are challenges to be managed’.\textsuperscript{316} Bringing in the discourse of regime coordination alters the whole point of the list reform exercise. Procedural reforms are recast as important not because they can address egregious conditions of unfairness but because they can help to realise ‘the ultimate objective’ – namely, ‘strengthening the credibility of the Security Council and its instruments of targeted sanctions’.\textsuperscript{317}

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

I found [Emmerson’s report] really offensive and intemperate … Having played a role in the construction of the mechanism we thought it wasn’t adequately respected, recognised and researched - both by Emmerson and by the ECJ [in the 2013 Kadi decision]. That’s what I call legal fundamentalism … I mean it’s easy for an International Law and Individual Human Rights person. It’s clear. She does not have effective remedy. So you either have it or you don’t. Well that’s a fundamentalist kind of view. It’s not a matter of saying, for all intents and purposes, she does have effective remedy. There’s been a lot of compromise and an under-appreciation of how far member states, particularly the US, have come on this issue.\textsuperscript{318}

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

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

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

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

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

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

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

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

The Security Council P5 are conventionally seen as the architects of the Law of the List. With their unique veto powers, ability to determine threats to international peace and security and create binding Chapter VII resolutions with worldwide effect, the P5 are the most powerful of global actors. The radical transformation of collective security since 9/11 has turned the UN Security Council into a novel form of ‘global quasi-government’. The UN1267 Sanctions Committee – a subsidiary organ composed of P5 diplomats exercising delegated powers from the Council - has been said to exemplify ‘global hegemonic international law’ in action, with listing procedures specifically designed to ‘inure to the benefit of the powerful’.

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

This section explores these problems by analysing how and why the Security Council P5 came to institute the Office of the Ombudsperson. It does so by empirically excavating the Council’s motivations and identifying what the list, and its accountability problems, means for them. What emerges is a rather different story than the one usually presented on this issue. Conventional accounts use the Ombudsperson to explain how the Security Council is gradually evolving into a more human-rights friendly international organisation, relying on a variety of norm diffusion models. In these narratives, the Ombudsperson is delivered as proof that the Council are institutionally learning - albeit slowly and in response to concerted legal and political pressure - to take their human rights obligations more seriously.

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

323 Krisch (n 87) 879.
324 José E. Alvarez, ‘Hegemonic international law revisited’ (2003) 97(4) The American Journal of International Law, 873. For Alvarez, ‘the hegemon [ie, the United States] can only do so much to alter the fundamental sources of international obligation on its own. But when acting with the Council, the hegemon can do almost anything, while still appearing to be acting consistently with the Charter’s vague Principles and Purposes’ (887). For a similar critique, see Kim Lane Schepppele, ‘Empire of Security and the Security of Empire’ (2013) 27 Temple International and Comparative Law Journal 241.
326 On global administrative law, see (n 10).
328 Li (n 184) 592.
implementation, de-politicisation and ensuring longevity both of the Al-Qaida list and the Council’s counterterrorism powers. The Security Council, in other words, are playing the long game of strengthening their global authority through time. The Ombudsperson thus plays a crucially productive role in assembling the Law of the List. It helps to stave off critique, boost the Council’s fledgling credibility vis-à-vis potentially disobedient Member States, and legitimate their novel assertions of authority in the counterterrorism domain. In other words, with the Credible List the primary beneficiaries of these due process reforms are not so much targeted individuals who have been denied redress, but the Security Council themselves.329

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

In the beginning designated individuals were not informed that they were put on the list and there was no procedure available for them to petition for removal. It wasn’t until 2005 that those targeted were notified in writing of the fact and the broad standard of ‘associated with’ was spelt out in any detail.330 A requirement to submit a ‘statement of case’ - essentially, a cover sheet with the target’s personal details outlining, in generic, box-ticking terms, how they meet the ‘associated with’ criteria - was also introduced to ‘standardize listing requests’ by designating states.331 At that time, the only way for individuals to be delisted was to petition their states of residence or nationality and have them take the matter up on their behalf in New York - that is, by relying on a confidential diplomatic process that was both opaque for the individuals concerned and generally ineffective in delivering any redress.332

Despite unduly optimistic claims by some academics that these initial procedural reforms strengthened the rights of targeted individuals,333 they unsurprisingly failed to satisfy the courts. So in 2006 the Security Council created a ‘Focal Point’ or administrative mailbox within the UN Secretariat to receive delisting requests directly from targeted individuals and groups, forward these requests to designating states and states of residence for their

330 S/RES/1617 (n 234) paras. 5, 2 - 3. Notification requirements were introduced in S/RES/1526 (2004) para. 18. 331 ibid, para. 4; US Embassy Cable O6USUNNEWYORK1078 (dated 26 May 2006), para. 6. 332 See, for example, the case of Abdirisiiq Aden - one of the Somali Swedes discussed at (n 129) above. The Swedish Government sought delisting (on Aden’s request) from the UN1267 Sanctions Committee but were initially unsuccessful – see: Per Cramer, ‘Recent Swedish Experiences of Targeted UN Sanctions, The Erosion of Trust in the Security Council’ in Erik de Wet and Andre Nollkaemper (eds.) Review of the Security Council by Member States (Intersentia, 2003). See also the Sayadi and Vinck case (discussed in the Legal List section above) and Youssel v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 3 - which notes that ‘from June 2009 until late 2012 the Secretary of State actively supported his removal from the Sanction Committee’s Consolidated List, and attempted to persuade other members to agree, but without success’ (para. 4). 333 For Feinäugle, for example, ‘the application of the ‘associated with’ standard gives the Committee’s decision-making process an impetus away from a political decision and towards a decision according to written legal standards’. It is an element providing ‘legal clarity and certainty’ that is ‘reminiscent of domestic administrative law’. The statement of case is said to compel the designating state to submit ‘a detailed collection of evidence that allows the Committee to assess the case objectively and to apply it’s ‘associated with’ standard’ – Clemens A. Feinäugle, ‘The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?’ in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.) The Exercise of Public Authority by International Institutions (Springer, 2010) 118, 129, 117. Such claims are disconnected from how the listing process works, and how the Council exercises its authority, in practice. The Sanctions Committee takes listing decisions using a no-objection procedure. There is no legal decision-making process per se that is defined by written standards. Furthermore, the targeting standard has been designed so expansively that it can readily encompass almost any link or potential form of association. Being ‘associated with’ someone ‘associated with’ Al-Qaida is now sufficient to justify being targeted – see S/RES/2083 (2012) para. 3. The ‘associated with’ criterion also contains an open-ended expansive clause of ‘otherwise supporting’. In the recent resolution against foreign terrorist fighters the Council made clear that ‘otherwise supporting’ included activities undertaken ‘through information and communications technologies, such as the internet, social media, or any other means’ – that is, incitement or support on Facebook or Twitter. See: S/RES/2178 (2014), para. 7.
consideration and inform listed persons whether their requests were ultimately successful or not. 334 Leaked US Embassy Cables reveal considerable debate amongst the P5 about how to best design and delimit this mechanism. The US originally sought to have Member States create their own delisting procedures, thus outsourcing the administration of delisting to the national level. France opposed this move ‘because many of the European States most concerned with ‘due process’ wanted to shift the onus of decision-making from the national level to the sanctions committee in order to protect themselves’. 335 And it was out of these circumstances that the Focal Point was born as a compromise procedural solution.

For France, ‘the Security Council [needed] to maintain control of decision-making, but not be at the "forefront" of the process’, and here the Focal Point offered certain advantages. 336 It provided a “visible” change to procedures ‘without actually changing existing decision-making processes, threatening substantive review or altering the status quo in any way’. 337 ‘The focal point proposal’, as French diplomats explained in meetings with USUN officials, sent ‘more of a “political message” than anything else’. 338 This procedure was widely discredited shortly after it was created so it is not a particularly important reform in itself. 339 What is interesting for the purposes of this chapter are the twin themes of visibility and messaging that emerge from the P5 debates whilst the mechanism was being constructed. Such concerns allow us to better understand the Security Council’s motivations for creating procedural reforms in this area in the first place. They also help explain why the Office of the Ombudsperson was ultimately built the way it was, with all of its legal flaws and limitations.

The next round of incremental reforms came in 2008 when the Committee were required to create and post online a Narrative Summary of Reasons 340 for all new and existing list entries, and undertake a comprehensive review of the list over the following two years to ensure that it was as ‘updated and accurate as possible’. 341 These reforms were introduced in response ‘to public criticism that the Council’s decisions to impose targeted sanctions are opaque’. 342 They were also aimed at convincing the EU courts to defer to the Security Council in this area because they were taking the need for ‘fair and clear procedures’ seriously. 343 The US government went to great lengths to curb criticism and manage the public perception of

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

... acknowledge positively and publicly the fact that we have followed through on our commitment to include new measures ... to strengthen procedures to ensure fairness and transparency ... We do not believe that statements emphasizing that the Council can and must do more will serve any other purpose than to cast further doubt on the Council’s decisions ...

We ask that you refrain from statements focusing on the 1267 Committee’s weaknesses and instead recognize the positive changes that will be implemented and encourage others to do the same.344

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

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

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

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

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

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

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

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

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

355 The Like-Minded Group has since expanded to include Austria, Belgium, Costa Rica, Finland and Norway. For recent statement showing the group’s approach to reform, see UN Doc. S/2014/286 (dated 21 April 2014). For a good analysis of the role played by the group in procedural improvements in this area, see: Rodiles (n 353).
356 See US Embassy Cable 08USUNNEWYORK421 (dated 12 May 2008), which recounts a meeting between the Group of Like-Minded States and the UN1267 Sanctions Committee to discuss their advisory panel proposal. Russia, France, the UK, US and Italy all ‘made clear that they did not support the idea of a panel’ (para. 1).
357 See, for example, US Embassy Cable 09BRUSSELS5616 (dated 29 April 2009)
358 US Embassy Cable (n 354) para. 3.
359 US Embassy Cable 08LONDON1690 (dated 24 June 2008) para. 3
360 Ibid, para. 2
the UK Foreign and Commonwealth Office (FCO) responsible for UN Sanctions explained in interview, the prime impetus for Security Council reform was neither accountability or due process but rather Member State implementation:

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

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

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

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

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

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

361 Interview with former UK Foreign and Commonwealth Office Director, London, April 2013 (‘Interview J’).
362 Ibid
363 Ibid
364 On R2P, see: Anne Orford, International Authority and the Responsibility to Protect (Cambridge University Press, 2011). For analysis of how R2P facilitated the Council’s post-9/11 global counterterrorism campaign, see: Cohen (n 91) 269.
365 Interview J.
366 Here problematisation works as a translation device ‘linking together the objectives of the various parties to an assemblage, both those who aspire to govern conduct and those whose conduct is to be conducted’ – Li (n 104) 265. See also: Nikolas Rose, Powers of Freedom: Reframing Political Thought (Cambridge University Press, 1999) 48.
their territory - who may pose no threat to them, but potentially pose a threat to the US or UK - was a ground-breaking legal development and exercise in global governmentality. What consensus on Al-Qaida did ‘was essentially give ... the Security Council the right to hold countries to account’ for what would have previously been considered internal issues beyond the scope of Council control. Or, as Jean Cohen argues, it ‘entail[ed] a quasi-dictatorial expansion and use of Council powers without accountability or apparent legal or institutional checks and balances’ - a global state of emergency.

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

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

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

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369 Interview J.

370 Cohen (n 91) 19.

371 True-Frost (n 329) 1242.

372 Interview J.

373 Li (n 184) 592.

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

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

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

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

375 Ibid, paras. 3, 13
376 Ibid, para. 5. The anti-politics quote comes from Li (n 104) 265. See also Ferguson (n 229).
378 US Embassy Cable 06USUNNEWYORK1430 (dated 31 July 2006). Although this cable predates Rice’s intervention it is revealing about the US rationale for reform and so relevant in relation to the Ombudsperson.
379 US Embassy Cable (n 152); US Embassy Cable Ibid paras. 6, 2. The implication was that a review panel would be denied access to the classified material said to be underpinning listing decisions.
380 US Embassy Cable (n 152) para. 15.
381 On the problem of ‘low hanging fruit’ and listing as a means of showing demonstrable progress in the war against terror, see discussion in the Living List section of this chapter and Suskind (n 233) 193.
382 On this reluctance see: US Embassy Cable (n 239) para. 3. Here Italian officials acknowledge that they used the list to target many people ‘about which they knew little’ but still state that ‘Italy is not enthusiastic about delisting people from the 1267 list’.
383 US Embassy Cable 08ROME711 (dated 4 June 2008). This cable provides an illuminating account of how states use diplomatic cover and affairs of state to foster secrecy in their security governance arrangements.
384 Interview J.
385 Rice (n 245).
merit being on’ it.

But the living list idea was about more than dynamic governance and calibration against the current threat posed by Al-Qaida. It was about repositioning the Security Council to adapt, through this unique weapon and its novel targeting powers, toward whatever threat might come next. That is, renewing agreement on the problem of global terrorism in the present to allow the international peace and security envelope to be stretched through the list in the future. By 2009, for example, it was already widely acknowledged that Al-Qaida no longer posed the threat it once did. But the Syrian civil war had not yet started and it would be five more years before the list would be repurposed as a key weapon in the global war against ISIL and ‘foreign terrorist fighters’. When the US government expresses concern about the longevity of this ‘irreplaceable UN counter-terrorism tool’, I argue that it is precisely such envelope-stretching transformations of collective security that are at stake. So when countering claims that list improvement meant ‘a failure to designate terrorists’, Rice was adamant that such criticism missed the key point of reform: ‘The preservation of the tool, and the global consensus that it represents’, she argued, was ‘far more important than the designation of a handful of marginal figures’.

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

(iii) Credibility and the Sedimentation of Global Emergency Governance

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

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

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

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

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

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

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

(i) De Novo decision-making and Fair Adjudication

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

402 For Susan Leigh Star and James Greisemer, ‘boundary objects’ are ‘objects which inhabit several intersecting social worlds ... and satisfy the informational requirements of each of them’. They are ‘plastic enough to adapt to local needs and the constraints of the several parties employing them, yet robust enough to maintain a common identity across sites’. Boundary objects, in other words, are critically important translation devices. ‘The creation and management of boundary objects is a key process in developing and maintaining coherence across intersecting social worlds’, or what they term ‘institutional ecologies’ - Star and and Greisemer (n 109) 393. See also: Susan Leigh Star, 'This is not a Boundary Object: Reflections on the Origin of a Concept' (2010) 35(S) Science, Technology & Human Values 601.
403 Interview with the former UN 1267 Ombudsperson, Kimberly Prost. New York, November 2012 ('Interview K'). Unless indicated otherwise, all further references pertaining to the Ombudsperson in this section are drawn from this interview. Although Ms. Prost has been out of post since 2015 (n 5), I still refer to her as the Ombudsperson throughout this chapter.
404 Ibid
405 Ibid
decision on today, should this listing be maintained? And I'm feeding into that with ... considerable power. 406

According to the Ombudsperson, this exclusive focus on the present situation is a procedural strength rather than a weakness. It makes her unique brand of decision-making better for listed persons than conventional judicial review because it allows them to ‘present new information and explanations’ and gives them reassurance that ‘there is no issue of deference to the original decision maker’ taking place. 407 Moreover, it is a mistake to think that conventional review could possibly work in the ‘very unique context’ of the Council:

I know [the UN Special Rapporteur’s] calls for this independent judicial review process. [But] the first question I have is, what judicial review? What is a fair process in this particular context? Because what judicial review is in the United States ... is very, very different from what judicial review is in the European Union and it's very different from what it might be in the United Kingdom. So my question is, in this international context, what judicial review? ... I think there is a more fundamental question. It's not so much this whole idea of there must be judicial review for it to be fair. My question is, what makes it fair in this very context? And I'm not so sure judicial review is the answer. 408

This practice of not looking back has certainly assisted in having individuals removed from the list and so it underpins the mechanism’s broader claims to success. By early 2016, 63 delisting requests had been made to the the Office of the Ombudsperson and only 11 had been subsequently refused by the Council. 409 With such impressive results, humanitarian scholars-experts, the Monitoring Team, Security Council P5 and the Ombudsperson herself have all effusively praised this novel 'de facto judicial review’ procedure. 410 Legal scholars have argued that in light of the ‘high level of de facto judicial protection offered by the Ombudsperson ... [it] no longer seems appropriate to summarily dismiss the protection that is offered’. 411 Even EU judges have claimed that due to these procedural improvements it is now finally time for the courts to adopt a more deferential stance, perform less intensive review and acknowledge that UN listing and delisting procedures ‘can no longer be regarded as purely diplomatic and intergovernmental’ in nature. 412

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

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

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

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

A state can choose whatever information they want to give me. I know states are choosing not to give me certain pieces of information and that’s fine. It might not even be classified information. .... Some states have just decided: ‘Well we had this information way back then,'
but we don’t want to bother [because] we are not opposed to delisting’. So they just don’t give me information and that’s also perfectly fine. … Can I do a proper review? I can do a proper review of the decision I have to make … because it will be based solely on what they give me.\footnote{Interview K.}

According to the Ombudsperson, more than half of all delisting applications she has handled have been accepted by the Security Council P5 without any objections being raised or counter-material provided. And in a significant proportion of delisting cases, states have provided no response at all.\footnote{Interview with the former UN 1267 Ombudsperson, Kimberly Prost. New York, June 2014 (‘Interview L’).} This means that the majority of delisting cases are effectively dealt with \textit{ex parte}, with little to no input from the other side. So not only does this unique review refrain from reviewing the listing decision, but it also often takes place using material provided by those who are listed and little else. How can we account for the limited engagement by states in this de facto ‘review’ process? I suggest that the Ombudsperson is primarily valued for the important list pruning function it provides. As discussed earlier, getting off the Al-Qaida list is far more difficult than getting on. The collective inertia of states to delist, the indefinite application of the sanctions, the lack of \textit{pro bono} lawyers doing this defence work and the reduced ‘scrutiny from the press and NGO community because “even human rights groups don’t want to stand up for terrorists”’\footnote{US Embassy Cable 09LONDON452 (dated 20 February 2009) para. 5 (recounting dialogue between UK FCO and US diplomatic officials on list accountability reform).} all cumulatively mean that once someone is listed they will likely \textit{remain} listed forever, irrespective of the grounds or justification offered.\footnote{With the exception of those individuals who have the money to engage legal counsel (such as Mr Kadi).} The Ombudsperson’s \textit{de novo} techniques bypass these political obstacles and help to trim the list of ‘low hanging fruit’. This mitigates the threat of judicial review - by dissipating potential norm conflicts before they reach Court - and so strengthens the Council’s global listing authority.

But most importantly, this temporal cut allows the Ombudsperson to advance the claim that her decision-making processes are fair because they allow listed persons to know the case against them. This claim comes, however, with an important caveat: ‘when I say that I believe that listed individuals have been told about the case, it’s the case against them \textit{such as has been given to me’}.\footnote{Ibid} Yet the Ombudsperson acknowledges that her understanding of the cases is partial and fragmentary at best, often based on the ‘general, unsubstantiated, vague and unparticularised’\footnote{Interview K.} Narrative Summary of Reasons and/or Statement of Case released by the Committee ‘and nothing more. That does not mean that there \textit{is} nothing more, but that I \textit{have} nothing more’.\footnote{Kadi (n 69) para. 157.} For the Ombudsperson, however, this disparity does not create an inequality of arms between the Security Council and those whom they target. Rather, she insists that the delisting process remains fair because her recommendation and the Sanctions Committee’s decision are based on exactly the same information - ‘If that wasn’t the case, [then] I would say that it is an unfair process’.\footnote{Interview K.}

This idea of symmetry between the Ombudsperson and Council resonates with the conventional idea of review, where the decision-maker decides upon findings of fact and accepted evidence. But how can one readily assume that in this exceptional domain these two bodies ground their respective decisions on the same material? The relation between Council and Ombudsperson is not akin to that of executive decision-maker and court. I suggest that in the ‘emergency context within which the Security Council necessarily
operates’, this idea of symmetry is little more than wish-fulfilment. The Ombudsperson claims that ‘the mechanisms in place give significant weight to [her] ... recommendations’. Yet there are no rules restricting the types of information the Security Council can consider or that otherwise limit their discretion in any way. The Security Council remain effectively ‘unbound by law’. Furthermore, Council deliberations on delisting are undertaken in secret, ordinarily through discrete bilateral exchanges or in Capitals, outside of the 1267 Sanctions Committee meeting framework altogether.

This symmetrical myth anchors claims of procedural fairness and thus helps to assuage concerns of legal critics. But the Ombudsperson and Council remain qualitatively different institutions with no ‘constitutional connective tissue’ binding them together - they are fundamentally asymmetrical. There are any number of pragmatic or political reasons why the Council might choose to remove people from the list (or not). As the legal representative of listed individuals I have worked at length to prepare detailed arguments setting out why my clients were not ‘associated with’ Al-Qaida, as any defence lawyer would. Yet throughout the delisting process I was continually reminded - through the procedural irregularities and novelties of this mechanism - that this was a political and at best quasi-juridical procedure where my legal submissions may have little bearing on the end-result. Decisions to retain or remove listings may ultimately have nothing to do with the arguments put forward by listed parties or the recommendations of the Ombudsperson. As the former chair of the 1267 Committee plainly acknowledged: ‘At the end of the day, it’s a political decision based on a political process’. Avoiding litigation and consolidating the Security Council’s authority to govern global terrorism this way are the more likely catalysts for the delisting decisions undertaken to date.

(ii) Speculative Standards

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

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

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

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

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

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

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

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

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

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

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

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

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439 A/67/396 (n 259) para. 49.
440 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 15. For decisions concerning the exclusion of torture evidence at the domestic level, see: A and others v Secretary of State for the Home Department (No 2), [2005] UKHL 71; Oberlandesgericht (OLG), OLG Hamburg, Decision of 14 June 2005, reprinted in (2005) 58 Neue Juristische Wochenzeitschrift 2326; Hamdan v Rumsfeld, 548 US 577.
441 Letter from the UN1267 Ombudsperson (dated 12 November 2012), Copy on file with author.
442 Ibid
from the Torture Convention. I look at it more of, you know, looking at all the factors.\textsuperscript{443}

Following external pressure and criticism, the Ombudsperson finally made a public statement on the issue in 2013 stating that if she is ‘satisfied to the relevant standard that the information has been obtained through torture’ she will not rely on it in her analysis and recommendations.\textsuperscript{444} Yet given that the sources of the underlying information are never disclosed to the Ombudsperson, it remains entirely unclear how such an assessment could be undertaken and findings of ‘inherent unreliability’ drawn. States are under no obligation to disclose potentially tainted and exculpatory material.\textsuperscript{445} How can the Ombudsperson realistically assess claims of torture - even in accordance with her own very elastic standards - if she does not have ‘sufficient information’ to do so?\textsuperscript{446} As Lord Bingham of the House of Lords once observed in the comparable context of UK Special Immigration Appeals Commission (SIAC) proceedings: ‘despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been “established”’.\textsuperscript{447} Moreover, in an interview in 2012 the Ombudsperson expressed a much more cavalier attitude towards the use torture material seemingly at odds with her later public statements on this issue, that was driven by the pre-emptive logics of the list rather than considerations of unreliability:

Jack Bauer, you know, on 24. He tortured a lot of people [and] he got information [that] there is a bomb about to go off. Nobody would suggest that you shouldn’t use or rely on that information and go look for the bomb. So taking that in a preventative context here, if ... you’ve got information and it indicates from a preventative point of view that you should be using the sanctions, I don’t think anyone would argue that you shouldn’t, from a prevention point of view, rely on that information.\textsuperscript{448}

This novel assessment standard has been rightly criticised by jurists for being too vague and setting the evidential threshold too low given the ‘quasi-penal consequences’ that flow from being on the list.\textsuperscript{449} But for the Ombudsperson the applicable standard in this domain has to be kept ‘a bit fuzzy and a bit lower’\textsuperscript{450} than conventional criminal or civil standards because the list is ‘preventative in nature’ and her assessment hybridises two very different kinds of information - intelligence and evidence:

[With intelligence] you have to be looking at what the inferences are much more than you do with evidence. With evidence, you know you’re looking at concrete facts ... But here, it’s more about can you draw inferences from ... certain activities? ... It’s not just [in] the information but in the inference [that petitioners] have a chance to respond ... and explain.\textsuperscript{451}

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

(iii) Inquisitorial Dialogue and Speculative Lawyering

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

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

454 Dyzenhaus (n 150) 215.
455 S/RES/1904 (n 4) Annex II, paras. 1 - 4. During this initial four-month period, ‘members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant UN bodies, and any other States deemed relevant by the Ombudsperson’ are asked to provide information relevant to the delisting request and their views on whether the request should be granted (para. 2). The Monitoring Team are also engaged by the Ombudsperson to scrutinise the delisting request, provide relevant information from the Monitoring Team’s own extensive records and provide ‘questions or requests for clarification’ that the Ombudsperson should ask (para. 3). The information gathering period can be extended by an additional two-months if needed (para. 4).
456 Prost (n 401) 422.
457 Prost and Wilmshurst (n 407) 6.
458 Prost (n 401) 422.
459 Dominic Hoerauf, ‘United Nations Al-Qaïda Sanctions Regime after UN Resolution 1989: Due Process Still Overdue’, (2012) 26(2) *Temple International and Comparative Law Journal*, 213, 227 - 228. See also Prost and Wilmshurst (n 407) 6: ‘The Ombudsperson noted that it was very striking how much this meeting means for the petitioners. On several occasions she has been told by petitioners that it is the first time after many years of being on the list that anyone has listened to their side of the story’.
correspondence between lawyers. My client had been subjected to domestic criminal proceedings for alleged association with terrorism more than ten years prior to the meeting. These criminal proceedings had been based on conduct occurring five years before the trial – that is, almost fifteen years before the Ombudsperson dialogue meeting. In the end, my client was cleared of these terrorism charges by the Court for want of evidence. We had therefore assumed that his listing must have been based upon some other supposed allegations and were pushing the Ombudsperson to disclose the underlying basis of his UN terrorist designation to us so that we might adequately respond. Yet over the course of our correspondence it slowly became clear that the UN’s determination of terrorist association in respect of my client was indeed primarily based on the domestic judicial findings that had already found those same allegations to be unfounded. How could this possibly be correct?

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

When we made our concerns plain and explained to the Ombudsperson that many of these initial findings had been drawn from closed in absentia proceedings and had either been later overturned following detailed examination or otherwise abandoned, we were told that ‘for all judicial or administrative decisions it is the underlying information revealed by it, as opposed to the conclusions or reasoning, which is of significance’, that the Ombudsperson’s analysis ‘will ultimately consider the cumulated material and the inferences to be drawn from the same’ and, again, that the list was preventative in nature.\textsuperscript{460} This is one part of the ‘dialogue’ where the speculative evidential standards of the Ombudsperson can be put to coercive effect as a jurisdictional device.\textsuperscript{461} Material used as evidence in domestic proceedings to try and show terrorist association in accordance with conventional legal standards and burdens of proof can effectively be rerun at the global level in accordance with the extremely broad and unique standards crafted by the Ombudsperson. In this context, there is no double jeopardy rule and judicial findings or considerations of evidence are ‘not in any way determinative’, even if they end up in acquittal.\textsuperscript{462} Rather, what matters are the correlations that can potentially be drawn anew in the Ombudsperson’s fresh assessment of the ‘underlying information’.

\textsuperscript{460} Letter from the UN 1267 Ombudsperson (dated 15 August 2013), Copy on file with author.

\textsuperscript{461} According to Mariana Valverde, jurisdiction is best understood as a kind of sorting process that divides events into different classes to make things amenable to legal governance and ensure the ‘smooth functioning of law’. It is not only about grounding authority claims. It also ‘conceals from view the qualitative differences in governance that the discussion of scale has canvassed’ and transforms disputes about ‘the qualitative features of governance … into seemingly mundane and technical questions’. Jurisdiction doesn’t only decide who governs a particular situation, but ‘also determines how something is to be governed’ and so retains a ‘magical power to depoliticize governance’ – Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge 2015) 83 - 84. It is in this sense that the Ombudsperson’s delisting standards operate as a jurisdictional device. They rescale localised trial material to a global site whilst altering its temporal orientation in critical ways - from alleged past criminal activities to uncertain future threats - through technical means.

\textsuperscript{462} Ombudsperson letter (n 460).
One week before our meeting the Ombudsperson out forward a new allegation against my client: ‘There is evidence that Mr X recently met with a Tunisian extremist’. Our requests for more information about this allegation - for example, who did he meet with, when and in what circumstances, what was the alleged purpose of the meeting - were all rebuffed: ‘I am unable to disclose the source.’ And yet an inference was being clearly drawn from this unsourced allegation that my client was ‘associated with’ terrorism. Given the vagueness of the claim, we were unable to take instructions and present a counter-argument capable of interfering with the inference. What should one do as a defence lawyer in such extraordinary circumstances, duty bound to advance the best interests of your client? In the end we refused to respond to this ‘spectral evidence’, whilst pushing for an assurance that no adverse inferences would be drawn as a result (which was duly provided). But if our client had answered by guessing, then anyone mentioned would likely, by inference and association, be flagged as a potential terrorist, end up on a no-fly list or otherwise become a person of security interest. Here ‘dialogue’ is a means of generating new intelligence. And it is this generative capacity that may help explain why the Council have been so encouraging of the Ombudsperson to reach out and engage with the listed in this way.

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

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

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463 Letter from the UN 1267 Ombudsperson (4 September 2013), Copy on file with author.
464 Ibid
465 Spectral evidence is evidence based on dreams and apparitions. It was first rendered admissible in English courts during the Bury St Edmunds Witch Trials in Suffolk during the seventeenth century and was then famously deployed during the Salem Witch trials in Massachusetts, USA during the same period. I am indebted to my friend and colleague, Amir Attaran, for drawing the analogy between the use of spectral evidence in witch trials and the use of speculative material in the Ombudsperson delisting procedures.
466 Kadi (n 69) paras. 157, 177.
467 Interview K. According to the Ombudsperson: ‘sometimes they will say, “This is the only way we would allow that information to be put” or I might say “I’m going to ask this question, is that okay?”.’
468 Ombudsperson letter (n 460).
My client consistently denied all knowledge of and links with terrorism, as he had done before the courts many years before, but this dialogue was an altogether different kind of process. When one infers from inferences and associates upon associations using possibilistic standards and logics it is very difficult to mount what most jurists would consider a proper defence. In my experience, these ‘dialogue meetings’ demanded a particular form of speculative security lawyering that bore little resemblance to the judicial review litigation to which I was accustomed. This wasn’t ‘de facto judicial review’ or an opportunity for my client to share his side of the story, but a thoroughly inquisitorial and exceptional procedure more akin to a post-modern Star Chamber. Comparable domestic mechanisms of secret justice (such as Closed Material Procedures before SIAC) at least have special advocates who can attempt to mitigate this gross inequality of arms by accessing the underlying material and making submissions on the defendant’s behalf. No such mechanism exists here. There is only Ombudsperson dialogue. As Lord Bingham has observed: ‘It is inconsistent with the most rudimentary notions of fairness to blindfold a man [sic] and then impose a standard which only the sighted could hope to meet.’ Yet requiring the listed to explain themselves to an inferential standard applied by the Ombudsperson in secret to material that they will never see is, in my experience, precisely what defines this dialogue.

Multiplicity and Experimentation in Global Exceptional Governance

Since the end of the Cold War the Security Council’s powers have dramatically expanded to encompass a diverse array of novel and diffuse global threats. UN Sanctions - previously criticised as a ‘blunt instrument’ that engendered widespread humanitarian suffering - were recalibrated as targeted or ‘smart’. The 9/11 attacks accelerated these processes of ‘stretching the international peace and security envelope’, with individuals suspected of being nodes in global terrorist networks transformed into objects of legal intervention by the Security Council for the first time. But when IOs ‘pierce the state veil’ and begin exercising coercive powers over individuals, the dynamics of the international system radically change. Individual rights are interfered with directly without the possibility of redress. Executive decision-making is detached from domestic and regional review mechanisms and ‘drifts upward’ into ‘global administrative space’ where no legal constraints apply. The Al-Qaida list, in other words, has come to entrench a global state of exception. Giving individuals the means to challenge their listing and bring the Security Council to account has thus become the key fault line and litmus test of the global security law-building project.

The creation of the Office of the Ombudsperson in 2009 was designed to resolve this accountability dilemma, and for many it did. Scores of individuals were delisted following recommendations by the Ombudsperson and the Security Council has now moved away from due process concerns towards list implementation issues and fighting ISIL and foreign terrorist fighters. The Ombudsperson has been held up as an accountability success, despite the continued reservations of the courts and the constitutionalist scholars who support them. The history of the Security Council due process debate has now been effectively written, and

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469 The Star Chamber was an English Royal Prerogative court active from the 15th - 17th centuries. It was infamous for its secrecy, inquisitorial methods, use of torture and reliance on involuntary confessions. As such the Star Chamber has become synonymous with the worst excesses of exceptional medieval justice and is often used by common law jurists to account for the constitutional origins of due process principles and procedural justice. A and others (n 440) para. 59.


472 On individual rights as a ‘fault line’ in this domain, see: Elspeth Guild, ‘EU Counter-Terrorism Action: A fault line between law and politics?’, CEPS Liberty and Security in Europe Series, Brussels (April 2010).
reiterated innumerable times, as one of conflict leading to incremental improvement, institutional learning and responsive global governance. Key actors may have disagreed on the most appropriate response to take and whether the procedural protections offered went far enough. But we can all seemingly agree that this experiment has been a step in the right direction and provided something better than the legal black hole that existed before. As Global Administrative Lawyers, legal pluralists and functionalists keen to get on with the good work of global governance continually remind us, there is no “one size fits all” or “universally applicable” model of procedural fairness for resolving post-national accountability problems. Rights protection needs to be recast onto ‘a more flexible gliding scale’ when we are dealing with global security law norm conflicts. De facto judicial review might not be ideal, but it is good enough. ‘When partial efforts are seen as down payments on a better future’, argues David Kennedy, ‘defects in current practice seem tolerable’. Prefiguration - seeing the origins of a better world in the problem management processes of the present – ‘makes it easy to talk about what everyone might favor in the long term without mentioning whom that will actually favor between now and then.’

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

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

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

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

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

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

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

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

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491 Star and Greisemer (n 109).
493 A/67/396 (n 259) para. 12.
494 Dyzenhaus (n 150) 215, 3.