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### The Law of the List

*UN counterterrorism sanctions and the politics of global security law*

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#### 4. Complexity in the Courts: Mapping the Spatiotemporal Dynamics of the List\*

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

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

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

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

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

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\* Parts of this chapter were previously published in: Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights* (ECCHR, 2011); Gavin Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List' (2014) 5(1) *Transnational Legal Theory* 81; and Gavin Sullivan, 'Secret Justice inside the EU Courts' *Al-Jazeera* (online, 19 April 2014).

<sup>1</sup> US Embassy Cable 06USUNNEWYORK1609 (dated 22 August 2006).

<sup>2</sup> Technically the EU courts do not review the Al-Qaida list, because they cannot review Ch. VII measures of the Security Council. Rather, they review the EU decision to implement the UN list into the EU legal order.

<sup>3</sup> The literature on local sites producing the global is vast and has been discussed in the introductory chapter. See, for example: Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005) at 173 - 190; Anna Tsing, 'The global situation' (2000) 15(3) *Cultural Anthropology* 327; Richard Warren Perry and Bill Maurer (eds.) *Globalization under Construction: Governmentality, Law and Identity* (University of Minnesota Press, 2003); Aihwa Ong and Stephen J. Collier (eds.) *Global Assemblages: Technology, Politics and Ethics as Anthropological Problems* (Blackwell Publishing, 2008); George E. Marcus, 'Ethnography in/of the world system: The emergence of multi-sited ethnography' (1995) *Annual Review of Anthropology* 95; Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press, 2001); Annelise Riles, *The Network*

of the list is driven by dynamics of non-synchrony and dis-location and a mosaic epistemology. Understanding how these elements work is crucially important because they are operating underneath the radar of formal law to generate legal conflict and stretch the scope of this exceptional governance regime in practice. Building on previous chapters, I argue that detailed micro-level empirical analysis of how listing conflicts are negotiated reveals important insights into how this global security regime is assembled. Time and space have long been recognised as central vectors of globalisation. Yet they remain almost entirely neglected in global legal scholarship, which continues to posit law in normative positivist terms abstracted from time and space.<sup>4</sup> This reductionism impoverishes our conceptions of what global law is and funnels legal scholarship into a zero-sum debate and ethical choice between the One (global constitutionalism) and the Many (global legal pluralism).<sup>5</sup> This chapter instead draws on the sociological research of Saskia Sassen, who argues that globalisation proceeds through the emergence of novel spatiotemporal assemblages that stimulate legal fragmentation and conflict.<sup>6</sup> But whereas Sassen's work is pitched at a macro-level of historical change, this chapter maps dynamics and effects operating at a more granular scale – contributing to debates on the transformations of law under conditions of globalisation by showing how global security regimes are being built.

To develop these claims the chapter is divided into two interrelated sections. The first section (*Non-synchronous Law*) highlights the temporal dynamics of the list by exploring problems associated with using intelligence-as-evidence as the basis for listing decisions. The idea of non-synchronicity draws on the ground-breaking work of Boaventura de Sousa Santos who argues that law is never singular but always an effect of the 'interaction and intersection among legal spaces' or interlegality'.<sup>7</sup> For Santos, law is 'a highly dynamic process' because the sites and networks that clash and constitute it 'are *non-synchronic* and thus result in uneven and unstable mixings of legal codes'.<sup>8</sup> This chapter extends this insight to the empirical study of conflicting legal temporalities. In my account, non-synchronous law is best thought of as a form of legality composed of divergent temporal logics that are literally 'out of sync'. I argue that the Al-Qaida list is a paradigmatic example of non-synchronous law because of the ways it interlaces different temporal logics and epistemic practices associated with intelligence and evidence together into productive relation.

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

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*Inside Out* (University of Michigan Press, 2001); Sally Engle Merry, 'New legal realism and the ethnography of transnational law' (2006) 31(4) *Law & Social Inquiry* 975.

<sup>4</sup> There is little literature that takes spatiotemporal dynamics seriously in relation to global law. See, however: Neil Walker, 'Out of Place and Out of Time: Law's Fading Co-Ordinates', University of Edinburgh School of Law Working Paper No 2009/01; Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013); Mireille Delmas Marty, *Ordering pluralism: A conceptual framework for understanding the transnational legal world* (Hart Publishing, 2009).

<sup>5</sup> The global constitutionalism and legal pluralism debates were discussed in the introductory chapter. Framing these debates as the One and the Many is loosely drawn from: Desmond Manderson, 'Beyond the Provincial: Space, Aesthetics and Modernist Legal Theory' (1995-6) 20 *Melbourne University Law Review* 1049, 1060.

<sup>6</sup> Saskia Sassen, 'Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights' (2008) 1(1-2) *Ethics and Global Politics* 61; Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

<sup>7</sup> Boaventura de Sousa Santos, 'Law: a map of misreading. Toward a postmodern conception of law' (1987) 14(3) *Journal of Law and Society* 279, 288.

<sup>8</sup> *Ibid*, 298

to protect fundamental rights so readily enlisted to build, what is in effect, a legally authorised state of exception? The answers I provide don't look towards some sovereign decision or inexorable pre-emptive turn, but to the bona fide efforts of the judiciary to try and ameliorate practical problems of legal governance. I argue that the spatiotemporal dynamics and mosaic epistemology of the list are in friction with conventional legal practices (like judicial review) and forms of inductive reasoning that underpin the principles of legal proof. But managing these problems stimulates new recombinant legal practices and forms of reasoning that were not possible before. The list is altering, at a very granular level, the ways judges produce 'legal truth' and is taking judicial reasoning into the uncertain terrain of the contemporary security mosaic, with its logic of correspondences and associations.

The common view - in security studies and criminology concerned with risk governance - is that with the increasing shift towards pre-emption and governing of future threats, conventional legal principles and practices stand to be abandoned. So we need either radical new forms of jurisprudence and politics or a renewed commitment to liberal legality to protect ourselves from the perils of 'Future Law' and restrain the inexorable rise of the preventative state.<sup>9</sup> This chapter contributes to these debates by showing that when pre-emption and rule of law come into contact, one does not necessarily supplant the other. Risk and pre-emption, in other words, are not monolithic or emanating from the logic of late modernity in ways that herald an epochal shift. Instead, legal knowledges and modes of governance are reorganised in different ways through this encounter and global sociolegal scholarship must be empirically attentive to the forms this reorganisation takes if we want to understand the complexities of law in the present.

The second section of this chapter (Dis-located law) examines how this non-synchronicity confounds and reorders the spatial dynamics of judicial review. The prevailing literature suggests that the EU courts have robustly defended the rule of law against this UN listing regime. Yet in my analysis the list is both reordering how the EU judiciary produces legal knowledge and altering the review process itself in potentially far-reaching ways. Judicial review is usually retrospectively orientated towards the 'decision' of the authority under challenge. But I show how using intelligence-as-evidence for terrorism listing effectively defers this space of decision and challenges the judicial process because the decision supposedly under review is, strictly speaking, not there. I use the term 'dis-located law' to try and capture this dynamic process, because it draws attention to both the location of legal process and the sense of legal fracture occasioned through this deferral. My empirical analysis highlights this process of evacuation and shows how key sites of formal decision-making across the listing assemblage are rendered substantively baseless as a result. When the list is analysed through the lens of the Security Council resolutions that constitute it, the global is projected as something 'broadly encompassing, seamless and mobile' and representative of the 'international community'.<sup>10</sup> But my micro analysis of how pre-emptive security problems are being mediated by the courts shows that this global security regime is something far more 'patchy', 'partial and situated' than most accounts suggest.<sup>11</sup>

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

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<sup>9</sup> See, for example: Lucia Zedner, 'Preventive justice or pre-punishment? The case of control orders' (2007) 60(1) *Current Legal Problems* 174; Claudia Aradau and Rens van Munster, 'Governing terrorism through risk: Taking precautions, (un) knowing the future' (2007) 13(1) *European Journal of International Relations* 89, 106; Louise Amoore, *The Politics of Possibility: Risk and Security beyond Probability* (Duke University Press, 2013) 85.

<sup>10</sup> Stephen J. Collier and Aihwa Ong, 'Global Assemblages, Anthropological Problems' in Ong and Collier (n 3) 12.

<sup>11</sup> *Ibid*

into something much more plastic and fluid than has usually been the case. The second decision (*Abdulrahim*) moves in an altogether opposite direction, by looking backwards towards a listing decision presumed to have taken place in the past. Whilst the prevailing literature suggests that the EU courts are robustly defending the rule of law from attack via this UN listing regime, my analysis suggests that the relation between the two is more complicated and co-productive in practice. I show that through this encounter the list is modulating and reordering, in potentially far-reaching ways, the EU judicial review process itself. This isn't merely a matter of 'force yield[ing] place to law' or vice versa, but of pre-emptive security governance techniques reassembling the ways that justice is done.<sup>12</sup>

The spatiotemporal dynamics of the list are deeply entangled in assembling a novel form of global exceptional governance. One that carries the weight of the UN collective security system yet remains without foundation. A legal weapon that enables listing authorities to wield legal violence over individuals without any real consideration as to why. An exception that mutates and expands through legal efforts (however well-intentioned) to ameliorate its worst effects, defying attempts to fill its 'legal black holes'<sup>13</sup> with law. Building on the tradition of critical legal and security scholarship that emphasises the co-production of law and emergency politics,<sup>14</sup> this chapter shows that empirically mapping the fragmented spatiotemporal dimensions of legal governance provides important insights into how global emergencies come to be normalised, stretched and rendered durable through law.

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

Evidence is integral to the production of legal knowledge. It is collected in relation to specific acts alleged to have taken place in the past and ordinarily used to 'aid the court in establishing the probability of past events into which it must inquire'.<sup>15</sup> Legal evidence is therefore retrospectively orientated, as it comes to be used to 'establish that a version of what occurred has an acceptable probability of being correct'.<sup>16</sup> In judicial review emphasis is placed upon 'evidence which was before, or available to, the public body at the time of its impugned action'<sup>17</sup> - that is, relevant evidential questions are intimately tied to the nature of the executive decision-making under challenge. Legal evidence is evaluated publicly by judges in accordance with established forensic standards of proof - usually to either determine guilt beyond reasonable doubt (the criminal standard) or liability on the balance of probabilities

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<sup>12</sup> Cian Murphy, 'Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?' in David Cole, Federico Fabbrini and Arianna Vedeschi (eds.) *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing, 2013) 268, 282.

<sup>13</sup> See, in particular: David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

<sup>14</sup> See, for example: Fleur Johns, *Non-legality in International Law: Unruly Law* (Cambridge University Press, 2013); Derek Gregory, 'The Black Flag: Guantanamo Bay and the Space of Exception' (2006) 88(4) *Geografiska Annaler* 404; Susanne Krasmann, 'Law's Knowledge: On the Susceptibility and Resistance of Legal Practices to Security Matters' (2012) 16(4) *Theoretical Criminology* 379; Louise Amoore, 'Risk before Justice: When the Law Contests Its Own Suspension' (2008) 21(4) *Leiden Journal of International Law* 847; and Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2009).

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

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

<sup>17</sup> Michael Fordham, *Judicial Review Handbook* (Hart Publishing, 4th edn 2004) 331.

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

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

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

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<sup>18</sup> Whilst I use the English legal system as the typology here, degrees of proof are acknowledged within both standards in that context.

<sup>19</sup> Hearsay is excluded in a general sense but evidential rules on this issue are of course more differentiated and complex than presented here. In the US, for example, hearsay evidence is generally excluded in both civil and criminal matters. In the UK hearsay is expressly admissible in civil proceedings (see *Civil Procedure Rules*, Part 33 and *Civil Evidence Act 1995*, s. 2) and admissible on exceptional grounds in certain criminal matters (see *Criminal Procedure Rules*, Part 34 and *Criminal Justice Act 2003*, s. 114). Article 6(3) (d) of the European Convention on Human Rights generally prohibits the use of hearsay in criminal matters, stating that those charged have the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. However, this right has been limited in recent case law - see, for example: *Al-Khawaja and Tahery v United Kingdom* App. Nos. 26766/05 and 22228/06 (ECtHR, 15 December 2011).

<sup>20</sup> I draw upon the valuable work of Kent Roach on this issue. See Kent Roach, 'The eroding distinction between intelligence and evidence in terrorism investigations' in Andrew Lynch, Nicola McGarrrity and George Williams (eds.) *Counter-Terrorism and Beyond* (Routledge, 2010) 48.

<sup>21</sup> Twining (n 15) 104. On the speculative, see: Marieke de Goede, *Speculative security: The politics of pursuing terrorist monies* (University of Minnesota Press, 2012).

<sup>22</sup> On conjectural reasoning in the war on terror, see Claudia Aradau and Rens van Munster, *Politics of Catastrophe: Genealogies of the Unknown* (Routledge, 2011).

<sup>23</sup> Gregory F. Treverton, *Intelligence for an Age of Terror* (Cambridge University Press, 2009) 3. Treverton is the Director of RAND Corporation's *Center for Global Risk and Security*.

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*, 4, 28

properly 'connect the dots' contributed to the 11 September 2001 terrorist attacks.<sup>26</sup> More recently, in response to the mass surveillance and data mining techniques exposed by Edward Snowden, this idea of dot connecting has been reposed in the era of big data as the problem of 'finding the needle in a haystack' of electronic communications. But unlike the traditional detective work of finding particular clues and using them to unveil the whole, here intelligence agencies 'argue that the hay field - all the data - is needed to derive both expectations about normality and the anomalous elements. Big data is the new whole'.<sup>27</sup> The contemporary security mosaic, in other words, presupposes a very different epistemology than the inductive reasoning that marked earlier forms of intelligence analysis. It relies on logics of potential association and correspondence and practices of pattern-discovery through 'drawing things together' in order to identify unknown future terrorists.<sup>28</sup>

The Al-Qaida list is a form of global security law that collapses the distinction between intelligence and evidence. Its format is one of the most archaic ordering devices. But it is a governance technology produced by the epistemology of the contemporary security mosaic. On the one hand, the list is a pre-emptive security instrument designed to counter potential terrorist threats before they emerge and act in advance of any legal determination of culpability through risk-based techniques of 'disruption, restriction and incapacitation'.<sup>29</sup> Criminal due process standards are inapplicable in this domain because these sanctions have been deemed to be preventative, rather than punitive, measures.<sup>30</sup> According to the guidelines of the 1267 Sanctions Committee, for example: '*A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventative in nature*'.<sup>31</sup> In practice, this means that listing decisions formally taken by the UN 1267 Sanctions Committee are based on disparate forms of closed intelligence suggesting that the targeted

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<sup>26</sup> Rumsfeld's statement was made during a US Department of Defense press briefing in the lead up to the 2003 invasion of Iraq in relation to the lack of evidence linking Saddam Hussein's regime to the supply of weapons of mass destruction to terrorist groups:

'As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones'

For the transcript of Rumsfeld's briefing, see: <http://1.usa.gov/1QIIREI>. The *Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) is available at: <http://bit.ly/1jGQbs2>.

<sup>27</sup> Claudia Aradau, 'The signature of security: Big data, anticipation, surveillance', (2015) 191 *Radical Philosophy*, 21.

<sup>28</sup> *Ibid*

<sup>29</sup> Jude McCulloch and Sharon Pickering, 'Pre-crime and counter-terrorism: imagining future crime in the "war on terror"', (2009) 49(5) *British Journal Of Criminology* 628, 629; Marieke de Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14(1) *European Journal of International Relations* 161; Amoore (n 13) 847; International Commission of Jurists, *Assessing the Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009) 91 - 122.

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

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

<sup>31</sup> Al-Qaida Sanctions Committee, *Guidelines of the Committee for the Conduct of its Work* (30 November 2011) [para. 6(d)]. See also S/RES/1822 (2008), Preamble.

individual or group is in some way ‘associated with’ Al-Qaida or their associates.<sup>32</sup> Furthermore, as discussed in Chapter 2, this underlying material is produced diffusely and transnationally through an array of different security agencies, counterterrorism experts and state institutional actors. On the other hand, the UN list is not self-enforcing and must be implemented. And it is a core principle of the rule of law that when individuals are targeted by executive action they are entitled to certain due process protections, such as the right to an effective remedy. But to exercise these rights in any meaningful way, one must be informed of the material underpinning the accusation. So listing decisions are formally taken by the UN 1267 Sanctions Committee, putatively on the basis of closed *intelligence*, but are implemented by Member States and regional bodies (such as the EU) in circumstances where individuals are usually entitled to disclosable *evidence*. The Al-Qaida list therefore works as a hybrid legal technology by using *intelligence-as-evidence*, collapsing these traditionally distinct forms of knowledge and generating conflict between international security and human rights law in the process.

The use of intelligence-as-evidence is of course not unique to the Al-Qaida listing regime, but rather one of the defining features of post-9/11 counterterrorism law.<sup>33</sup> There are two broad approaches to resolving the problems associated with using intelligence-as-evidence: either change the nature of the intelligence purportedly underneath the list so it can be used in court proceedings or change the nature of court proceedings so that this material can be relied upon without disclosure.<sup>34</sup>

As discussed at length in the previous chapter, the various decisions taken by the EU courts in the *Kadi* case - and much of the subsequent European sanctions case law annulling listing decisions for violating defence rights - have tended to endorse the first approach to resolving this problem. In the 2010 *Kadi* decision, for example, the European General Court (EGC) held that the Narrative Summary of Reasons put forward as the grounds for justifying the listing decision was composed of ‘vague and imprecise allegations’ that prevented Mr Kadi from knowing and effectively contesting the case against him. The court held that listed individuals were entitled to an ‘in principle, full review’, extending to ‘the substantive assessments of the Sanctions Committee itself and the *evidence* underlying’ their decision.<sup>35</sup> On appeal, in 2013 the European Court of Justice (ECJ) confirmed that judicial review could only be based on evidence that has been disclosed. According to the Court, ‘in principle, full review’ required judicial ‘verification of the allegations’ to enable an assessment of ‘the probative value of the information or evidence’ and a determination as to whether the underlying reasons, ‘or at the very least, one of those reasons’, could be ‘substantiated’.<sup>36</sup> That is, only disclosure of the closed material underneath the listing decisions (to the Court, if not the listed parties) can ultimately remedy the intelligence-as-evidence problem.

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<sup>32</sup> David Cole, ‘Terror Financing, Guilt by Association and the Paradigm of Prevention in the War on Terror’ in Andrea Bianchi and Alex Keller (eds.) *Counterterrorism: Democracy’s Challenge* (Hart Publishing, 2008); Cian Murphy, *EU Counterterrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing, 2012) 142 – 144. S/RES/2083 (2012) broadened the targeting standard to include association with anyone already on the UN 1267 list - that is, being ‘associated with’ someone ‘associated with’ Al-Qaida and associated groups is now sufficient grounds to justify being listed.

<sup>33</sup> For an overview see: ICJ (n 29) 67 – 90; Justice, *Secret Evidence* (2009). For a cross-jurisdictional analysis, see: Cole, Fabbrini and Vidaschi (n 12).

<sup>34</sup> On analysing legal governance through problematisation, see: Nikolas Rose and Mariana Valverde, ‘Governed by Law?’ (1998) 7(4) *Social & Legal Studies* 541: ‘While it might seem obvious to begin by asking ‘what does law govern?’, from the perspective of government we would not start from law at all. Instead we would start from problems or problematizations – [that is] ... way[s] in which experience is offered to thought in the form of a problem requiring attention’ (at 545).

<sup>35</sup> *Kadi* 2010 (n 30) paras. 173 - 174 and 129 – 133.

<sup>36</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* [2013] Nyr, para. 124.

These decisions sent shockwaves through world capitals and the international legal community for effectively challenging the supreme authority of the UN Security Council. Leaked US Embassy Cables warned that, 'we cannot risk losing the use of one of our few non-military coercive tools because the EU courts believe that they are somehow illegitimate' and called for a 'coordinated US interagency strategy' targeting EU leaders to 'protect these policies from legal challenge'.<sup>37</sup> Targeted sanctions experts and advocates despaired that these decisions eroded the legitimacy of the Security Council's use of Chapter VII UN Charter powers<sup>38</sup> and thus undermined 'the legal authority of the Security Council in all matters, not just in the imposition of sanctions'.<sup>39</sup> If the Al-Qaida list was to survive scrutiny by the EU courts then something clearly had to give. And eventually, something did.

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

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

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

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<sup>37</sup> US Embassy Cable 09BRUSSELS616 (dated 29 April 2009).

<sup>38</sup> For Biersteker and Eckert: 'There is a real, and growing, political problem associated with the legitimacy, not only of the instrument of targeted sanctions, *but increasingly of actions taken under Chapter VII by the UN Security Council itself*. This is a fundamental challenge to an essential instrument of the international community to counter threats to international peace and security' [emphasis added] - Thomas Biersteker and Sue Eckert, *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'* (2009) 4.

<sup>39</sup> 11th Report of the UN 1267 Monitoring Team, UN Doc. S/2011/245 (13 April 2011), para. 30.

<sup>40</sup> A similar rule applies to ECJ proceedings [Article 54a, Rules of Procedure of the Court of Justice (OJ C 177, 2.7.2010)].

<sup>41</sup> ST 7795 2014 INIT, *Draft Rules of Procedure of the General Court*, 14 March 2014 (Article 101). Although the changes are designed to meet the problems generated by sanctions litigation, they extend beyond this domain to all matters where the security of the EU, its Member States and/or their international relations are in issue.

<sup>42</sup> Special advocates are security-vetted lawyers who can see the classified material and make submissions to the Court about it, but are prevented from disclosing it to listed parties. For discussion of the viability of special advocates in this context, see Cian Murphy, 'Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?' in Cole, Fabbrini and Vidaschi (n 12); and Christina Eckes, 'Decision-making in the Dark? - Autonomous EU Sanctions and National Classification' *Amsterdam Law School Legal Studies Research Paper* No. 2012-64.

secrecy.<sup>43</sup> Instead, the Court has simply said it will ‘take account of the fact that a main party has not been able to make his views on [*the secret material*] known’ and therefore ‘has not been fully able to exercise his rights of defence’<sup>44</sup> when they ‘weigh up’ the different elements to ‘make a reasoned order specifying the procedures to be adopted’.<sup>45</sup> This exception, according to the Court, constitutes a ‘significant innovation’.<sup>46</sup> In February 2015, with the UK government abstaining,<sup>47</sup> the EU Council of Ministers finally approved these reforms. The EGC signed off on the changes shortly thereafter and the new court rules finally entered into force on 1 July 2015.<sup>48</sup>

There is little available information that explains the rationale for this exception to the longstanding principle of open justice or that sheds light on the political and legal complexities underneath these reforms.<sup>49</sup> Until the Council of the EU posted the final draft amendments online in March 2014, the reform process remained almost entirely opaque and shrouded in confidentiality.<sup>50</sup> The proposals recently approved by the EGC suggest a fairly innocuous process of procedural adjustment. But my empirical analysis reveals a much more complicated negotiation process involving a wide range of actors navigating deep-seated underlying conflicts and problems.

This complexity has been rendered partly visible through listing litigation. EU court cases overturning listing decisions for violating fundamental rights have been a key catalyst for these reforms. The core problems of using intelligence-as-evidence in this domain were identified by the EGC as early as 2006 in *Organisation des Modjahedines du peuple d’Iran v Council* (‘the *OMPI* case’) - a case involving an Iranian group’s challenge to their inclusion on the EU autonomous terrorism list on the basis of material the French government refused to disclose to either the group or the Court.<sup>51</sup> In their decision, the EGC (then Court of First Instance) acknowledged that ‘the use of confidential information may be necessary when national security is at stake’ but said that that this did not free executive bodies from judicial review in terrorism-related matters.<sup>52</sup> ‘The Community Courts’, the EGC held, ‘*must* be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential’.<sup>53</sup> Yet precisely how this imperative of review could be realised in relation to the

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<sup>43</sup> Armin Cuyvers, ‘“Give me one good reason”: The unified standard of review for sanctions after *Kadi II*’, (2014) 51(6) *Common Market Law Review* 1759, 1779.

<sup>44</sup> Draft Rules (n 40) Art. 104 and 102.

<sup>45</sup> *Ibid*, Art. 105(6)

<sup>46</sup> *Ibid*, Art. 104

<sup>47</sup> The UK government abstained for two reasons. First, concern that once intelligence material was admitted as evidence it might not be able to be withdrawn at any later stage. Second, there were not procedures in place for EU court judgments and orders made using intelligence-as-evidence to be vetted by the security services. See Comments by Rt Hon D. Lidington MP, Minister for Europe, *House of Lords Select Committee on the European Union Sub-Committee E, Plans for New Court Rules and Conduct of EU Sanctions* (2 March 2015). Available at: <http://bit.ly/1L901I8>.

<sup>48</sup> See General Court of the European Union, *Press Release No 73/15* (19 June 2015). Available at: <http://bit.ly/1TADREh>

<sup>49</sup> For material indirectly discussing the reforms through analysis of recent ECJ case law, see Nik de Boer, ‘Case C-300/11, *ZZ v. Secretary of State for the Home Department*. Judgment of the Court (Grand Chamber) of 4 June 2013’, (2014) 51(4) *Common Market Law Review* 1235, 1252 – 1256; Stephan Hollenberg, ‘The Security Council’s 1267/1989 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review’ (2015) 28(1) *Leiden Journal of International Law* 49; Cuyvers (n 43).

<sup>50</sup> See, however, posts on the weblog *European Sanctions: Law and Practice* maintained by one of *Kadi*’s lawyers, Maya Lester (available at <http://bit.ly/1CYk37j>) and <http://bit.ly/1Ff7svs>) and Laurence Norman, ‘EU Governments Approve Secret Evidence in Sanctions Cases’, *Wall Street Journal* (10 February 2015).

<sup>51</sup> Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council of European Union* [2006] ECR II-04665.

<sup>52</sup> *Ibid*, para. 156

<sup>53</sup> *Ibid*, para. 155 (emphasis added)

list was left unclear. Closed material might be provided to the Court 'in accordance with a procedure that remains to be defined', but the issue was ultimately deferred.<sup>54</sup>

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

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

*Commission:* The problem that we have ... [is that] we are seeing hundreds of cases that we lost [sic] approaching. And we think that these cases could have been won if there was the information. But Member States say it is classified and they cannot give it to the Council ... And [so] we start from the end (the end is the court), by trying to introduce rules of the court that will allow the court to receive classified information.

*GS:* Presumably the Commission are hoping that re-drafting the rules will allow states to feel more confident to disclose. But ... if states are reluctant to even share [closed material] with Council at the moment in a confidential working party, what would make you think that they would share it with the court if confidential rules apply?

*Commission:* The fact ... that they will lose a hundred and fifty cases. And if they lose a hundred and fifty cases then the regime will fall apart (any regime would fall apart) ... Fortunately we don't have any UN listing challenges at the court right now ... If the UN is challenged it is sure ... that they will lose it and then it will have the effect of a [House of Cards].<sup>58</sup>

This threat of regime 'collapse' was widely shared by listing experts within the UN Security Council and powerful states outside the EU, such as the US. As one former member of the UN Al-Qaida Monitoring Team put the impact of the ECJ's 2008 *Kadi* decision:

If EU isn't going to implement, no one is going to implement. Come on, why should Africa or the Middle East implement? So you'd be left with a permanent members implementing and

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<sup>54</sup> *Ibid*, para. 158

<sup>55</sup> Joined Cases C-402 P and 415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I 6351, para. 342.

<sup>56</sup> *Ibid*, para. 343

<sup>57</sup> *Ibid*, para 344

<sup>58</sup> Interview with member of European Commission Legal Service, Brussels, November 2012 ('Interview M'). These comments were given before the 2013 *Kadi II* decision. It is unclear whether that case provides a more optimistic outlook for EU institutions.

moaning that nobody else is. What's the point of having a ... regime like that? So these court decisions are *incredibly* important, they're fundamental to survival of the sanctions regime.<sup>59</sup>

Leaked Embassy Cables reveal the extent of US government concerns about EU judicial review of terrorism listing and suggest that the US have been deeply involved behind the scenes pushing for EU procedural reform on this issue. In one Cable entitled *1267: Saving the Al-Qaeda/Taliban Sanctions Regime* US National Security Adviser Susan Rice warned: 'Bold action is needed to salvage the UN's 1267 al-Qaeda ... targeted sanctions regime ... [which] has been seriously undermined by criticisms - and adverse European court rulings - asserting that procedures for listing and delisting ... are not adequately fair and clear'.<sup>60</sup> According to another Cable:

We cannot risk losing the use of one of our few non-military coercive tools because EU courts believe that they are somehow illegitimate ... The US has an interest in actively engaging the EU to overcome the gap that is developing between us on this issue. We must support and supplement existing EU sanctions ... by sharing substantive information on our ... targets ... and *comparing strategies to protect these policies from legal challenge* .... Without the political will and commitment of EU leaders in the coming year, and a *coordinated US interagency strategy to effect this*, we will fall short of our intended mark on vital national security and foreign policy goals.<sup>61</sup>

Another Cable dispatched after the ECJ's 2008 *Kadi* decision stressed how EU judicial review is adversely affecting '*USG proposals to the EU for listings and terrorist sanctions*' and suggested new methods of US-EU intelligence sharing might resolve the issue:

EU ... courts are rendering judgments that may hinder our ability to secure EU-wide designations of terrorist entities. The new problem for us is the higher standards of evidence and the judicial review of the sufficiency of that evidence, that will make the EU and its member States less responsive to our request for terrorist designations and accompanying asset freezes. As we pursue the valuable foreign and security policy tool of terrorist designations, we may need to ramp up our intelligence sharing on terrorist entities against which we seek EU action. ... We must confront the possibility that working with the Council on designations may entail enabling the EU court to access unclassified or even classified information to review the legality of the EU listing by a standard yet to be fully determined.<sup>62</sup>

Such intelligence sharing has long been a key talking point in collaborative US-EU work on listing policy. One Cable - entitled *EU Intelligence and Classified Information Sharing* - documents a meeting in Brussels in February 2010 between US inter-agency sanctions officials and the European Commission Legal Service which aimed to identify how the EU and US could best work together to strategically offset the adverse effects of the (then) upcoming decision of the EGC in the *Kadi* case.<sup>63</sup> In its action points the Cable states:

Intelligence and classified information sharing between EU institutions and Member States is among the most sensitive and least developed areas of EU policy and procedure, a last bastion of national sovereignty. *EU level implementation of UN and autonomous counterterrorism sanctions is testing the limits of how long the EU can hold out against confronting the practical implications of handling these issues* ... Given U.S. security and foreign policy equities in EU sanctions and other counter-terrorism policies, we should expand

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<sup>59</sup> Interview with former member of the UN 1267 Monitoring Team, New York, November 2012 ('Interview A').

<sup>60</sup> US Embassy Cable 09USUNNEWYORK818 (dated 4 September 2009), para. 4.

<sup>61</sup> US Embassy Cable 09BRUSSELS616 (dated 29 April 2009), emphasis added.

<sup>62</sup> US Embassy Cable 09BRUSSELS41 (dated 13 January 2009).

<sup>63</sup> US Embassy Cable 10USEUBRUSSELS212 (dated 24 February 2010).

U.S.-EU legal expert discussions ... addressing the institutional underpinnings necessary to preserve EU measures before their courts.<sup>64</sup>

It was against such a political backdrop that ECJ Advocate General (AG) Sharpston issued her opinion in the case of *French Republic v PMOI* suggesting that 'serious consideration' be given to amending the Court's procedural rules to allow for 'the production of evidence that is truly confidential'.<sup>65</sup> In her opinion, AG Sharpston - who has previously represented the British government in national security cases before the Special Immigration Appeal Commission (SIAC)<sup>66</sup> - outlined a broad range of reform scenarios, intimating that special advocates and closed material procedures might provide the key to resolving the intelligence-as-evidence problem.<sup>67</sup> Her opinion - which aimed 'to assist those who will have to engage with the question of how precisely to deal with this conundrum'<sup>68</sup> - proved highly influential. According to one EGC judge, it really 'pushed us to talk about these things' and helped influence the court's initial decision to review their rules of procedure on this issue.<sup>69</sup>

Finally, in July 2013 the ECJ delivered their long awaited appeal decision in the *Kadi* case on the appropriate standard of review to be adopted by the EU courts in sanctions cases.<sup>70</sup> As discussed, the EGC had previously held the EU courts must undertake an, 'in principle, full review' of listing decisions that included judicial access to the underlying evidential material relied upon. The ECJ's decision, however, overturned this approach and laid out a novel formula for handling the intelligence-as-evidence problem in listing cases. Instead of 'full review', the EU courts only needed one substantiated ground for listing disclosed to them for judicial review.<sup>71</sup> In language that closely mirrors the draft procedural reforms the courts had been negotiating in private with the Commission and Council, the ECJ noted that in listing cases 'overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned'.<sup>72</sup> When confronted with such security-sensitive dilemmas, the court must:

... apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights.<sup>73</sup>

Just what such 'techniques' might mean, however, was left unclear. Beyond echoing their earlier pronouncements in the 2008 *Kadi* decision, the only possibility entertained by the ECJ was 'disclosure of a summary outlining the information's content or that of the evidence in question'.<sup>74</sup> It would be up to the courts to 'assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned' would affect 'the probative value of the confidential evidence'.<sup>75</sup>

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<sup>64</sup> *Ibid* (emphasis added)

<sup>65</sup> Case C-27-09 P *French Republic v PMOI* [2011] ECR I 13427, Opinion of AG Sharpston, para. 186.

<sup>66</sup> See, for example: *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, paras. 22 - 26.

<sup>67</sup> AG Sharpston (n 65) paras. 171 - 186, 244. For discussion on this opinion see: Murphy (n 42).

<sup>68</sup> *Ibid*, para. 190

<sup>69</sup> Interview with member of the European General Court, Luxembourg, March 2013 ('Interview N').

<sup>70</sup> *Kadi II*, (n 36).

<sup>71</sup> *Ibid*, para. 130

<sup>72</sup> *Ibid*, para. 125

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid*, para. 129

<sup>75</sup> *Ibid*

The procedural reforms enabling the judicial handling of intelligence provide the missing piece to this puzzle, effectively ‘codif[ying] the approach’ taken by the ECJ in the *Kadi* appeal.<sup>76</sup> Interestingly, the initiative for EU judges to review intelligence-as-evidence originated as a proposal made by the EGC itself.<sup>77</sup> The Commission then wrote to the Court in the context of their procedural review requesting that serious consideration be given to making the necessary amendments for handling classified material.<sup>78</sup> On the Commission’s view, the reform process was envisaged as something fairly straightforward. First, they wrote to the EGC leaving it open to them to lead on this issue by suggesting how they would best like to handle the matter, but asking them to consider the viability of an EU Special Advocate regime and mechanisms for using closed material like those used in the UK.<sup>79</sup> Following internal discussion and debate it was then thought the Court would formulate their specific options for reform. Finally, once the Court had made their views known, ‘it will become a Council Regulation’.<sup>80</sup> For Commission lawyers, the reforms aimed at resolving the problem of using intelligence-as-evidence in sanctions cases – which was seen as ‘the most difficult decision of all’ for the EU Courts to grapple with following the *Kadi* decision.<sup>81</sup>

But members of the EU judiciary interviewed on this issue expressed quite different understandings of the complexities involved and had very real concerns about the how the reform process ought best be handled. As one member of the EGC explained in early 2013:

We are currently in the throes of a review of our rules of procedure covering a whole range of measures. And one of the issues that has come up is the existence of the present rule which says that as between the principal parties everything has to be made available to everyone ... Although no final decision has been taken ... I think the current attitude is that we *could* envisage an exception to that rule being made.<sup>82</sup>

For the courts, however, this reform process was anything but straightforward. Proactively designing techniques for handling intelligence potentially compromises the Court’s role as guardian of fundamental rights, raising the thorny problem of judicial independence:

Where one is going to be formulating a set of procedural rules which are probably at the upstream stage going to involve limiting ... the procedural rights of the applicant ... it’s absolutely clear that we are going to be faced with arguments that this involves infringements of fundamental rights guaranteed by the Charter ... [So] we are going to have to be slightly careful here because we don’t want to find ourselves in a position whereby we have implicitly approved a model which is then challenged ... and we find that our hands are notionally tied - having said that this is an excellent idea and then we do something else.<sup>83</sup>

As one member of the ECJ explained, *who* crafts the exception is critically important: ‘I don’t want to have to design their architecture for them because I might have to ... [determine] whether it is sufficient ... [But] I am a bit nervous about people designing architecture who ... don’t realise what the implications *are* of judicial scrutiny’.<sup>84</sup> If the process was left for the executive to resolve the end result would likely violate fundamental rights. But being too

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<sup>76</sup> Cuyvers (n 43).

<sup>77</sup> ‘The Court made a suggestion: is this worth looking into? And so the Commission began looking into it’: Interview with member of the European External Action Service (EEAS), Brussels, March 2013 (‘Interview O’).

<sup>78</sup> Interview M.

<sup>79</sup> *Ibid*

<sup>80</sup> *Ibid*

<sup>81</sup> *Ibid*

<sup>82</sup> Interview N.

<sup>83</sup> *Ibid*

<sup>84</sup> Interview with member of European Court of Justice, Luxembourg, March 2013 (‘Interview P’).

involved in designing this exception could unwittingly place the courts in a conflicting and constitutionally compromising position.<sup>85</sup>

The reforms were also difficult for the courts because they foregrounded problems of multilateral intelligence sharing. As one EGC judge put it: ‘When the Commission takes a decision, does that mean that all members of the Commission are going to have the right of access to that material, or their *Chef du Cabinet*? How is the security clearance going to be done and so on. You can see all these problems’.<sup>86</sup> Providing underlying material to the Council was seen as even more problematic because it would likely require confidential material to be shared amongst the executives of 28 EU Member States. This threat of disclosure was a critical determinant for sanctions officials interviewed in the EEAS, who predicted that any reforms requiring closed material to be shared amongst the Council would be vociferously opposed by the UK and France – who, as P5 members, have long guarded UN Security Council prerogatives within the EU.<sup>87</sup>

(ii) Reassembling the Courts and the Epistemology of the Security Mosaic

Given these complexities, how *did* the EU courts actually end up forging these amendments? What techniques enabled these changes to unfold and what are their likely governance effects? How was a court vested to protect fundamental rights so readily enlisted to build, what is in effect, a legally authorised state of exception? And why - when the *Kadi* case has been ‘one of the most discussed judgments in ECJ history’<sup>88</sup> - have legal and security scholars paid so little attention to the potentially far-reaching consequences of these reforms?

As detailed in the introductory chapter, most literature on the Al-Qaida sanctions focuses on the normative conflict between UN counterterrorism law and EU human rights law epitomised in cases like *Kadi* and how this conflict supports competing claims about the structure of global law. But the tension these reforms aim to resolve is more than just a clash of competing norms. I argue that it is also a problem of the conflicting temporal dynamics embedded in the list: one, reactive, evidence-led, disclosure-driven and based on a ‘past-present axis’ and the other proactive, intelligence-led, secret and based on a ‘present-future axis’.<sup>89</sup> Using intelligence-as-evidence entangles pre-emptive and retrospective logics together and produces this list as non-synchronous or ‘asynchronous’ law.<sup>90</sup> And it is these divergent legal temporalities and their disordering capabilities that the procedural reforms seek to manage. Consider how one member of the ECJ explained the distinction they thought *ought* to be drawn between intelligence and evidence to resolve problems generated by the list:

I want to make a distinction between intelligence/surveillance material and material underpinning a decision that is going to be susceptible to judicial review. In terms of

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<sup>85</sup> This judicial uncertainty was the focal point of resistance by a number of influential legal and human rights advocacy organisations – including the Law Society and Bar Council of England and Wales, Justice and Liberty – who were in private correspondence with the EU courts in an effort to persuade them to engage in public consultation on the proposals. See, variously, Letter to the President of the Court of Justice of the EU (21 May 2013); Letter to the Chairman of the Bar Council of England and Wales (18 June 2013); Letter to the President of the Court of Justice of the EU (22 July 2013) [Copies with Author]. This group argued that the proposals could have ‘a serious substantive impact on the rule of law and rights of defence, which may affect the validity and legality of the amendments’ (letter dated 22 July 2013).

<sup>86</sup> Interview N.

<sup>87</sup> Interview O.

<sup>88</sup> Murphy (n 42) 115.

<sup>89</sup> Brian Massumi, ‘The future birth of the affective fact’ *Conference Proceedings: Genealogies of Biopolitics* (2005).

Available at: <http://bit.ly/1Dvcq4B>

<sup>90</sup> Delmas Marty (n 4) 119 – 132.

surveillance, anything you can get your paws on is good. You evaluate its credibility, its weight etc. But you have not got problems about admissibility or challenge. Because ... surveillance material is kind of like a sponge ... - you get [it] in and the problem is then working out what is right, what is wrong, what is false lead, what is deliberately misleading.

I think ... that is sharply to be distinguished from: 'I am going to take an executive decision, which is going to have certain adverse consequences for that person. I know before I take that decision ... that the system under the rule of law of which I'm part is going to afford that person the right to challenge my decision'.

If I know all of that, then I need to be asking myself, *upstream* of taking the decision, 'What is the material on which I'm going to base that decision'? And I need to ask ... whether I think that material will stand up scrutiny. And at that moment *I mustn't confuse which hat I'm wearing*. It is *not the same* as looking at surveillance material and deciding that X is probably a bad egg and needs watching. It's not the same, ... it's *a completely different function* ...

The problem is: [this] distinction ... is one that *needs to be* accepted. And, therefore, needs to inform what goes in upstream into the process of making the decision. You can't unmake the omelette starting from this end!<sup>91</sup>

Demanding the demarcation of intelligence and evidence as something that 'needs be accepted' to resolve the problem tells us that the opposite is, in fact, likely to be the case. For the judiciary, the conflation and use of intelligence-as-evidence is driving normative conflicts in this domain.<sup>92</sup> We are told that this problem should be properly be dealt with by the executive further 'upstream' - and the Ombudsperson experiment discussed in the previous chapter is certainly one effort in that direction. But the fact these reforms have been initiated, co-designed and adopted by the judiciary suggests that core principles of the EU justice system are also being altered to 'unmake' these conflicts through the courts.

When such problems arise in academic accounts they are usually framed in terms of secrecy and posed as something that can be remedied by the transparency of constitutional law.<sup>93</sup> The locus of the problem, we are told, is one of visibility. If only the 'gist'<sup>94</sup> of material hidden behind the classified curtain could be revealed, then a proper defence could be mounted - either in national or regional courts or before some new supranational review mechanism - and the underlying normative conflict resolved.<sup>95</sup>

But intelligence and evidence don't just differ in degrees of visibility. They are also distinct knowledge forms with quite different epistemic and temporal qualities. Though hinged together here in the singular format of the list, these are dynamics that cannot easily be made commensurable. They move in different directions and speeds, carrying radically

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<sup>91</sup> Interview P.

<sup>92</sup> For analyses recognising the centrality of the intelligence-as-evidence problem in this domain see: Craig Forcese and Kent Roach, 'Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads', (2010) 42 *George Washington International Law Review* 217; Vanessa Baehr-Jones, 'Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions', (2011) 2 *Harvard National Security Journal* 447; Hollenberg (n 49).

<sup>93</sup> See, for example: Cole, Fabbrini and Vidaschi (n 12).

<sup>94</sup> *A and others v United Kingdom* App. No. 3455/05 (ECtHR, 19 February 2009). In this case the Strasbourg court held that individuals 'must be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate - that is, the 'gist' of the underlying allegations (para. 220).

<sup>95</sup> For some (like Fabbrini and Hollenberg) the answer lies in decentralised review by domestic courts with mechanisms in place for reviewing secret intelligence without disclosure. For others (like Baehr-Jones) only new mechanisms and universal standards for reviewing intelligence at the UN level can assuage US concerns about handing the secret evidence underneath the Al-Qaida list for review. See, respectively: Hollenberg (n 49); Federico Fabbrini, 'Global sanctions, state secrets and supranational review: seeking due process in an interconnected world' in Cole, Fabbrini and Vidaschi (n 12) 284; Baehr-Jones (n 92).

divergent assumptions about the proper relation between suspicion and proof.<sup>96</sup> As the EGC held in the 2010 *Kadi* decision: ‘the assessments in question here are complex and require an evaluation of the measures necessary to safeguard international and internal security. They require the know-how of the intelligence services and the political acumen which, in the Council’s submission, only governments possess’.<sup>97</sup> Thus as one ECJ member explained when discussing the review of listing cases, using intelligence-as-evidence demands legal standards and forms of reasoning altogether more pre-emptive in orientation:

If you say to me this person was involved in violent anti-government demonstrations that is an assertion of fact and ... I’m going to want something that I can recognise judicially as evidence ... because your building this part of your case on an allegation of a specific fact. If you say to me, ‘The material suggests that they’ve been involved in a number of groups and therefore the inference is that they represent [or are] probably thinking of violent Jihadi tactics’ ... Well at that stage its not that they were a member of that demonstration. *Its much more a chain of little scraps, little mosaic scraps which have led you to the inference.* [And] there ... I’m going to have a problem, aren’t I? Because I’m not a security agent and I don’t have the training to put it together?<sup>98</sup>

The mosaic form is an increasingly pervasive feature of contemporary security governance, as discussed earlier in the chapter. It is grounded in a ‘theory of informational synergy’ that assumes that ‘disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information’.<sup>99</sup> From e-borders<sup>100</sup> and targeted killing<sup>101</sup> to global surveillance and datamining initiatives,<sup>102</sup> uncertain future threats are identified and rendered actionable through informational fragments and otherwise innocuous details associated together in novel ways to bring emergent dangerous subjects into view. This mosaic presupposes a very different economy of knowledge and spatiotemporal dynamics than conventional forms of inductive reasoning and logics of proof. As Louise Amoore observes in her analysis of biometric border policing techniques, ‘the lines of association that are drawn here are not linear and causal but temporally and spatially fractured’.<sup>103</sup> For Claudia Aradau the mosaic form is best thought of as a kind of ‘divination rather than detection’ and its epistemology ‘has more in common with the “pseudo-rationality” of astrology than the method of clues’ usually associated with the detective work of intelligence analysis.<sup>104</sup>

But for most security scholars the mosaic’s temporal and epistemic logics remain something exogenous to the law. According to Claudia Aradau and Rens van Munster, as ‘computation of the future ... become[s] decisional’ under contemporary conditions of precautionary risk, it becomes untenable for courts to determine liability in terrorism cases through ‘careful

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<sup>96</sup> Justice (n 33): 236: ‘It is often assumed that, secrecy aside, the evidence in ... [SIAC] cases is no different from that put forward in an ordinary criminal trial or civil hearing. Nothing could be further from the truth’.

<sup>97</sup> *Kadi* 2010 (n 30) para. 106.

<sup>98</sup> Interview P.

<sup>99</sup> David E. Pozen, ‘The mosaic theory, national security, and the freedom of information act’, (2005) 115 (3) *Yale Law Journal* 628, 633 and 630.

<sup>100</sup> Amoore (n 9).

<sup>101</sup> Jeremy Scahill, and Glenn Greenwald, ‘The NSA’s Secret Role in the US Assassination Program’, *The Intercept* (10 February 2014), available at: <http://bit.ly/1zeKzrV>; Ian Cobain, ‘Obama’s secret kill list – the disposition matrix’, *The Guardian* (14 July 2013), available at: <http://bit.ly/QBfj7A>; Cori Crider, ‘Killing in the Name of Algorithms: How Big Data Enables the Obama Administration’s Drone War’, *Al Jazeera America*, (4 March 2014), available at: <http://bit.ly/1BgYFum>.

<sup>102</sup> NSA, ‘Summary of DNR and DNI Co-Travel Analytics’ (1 October 2012), available at: <http://bit.ly/1GHNuxh>; Barton Gellman and Laura Poitras, ‘US, British intelligence mining data from nine US Internet companies in broad secret program’, *The Washington Post* (7 June 2013), available at: <http://wapo.st/1gIS8gu>.

<sup>103</sup> Amoore (n 9) 94.

<sup>104</sup> Aradau (n. 27).

consideration of evidence' and the use of 'burdens of proof'. Fighting terrorism through techniques like administrative detention thus reveal 'the inadequacy of law to deal with situations of precautionary risk'. 'What counts', they suggest, 'is a coherent scenario of catastrophic risk and imaginary description of the future'.<sup>105</sup> In her analysis of SIAC proceedings in the UK Louise Amoore makes a similar argument. Whilst astutely observing how decisions at the border are increasingly 'drawn through [the] ... joining of dots and lines of associated elements', she argues that 'decisions on the assembly of the mosaic' remain 'untraceable and unrecognizable in the conventions of legal evidence and burdens of proof'.<sup>106</sup>

And yet here we find the mosaic form embedded right at the heart of the EU justice system guiding the production of legal truth and being used to explain how intelligence-as-evidence is transforming judicial functions. Law is not contained in some privileged rampart here - standing above the turbulent sea of pre-emption, receding in the face of exception<sup>107</sup> and incalculable risk<sup>108</sup> or set apart from the security practices it seeks to temper. Rather, legal practices and techniques are being put into motion and recalibrated at the most granular of levels so that courts can assess uncertain future risks, possible associations and inferences as judicial evidence.<sup>109</sup> Judicially reviewing this body of non-synchronous law brings retrospective evidential standards and pre-emptive security practice into co-productive relation,<sup>110</sup> enlisting the judiciary into the radically uncertain process of identifying unknown future terrorists without the training to put the pieces of the security mosaic together.<sup>111</sup>

These procedural changes may well end up allowing a degree of secret material to be made available for judicial assessment in listing cases and rendering visible some of what has hitherto been kept hidden.<sup>112</sup> But core problems associated with non-synchronicity will undoubtedly persist. How can judges decide whether listing decisions are justified by assessing both past acts (using evidence sufficiently detailed to close the gap between suspicion and proof) and radically uncertain future possibilities (assembled from 'little mosaic scraps' organised according to pre-emptive logics of potential risk and threat)? How can the proportionality of action taken 'not in response to but in anticipation of wrongdoing' be judicially assessed with any kind of legal certainty?<sup>113</sup> When can suspicions from past actions become (or cease to become) future threats sufficient to warrant listing and what possible standard of proof (if any) could apply to such non-quantifiable, possibilistic claims?<sup>114</sup> Conventional forms of legal knowledge production grounded in inductive reasoning and linear temporality are destabilized and reordered when confronted by a list that governs the

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<sup>105</sup> Aradau and van Munster (n 9) 106.

<sup>106</sup> Amoore (n 9) 85. See, however: Amoore (n. 14) - where the confluence of risk and juridical is underscored.

<sup>107</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2005) 12.

<sup>108</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, 1992); Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19(4) *Theory, Culture & Society* 39.

<sup>109</sup> The opinion of Advocate General Bot in the Kadi II appeal is instructive in this regard: 'the fight against terrorism cannot lead democracies to abandon or dent their founding principles, which include the rule of law. However, it does cause them to make the changes to them that the preservation of the rule of law requires'. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v Kadi* [2013] Nyr, Opinion of AG Bot, para.6.

<sup>110</sup> Sheila Jasanoff (ed.) *States of Knowledge: The co-production of science and social order* (Routledge, 2004).

<sup>111</sup> On the relation between the mosaic form and the 'emergent subject', see: Amoore (n 9) 79 - 104. For examples of critical security scholarship highlighting this co-productive relation, see: Marieke de Goede and Beatrice de Graaf, 'Sentencing risk: temporality and precaution in terrorism trials', (2013) 7(3) *International Political Sociology* 313; and Krassman, (n. 13).

<sup>112</sup> Under the principles laid out by the ECJ in the 2013 Kadi appeal decision, for example, only one substantiated ground must be provided to justify a listing decision: Kadi II (n 36) para. 130.

<sup>113</sup> Zedner (n 9) 198.

<sup>114</sup> Cuyvers (n 43) 1770. 'Possibilistic' refers to the important work of Louise Amoore on this issue: Amoore (n. 9).

contingencies of the future by acting on the present under epistemic conditions of ‘objective uncertainty’.<sup>115</sup>

Unsurprisingly, the revised rules are vague about how judges will actually perform their judicial review functions under heightened conditions of epistemic and temporal complexity. They merely provide the court with broad *ad hoc* discretion to assess listing decisions by weighing up the different interests involved. ‘These are’, as Cuyvers observes, ‘highly factual and complex questions of a rather executive nature ... [*that*] make it difficult for the EU courts to set a clear standard for review’.<sup>116</sup> Yet rendering legal standards problematic, as Cuyvers suggests, might be a rather optimistic assessment. According to Lord Hoffmann, it is questionable whether standards play any meaningful role when judges are required to assemble fragments and ‘little mosaic scraps’ as evidence of uncertain future threat:

... the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is *not whether a given event happened but the extent of future risk* ... [This] cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment.<sup>117</sup>

The more profound effects of these procedural reforms are therefore not in what they may or may not make visible, but how the effort of doing so serves to reorder or modulate legal institutions in alignment with broader security rationalities and the epistemologies. By more deeply embedding pre-emptive logics and decision-making techniques into the EU legal system I argue that these reforms stand to change the temporal ordering of the legal system itself by requiring judges to use more associational, inferential practices oriented towards countering future risk. The application of conventional standards of proof, retrospective modes of legal reasoning and the delivering of public judgments are all made more difficult to sustain when the courts are concerned with assembling chains of ‘little mosaic scraps’ and risk fragments to evaluate whether individuals are ‘associated with’ global terrorism.<sup>118</sup>

My point here is not to claim that law is being replaced by security or evidence supplanted by intelligence. It is that in bringing intelligence and evidence (and their divergent legal temporalities) together, the list functions *jurisgeneratively* - stimulating new problems and recombinant legal practices that were not possible before. The list is changing, at a very granular level, the ways judges come to produce ‘legal truth’ in concrete cases and is taking legal reasoning into the very uncertain terrain of the contemporary security mosaic. These effects are not the inevitable end result of law’s decline in the face of pre-emptive security or the rise of risk in late modernity - they are more site-specific and provisional than that. My analysis shows judges in the EU courts doing their best to try and pragmatically resolve a particular legal problem. But doing so requires them to grapple with the radically different episteme of the mosaic that is stimulating changes in the ways they reason and judge.

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<sup>115</sup> Brian Massumi, ‘Potential politics and the primacy of preemption’ (2007) 10(2) *Theory & Event* 13, 24.

<sup>116</sup> Cuyvers (n 43) 1772-3 and 1774.

<sup>117</sup> Rehman (n 66) para. 56 (emphasis added). The case concerned the use of intelligence-as-evidence in Special Immigration Appeals Commission (SIAC) proceedings, which is comparable and relevant for the current context.

<sup>118</sup> As detailed earlier, one of the key objections of the British government to these proposals concerned the inability of security services to vet EU judgments for unwarranted disclosure of security-sensitive material - see: Lidington (n 47). In 2013 the UK Supreme Court held that it was appropriate to hear evidence in closed session for the first time on appeal, with serious misgivings expressed by the judiciary. See *Bank Mellat v HM Treasury* [2013] UKSC 38.

As Pat O'Malley points out, analysing risk governance techniques means 'attending to their natures as the products of contingency and invention' - not black-boxing them as 'the effects of an inescapable "logic" of modernity', as theorists like Ulrich Beck suggest.<sup>119</sup> Similarly, for Foucault, understanding security governance requires analysis of 'the point[s] where power surmounts the rules of rights that organize and delimit it and extends itself beyond them' and 'invests itself in institutions' and procedures that are then 'displaced, extended and modified'.<sup>120</sup> Only by mapping how governmental practices emerge, transform and cohere around particular problems at the microphysical level can we properly understand how new forms of power and authority are formed. Similarly, my analysis of this reform process shows how this list works to stretch the terrain of exceptional security politics by reordering established rule of law principles and methods of legal knowledge production.

As discussed earlier in our analysis of the Ombudsperson experiment most scholarship posits law and exception in antithetical terms. States of exception are represented as 'lawless' and forged by transferring the power of security intervention and determinations of guilt or innocence from the established conventions of the juridical order to the realm of arbitrary sovereign decision.<sup>121</sup> These reforms highlight the flaws of sweeping claims that explain exceptional politics as 'suspension[s] of the juridical order itself'.<sup>122</sup> As detailed in Chapter 3, laws and norms are not locked in a zero-sum game but are hybridised through the problematics of government.<sup>123</sup> Or as Foucault put it, law and legal institutions don't fade into the background under conditions of security but instead come to operate 'more and more as a norm' and are 'increasingly incorporated into a continuum of apparatuses'.<sup>124</sup> These reforms help to show how exceptional governance is made durable through the 'novel recombination[s] of already existing . . . mechanisms and modalities of power' and inscribed through the concrete re-articulation of legal practices in accordance with pre-emptive security logics, rather than an abstract movement away from 'the Law'.<sup>125</sup>

Members of the EU judiciary interviewed about these procedural reforms, for example, downplayed the secret review of intelligence-as-evidence by likening it to existing procedures for reviewing legally privileged communications in competition law disputes:

In reality we have, in many contexts, to have discussion with the parties about how to treat various items of evidence in *all sorts* of situations, [including] commercially confidential material. And in that connection I don't see why one shouldn't have discussions as to whether, for the purpose of this particular case, looking at that material how it should be handled in order to preserve confidentiality.<sup>126</sup>

Reference was made to procedures that were developed out of earlier EU case law on the confidentiality of documents subject to legal professional privilege.<sup>127</sup> If companies claimed

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<sup>119</sup> Pat O'Malley, *Risk, Uncertainty and Government*, (Glasshouse Press, 2004) 7.

<sup>120</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Springer, 2008) 3.

<sup>121</sup> Liam Stockdale, 'Imagined futures and exceptional presents: a conceptual critique of 'pre-emptive security'', (2013) 25(2) *Global Change, Peace & Security* 141.

<sup>122</sup> Giorgio Agamben, *The State of Exception* (University of Chicago Press, 2005) 4.

<sup>123</sup> Rose and Valverde (n 34) 546. On the co-constitutive relation between the legal and extra-legal, see: Johns (n 13). See also the vast literature on autopoietic systems theory: Nikolas Luhmann, *Law as a Social System* (Oxford University Press, 2004); Gunther Teubner, 'The Two Faces of Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443.

<sup>124</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Vol. 1*, (Penguin, 1979) 144.

<sup>125</sup> Much of the Agamben scholarship on pre-emptive security reproduces a reified conception of law that excludes administrative measures as extra-legal – hence, my use of the term, 'the Law'. See G. Sullivan and M. de Goede, 'Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise' (2013) 26(4) *Leiden Journal of International Law* 833, 838.

<sup>126</sup> Interview N.

<sup>127</sup> C-155/79, *Australian Mining and Smelting Europe Ltd. v Commission*, [1982] ECR 1575; Joined Cases T-125-03 and T-253-03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission* [2007] ECR II 3523.

that written communications were privileged and European Commission antitrust inspectors disagreed, the disputed documents could be sealed and sent to the EGC for determination:

The procedure was improvised. Ok, ... we have problem. Here is a stack of documents. They [*ie, the company*] are saying *this is* legal advice and is covered. The Commission is saying, 'Our inspector wants to see it. We will take those documents and we will ... both watch [while] we put it into an envelope [and] seal it.' The envelope goes to the court. The court opens the envelope and it assesses the content and nature of each document.<sup>128</sup>

For the judiciary this example highlighted how the EU courts had previously developed pragmatic techniques for resolving confidentiality problems that parallel those of the present. In this way, changing the rules of the court to handle intelligence-as-evidence could be framed as constitutionally insignificant, and simply 'a more extreme case of what we have to do in many cases [already] where one has stock market sensitive material'.<sup>129</sup>

Judges are professionally predisposed to reasoning by analogy. But real differences between assessing commercially confidential material and intelligence-as-evidence are quietly subsumed when these procedural innovations are discursively sutured together in this way. Reviewing privileged communications and intelligence-as-evidence might both require confidentiality. But because of the mosaic epistemology of the list, reviewing intelligence-as-evidence requires temporally complex processes of contingent legal knowledge production. The assessment of privileged communications, moreover, easily fits within the existing judicial review framework. But the assessment of intelligence-as-evidence alters the review process itself in significant ways. And whilst both issues engage questions of fundamental rights, they do so carrying profoundly distinct consequences. Commercially confidential material might prove important in securing a company's competitive advantage. But listing information is sometimes procured through torture.<sup>130</sup> And so when judges assess it without knowledge of its source, they risk embedding torture material within the EU justice system. As Lord Bingham observed in the UK case of *A and Others*: "despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture *will be* laid before SIAC because its source will not have been "established".<sup>131</sup>

When the procedures for reviewing legally privileged communications and intelligence-as-evidence are conflated this way, the judiciary helps to bring preemptive security logics and EU justice principles into practical alignment. Such discursive moves perform important legitimation and legal assemblage work by linking divergent objectives and 'smoothing out contradictions so that they seem superficial rather than fundamental'.<sup>132</sup> The proliferation of exceptional governance is often explained as a 'migration of anti-constitutionalist ideas' from the exceptional core (eg, the US, UK or UNSC) to the rule-of-law periphery (such as the EU).<sup>133</sup>

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<sup>128</sup> Interview P.

<sup>129</sup> Interview N. By way of contrast, the introduction of closed material procedures in the UK (through the *Justice and Security Act 2013*) was subjected to considerable public and parliamentary debate due to the risks these changes posed to the rule of law, principles of natural justice and the protection of fundamental rights.

<sup>130</sup> On the use of torture material in terrorism listing see, in particular: Case T-306/10, *Yusef v Commission* [2014] Nyr; and Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/67/396 (2012). As Emmerson notes, 'intelligence derived from torture has been used to justify the designation of individuals' (para. 47).

<sup>131</sup> *A and others v Secretary of State for the Home Department* (No 2) [2005] UKHL 71 (para. 59, in dissent, emphasis added). On the risk of relying on torture material as a result of these procedural changes, see: Cuyvers (n 42) 1776.

<sup>132</sup> Tania Murray Li, 'Practices of assemblage and community forest management', (2007) 36(2) *Economy and Society* 263, 265.

<sup>133</sup> As suggested in Cian Murphy, 'Counter-terrorism and the Culture of Legality: The Case of Special Advocates'. Working Draft. SSRN, 21; following Kim Lane Scheppele, 'The Migration of Anti-Constitutional Ideas: the Post-9/11 Globalisation of Public Law and the International State of Emergency' in Sujit Choudry (ed.) *The Migration of*

But these reforms suggest that when it comes to the global war on terror legal agency is much more distributed and multidirectional than that. Just as the Monitoring Team and Ombudsperson examined in earlier chapters embedded and stretched this form of law in novel ways by trying to resolve particular problems of the List, these reforms show the EU courts assembling this domain of global law and exceptional governance in important ways by attempting to ameliorate its worst effects.

### Dis-located Law: Taking Listing Decisions Beyond the Vanishing Point of Review

The preceding section examined how the list's non-synchronous dynamics generate conflicts and introduce complexities into the EU judicial review process. Temporal shifts always enact corresponding spatial changes because 'time' and 'space' are integrated and inseparable dimensions in legal governance constellations. As Valverde observes 'different legal times create or shape legal spaces and vice versa ... [and] the spatial location and spatial dynamics of legal processes in turn shape law's time'.<sup>134</sup> The challenge for global sociolegal scholarship then is thinking through the 'temporal and spatial dimensions of governance *at the same time*', rather than reifying time-space binaries, privileging one dimension over the other or representing different governance scales as mutually exclusive.<sup>135</sup>

This section accordingly analyses how the spatial dynamics of judicial review are challenged and reordered through the temporalities of intelligence-as-evidence. Administrative 'decisions' are almost always the focal point of judicial review, such that it is often claimed that 'absent a "decision", judicial review will not lie'.<sup>136</sup> EU annulment proceedings in sanctions cases are similarly decision-orientated and directed at the legality of EU institutional acts.<sup>137</sup> Grounds of administrative legal challenge are therefore usually inextricably tied to the nature and quality of executive decision-making. So what happens when this constitutive relation is substantively emptied out or severed? It is this problem of (dis)location of the listing decision that is explored in the remainder of this chapter.

We have already discussed key divergences in trying to resolve the intelligence-as-evidence problem. To reiterate: one approach (endorsed by the ECJ's 2008 *Kadi* decision) suggests that closed material underneath the list should either be declassified or transformed so it can be used as evidence in judicial proceedings. The other approach (implicit in the recent procedural reforms) suggests that EU judicial procedures should themselves be changed to enable reliance on closed material without risk of disclosure. Crucially, both approaches assume that the material underpinning UN listing decisions is actually *held* by the 1267 Sanctions Committee and so could potentially be disclosed to the European Council, Commission and Courts. But on closer analysis, this assumption - of there being some kind of 'upstream' space of substantive assessment or decision-making that reviews the merits of individual listing decisions - appears to actually be unfounded.

#### (i) Emptiness of the Sanctions Committee Decision-Making process

In his 2013 opinion in the *Kadi II* appeal Advocate General Bot of the ECJ claimed that 'the listing and delisting procedures in the Sanctions Committee allow for a careful examination of whether listings are justified and whether or not it is necessary to maintain them'.<sup>138</sup> I argue

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*Constitutional Ideas* (Cambridge University Press, 2007).

<sup>134</sup> Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) 17 - 18.

<sup>135</sup> *Ibid*, 36

<sup>136</sup> Fordham (n 17) 138.

<sup>137</sup> *The Decision Making Process and the Work of the Institutions*. Available at: <http://bit.ly/1MIsIBE>

<sup>138</sup> A.G. Bot (n 109) para. 86.

that this claim is little more than blind assertion. It shows the extent of mainstream thinking about the Law of the List and just how far removed it is from listing practices.

The UN 1267 Sanctions Committee does not access the classified material that purportedly underpins its own listing decisions.<sup>139</sup> Instead, it is standard practice of the Committee to simply approve proposed designations provided to them by states using a confidential ‘no-objection’ procedure - where ‘if no State has opposed a listing proposal (or has put it “on hold”) within 10 working days, the individual or entity will be added to the list’<sup>140</sup> - that precludes any substantive consideration of the grounds.<sup>141</sup> Whilst the Committee appears to require states to structure their designation requests in a particular format - including basic identifying information and generic allegations of terrorist association (the ‘statement of case’) - the underlying material supposedly supporting the allegations is neither collectively presented nor substantively assessed. As one former member of the Monitoring Team stated in relation to this issue:

Intelligence sharing always has a limitation as to the level of trust between states. You are never going to get a degree of intelligence sharing within fifteen members, random members more or less, of the international community, which anyone is going to regard as able to protect a secret ... Any idea that the UN could *keep* a secret let alone share one, I mean, is ridiculous. It just will never happen here ... We’ve had very bad experiences of people giving intelligence, so-called, to the Security Council, like in the run up to the Iraq war. It’s not a mechanism that works, [and] quite frankly ... should be avoided.<sup>142</sup>

(ii) Speculating from Inside the Lacuna: the UN 1267 Office of Ombudsperson

In light of the Committee’s ‘rubber-stamping’ process, some commentators argue that the Ombudsperson mechanism examined in the previous chapter helps fill this decisional void. Whilst Eckert and Biersteker observe that ‘a thorough analysis of all available information is critical for due process’ and securing access to information has been a ‘significant challenge’, they nonetheless argue that ‘with the creation and enhancement of the Office of the Ombudsperson ... the rights of individuals to be informed, have access to, and be heard, appear to have been addressed’.<sup>143</sup> There is a presumption that the Ombudsperson is proximate to the source material underneath the list. As one member of the Commission Legal Service explained in interview: ‘the Ombudsperson is the closest to the decision-taking and therefore ... best placed to make the review ... The review that she does is ... the best one a listed person can have ... *We don’t pretend that the Commission makes a more substantive review than the Ombudsperson. It’s the other way round.*’<sup>144</sup>

As detailed in the previous chapter, the Ombudsperson also claimed that her decision-making process is fair because it enables listed individuals to know the case against them.<sup>145</sup> These claims to fairness, however, come with two important caveats. First, ‘[W]hen I say that I believe [listed individuals] have been told about the case, it’s the case against them *such as*

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<sup>139</sup> Emmerson (n 130) para 26; Lisa Ginsborg and Martin Scheinin, ‘Judicial Powers, Due Process and Evidence in the Security Council 1267 Terrorist Sanctions Regime: The *Kadi II* Conundrum’, *EUI Working Papers: RSC* (2011), at 9 - 10.

<sup>140</sup> Emmerson (n 130).

<sup>141</sup> Simon Chesterman, ‘The Spy who Came In from the Cold War: Intelligence and International Law’ (2006) 27 *Michigan Journal of International Law* at 1071, 1115.

<sup>142</sup> Interview A.

<sup>143</sup> Thomas Biersteker and Sue Eckert, *Due Process and Targeted Sanctions: An Update of the Watson Report* (2012) 22 – 23.

<sup>144</sup> Interview M (emphasis added).

<sup>145</sup> For a detailed analysis of the problems associated with the Ombudsperson’s delisting processes, see Sullivan and de Goede (n 125) and discussion in chapter 3.

*has been given to me.*<sup>146</sup> And she acknowledges that she is given is often the summary of reasons compiled by Committee and Monitoring Team ‘and nothing more’.<sup>147</sup> Second, and more importantly for the purposes of this chapter, the Ombudsperson does not actually review the original listing decision, as discussed at length in the previous chapter. For the Ombudsperson reviewing listing decisions would ‘be impossible ... in this context unless you have all the information the agency had that made the decision’.<sup>148</sup>

Bilateral agreements have certainly been forged with particular states for accessing closed material. But the Ombudsperson still has no secure arrangement in place with the US, which is by far the most prolific designating state and the one that presumably retains the most underlying material. And the states with which she *does* have agreements remain selective about what material they provide to her.<sup>149</sup> ‘Even then’, as one former Monitoring Team member notes, ‘she’s not going to go and interrogate the sources, she’s not going to go and look through the files.’<sup>150</sup> That is, there’s no assessment of the veracity and reliability of the incuplatory material that supposedly underlies individual list entries. In short, claims that the Ombudsperson fills this gap by undertaking a substantive assessment of the underlying material are problematic and difficult to sustain. As Hollenberg concludes in his analysis of this issue: ‘it is difficult to see how the problem of not sharing confidential information underlying an individual’s designation could ever be solved at the UN level’.<sup>151</sup>

### (iii) EU Listing Decisions and the Politics of Executive Box-Ticking

If the material that supposedly justifies the listing decision is not held or assessed at the UN level by the Sanctions Committee or Ombudsperson then it cannot be passed from there to EU executive institutions implementing the list.<sup>152</sup> Contrary to popular assumption, there is no movement of underlying material from supranational ‘core’ to regional ‘periphery’. The same kind of empty decision-making taking place in the UN is replicated, in exacerbated form, in the EU.

Leaked US Embassy cables highlight the extent of this baselessness. One cable documents a February 2010 meeting between US Justice, Treasury and State department officials and senior civil servants from the EU Council and Commission on the dangers that EU judicial review poses to UN Al-Qaida listing. A key ‘area of high risk’, according to Council lawyers, is the ‘multiple cases involving UN designations’ before the EU courts where ‘EU institutions have little or no [supporting] information’.<sup>153</sup> Other cables between Italian security officials and the US Consulate in Rome explain that ‘on behalf of the US, Italy had proposed numerous candidates for designation’ on the 1267 list ‘about which they knew little’. In the event of EU legal challenge Italy will have difficulty justifying these listing decisions ‘unless they get ... [background] information’<sup>154</sup> from the US government – even though designating states are ‘generally expected to have reviewed the underlying evidence’ before nominating people to be targeted by the list.<sup>155</sup>

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<sup>146</sup> Interview with Kimberly Prost, former UN 1267 Ombudsperson, New York, November 2012 (‘Interview K’, emphasis added). I refer to Ms Prost as the Ombudsperson here despite the fact that her mandate expired in July 2015. The position is currently held by Ms. Catherine Marchi-Uhel.

<sup>147</sup> *Ibid*

<sup>148</sup> *Ibid*

<sup>149</sup> Interview A.

<sup>150</sup> *Ibid*

<sup>151</sup> Hollenberg (n 49) 63. See also: Forcese and Roach (n 92).

<sup>152</sup> Ginsborg and Scheinin (n 139) 18.

<sup>153</sup> US Embassy Cable 10BRUSSELS219 (dated 25 February 2010).

<sup>154</sup> US Embassy Cable 09ROME652 (dated 9 June 2009).

<sup>155</sup> Emmerson (n 130) para. 26.

EU case law on terrorist listing and interviews with key European actors provide further support to the argument that EU listing procedures are bereft in substance. In the 2010 *Kadi* decision the EGC frankly acknowledged that ‘at the hearing, the Commission confirmed ... that it did not have any of the evidence in question’ and that ‘a request for the production of evidence must, in its view, be made to the United Nations States which hold it’.<sup>156</sup> Again, on appeal, the ECJ noted that ‘the Commission was not ... put in possession of evidence other than [the] ... summary of reasons’,<sup>157</sup> before setting out the new review standard they thought ought to be applied in listing cases.

Trying to get underlying information out of the Al-Qaida Sanctions Committee, according to one member of the Commission Legal Service, was ‘very difficult’: ‘it takes a lot of time to get a reply and the reply is telegraphic. Most of the time, there is nothing.’<sup>158</sup> On the rare occasions when information *is* forthcoming, the Commission only sees redacted versions of documents at best. Sources and methods used to obtain information remain unknown, posing problems for EU institutions bound to refrain from relying on torture material.<sup>159</sup> In sum, the Commission ‘doesn’t have any institutional role when it comes to classified information. We have access, now and then, ... [but only] because there is an interest from one of the states to win a case. Otherwise we wouldn’t have *any* access at all’.<sup>160</sup> Another official interviewed from the European Council confirmed that ‘there is no dossier of justifying information’ supporting Al-Qaida listing decisions or any kind of substantive decision-making taking place within the EU. Instead, listing decisions are wholly taken within the capitals of key Member States who only share information bilaterally with their trusted partners.<sup>161</sup> According to this official, if the EU Courts keep pushing to see something resembling a proper decision ‘they will not find it’. Such pressure will more likely lead to ‘abandon[ing] the use of targeted sanctions as a [counterterrorism] tool’ altogether.<sup>162</sup>

It is precisely this kind of empty decision-making that has confounded the EU judiciary when reviewing terrorist listing cases and driven them to overturn the implementation of UN listing decisions and try and improve EU listing procedures. As a result of the ECJ’s 2008 *Kadi* decision, for example, EU institutions could no longer simply automatically implement the Al-Qaida list into the EU legal order. Instead, they were to undertake an independent assessment of their own to determine whether their implementation was consistent with fundamental rights. In April 2009 a new Council Regulation was introduced to change European listing practice from one of ‘automatic compliance’ to ‘controlled compliance’.<sup>163</sup> Individuals or groups added to the list were to be sent ‘without delay’ a copy of the Statement of Reasons and invited to express their views on the listing decision. The Commission were then obliged to take into these views into account, as well as the opinion of an advisory committee of experts from the Member States, before taking the final decision to designate them on the list.<sup>164</sup>

This procedure appears to facilitate some kind of independent EU decision-making but in practice it has continued to remain elusive. One Embassy Cable documenting a 2009 meeting between the US Mission to the EU, Francesco Fini (of the former EU Council Secretariat

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<sup>156</sup> *Kadi* 2010 (n 29) para 95.

<sup>157</sup> *Kadi II* (n 36) para. 110.

<sup>158</sup> Interview M.

<sup>159</sup> *Ibid*

<sup>160</sup> *Ibid*

<sup>161</sup> Interview with member of Council of the European Union, Brussels, March 2013 (‘Interview Q’).

<sup>162</sup> *Ibid*

<sup>163</sup> Regulation (EU) No 1286/2009, amending Regulation (EC) No 881/2002.

<sup>164</sup> Those who were already on the EU list implementing Resolution 1267 prior to the *Kadi* judgment were also empowered to ask for a statement of reasons and invited to submit representations that the Commission must take into account before taking their final decision on continued designation.

Directorate General for External and Politico-Military Affairs) and Richard Szostak (of the Council Legal Service) recounts how this novel EU listing procedure was explained to US officials:

Finis and Szostak insisted that the Council would never reject a UN decision, since any Member State obstructing UN sanctions would have to defend itself directly in New York and would not have recourse to the EU de-listing process. In their view, the EU would limit its objections to requests for additional information from UN institutions and Member States. Such exchanges would address EU concerns (e.g., factual inaccuracies), 'without putting the UN in a difficult situation.'<sup>165</sup>

Limiting decision-making to requests for basic factual information and fettering discretion because of the political 'difficulties' this might pose for the Security Council is quite removed from what is usually thought of as lawful administrative decision-making. The flaws in this procedure were made plain in 2010 when the EGC annulled the Commission's renewed decision to freeze Mr Kadi's assets. The Court held that this EU 'decision' was patently inadequate and rights-compliant 'only in the most formal and superficial sense' because the Commission 'in actual fact considered itself strictly bound by the Sanctions Committee's findings and therefore at no time envisaged calling those findings into question in the light of the applicant's observations.'<sup>166</sup> For the Court, the new listing procedure underscored, rather than remedied, the fundamental emptiness of the situation. Following this decision:

... the Regulations broadly remained in place, but now sort of slightly more had been done by way of explaining what had happened. Though the peculiarity is: *in what way is it relevant for the Council to be explaining what someone else has done?* I mean what does that add to the validity of the legal exercise that the Council, or the Commission, goes through before putting someone on the list?<sup>167</sup>

An EGC judge involved in this decision explained the Court's approach in the following terms - reproduced at length, because it's a rare instance of a judge candidly explaining (outside the confines of formal judgment) the impetus for their decisions in terrorist listing cases:

One of the peculiarities about the situation that was created as a result of the post-9/11 legislation adopted by the EU was that ... it provided ... that the listing of someone by the 1267 Committee was a sufficient basis for the UN to require states under Chapter VII ... to take certain action vis-à-vis those individuals. And the Member States, through the Regulations in question, ... did precisely that. So when in *Kadi* the issue arose: 'Well, what *was* the material that on the basis of which the *Council* had made its decision to put someone on the list?'—the situation *wasn't one* in which it had applied its mind to the underlying material that had led the 1267 Committee to impose the sanctions ... *There was no sort of looking at the evidence*. It was merely, in its express terms, there was an external obligation to take *these* measures against *these* people once *this* factual condition is fulfilled: [namely] that X's name appears on the list established by the United Nations.

... I think many of the commentators slightly misunderstood what we were saying in our [2010] judgment. Effectively what we were saying was: 'We are here as the Administrative Court of the European Union whose task is review the legality of acts of the EU institutions. To do that job properly what we have to do is actually have a look to see what the institutions *have*, in fact, *done* and to see whether that accords with whatever legal constraints they may be under'. And from that point of view, what the Council did is effectively no more than simply say, 'Well where is Mr Kadi's name? Yes, we see it. It's on the list. Tick box one ... no other boxes to tick. Well that's it'... The issue wasn't ... whether we *can* or *can't* review

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<sup>165</sup> US Embassy Cable 09BRUSSELS1524 (13 November 2009). Finis is now Head of Sanctions at the EEAS.

<sup>166</sup> Kadi 2010 (n 30) para 171.

<sup>167</sup> Interview N.

decisions of the Security Council - we clearly can't, not in any normal sense of review ... This actually went to the *legality* of the base regulation itself: namely ... [does] a measure of this type ... nonetheless require *something further beyond the mere box-ticking exercise?* ... [It was] the legal regime set up by [the EU Regulation] - which did no more than require that box-ticking process - [that] was arguably the *real vice* in that case.<sup>168</sup>

This encounter succinctly highlights some of the problems faced by courts when trying to judicially review global security laws with complex spatiotemporal dynamics. We can see the EU judiciary looking back here to the executive act implementing the Al-Qaida list and rightly asking for the evidence relied on to arrive at that decision, as per their mandate as EU Administrative Court. But what they found was that 'the decision' was not really there at all and so 'there was no ... looking at the evidence' in the conventional sense. The mosaic method for putting someone's name on the list had effectively shifted the 'source' of decision elsewhere. The non-synchronous and dis-locating dynamics of the list are, in other words, mutually constitutive processes. What's left for the courts to review is nothing other than a *pro forma* 'box-ticking exercise' which enables EU institutions to exercise coercive control over listed individuals without any real consideration as to why.

Unsurprisingly, this situation was viewed by the Court as an intolerable exception in a polity based on the protection of fundamental rights. The quote from the EGC judge above also suggests that the judiciary objected to the loss of power and control to properly determine the issues brought before them as a result of the Security Council's counterterrorism policies. Yet as even this judge acknowledged, the solution proposed in the case (full substantive review) was optimistic and provisional. Dis-location was seen as an enduring feature of the list and a core problem 'we are going to have to come back to ... in the context of *Kadi II*, and possibly post-*Kadi II*, when we are saying: 'Well, *what precisely is it that the Council is doing?* On what material is it going to have to be acting and how then is this material going to be handled?'<sup>169</sup>

(iv) 'What precisely is it that the [Courts] are doing?'

When the *Kadi II* appeal judgment was delivered in July 2013 the ECJ's proposed solution to this problem was made clear. Listing decisions were to be re-located by the Court enacting a uniform standard of review applicable to both UN and EU sanctions cases. The case was received as a victory for EU transparency over UN Security Council secrecy. It underscored the unlawfulness of empty decision-making by affirming that EU institutions are 'under an obligation to examine, carefully and impartially, whether the alleged reasons are well-founded', taking into account exculpatory material or evidence provided by listed parties and even by seeking information from the Al-Qaida Sanctions Committee or relevant Member States if required.<sup>170</sup> Following *Kadi II*, the EU courts are now obliged to review 'the factual basis of listings, so the relevant authorities will have to provide sufficient evidence to support the reasons given for listing. No evidence means no sanction'.<sup>171</sup> Following the decision Commission officials planned high-level meetings in the US with the UN Al-Qaida Sanctions Committee, Ombudsperson and US counterterrorism officials to try and forge classified information-sharing agreements.<sup>172</sup> Sanctions officials were predictably shocked by scope of the ECJ's decision. For the former coordinator of the Al-Qaida Monitoring Team, Richard Barrett, for example:

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<sup>168</sup> *Ibid*

<sup>169</sup> *Ibid*

<sup>170</sup> *Kadi II* (n 36) para 114.

<sup>171</sup> Cuyvers (n 43) 1771.

<sup>172</sup> Interview with a member of the Commission Legal Service, Brussels, October 2013 ('Interview R').

This ruling presents a direct challenge to the ability and authority of the Security Council to impose targeted sanctions ... [It] means that any individual or institution under Security Council sanction can avoid the consequences within the EU by taking the case to court. The Security Council will not readily submit its decisions in such matters to the second-guessing of the EU courts and may ask what article 103 of the UN Charter actually means.<sup>173</sup>

Yet whilst pushing toward greater disclosure with one hand, the Court narrowed the potential effects of this move with the other, altering the EU judicial review process in crucially important ways. The EGC had previously held that the listed were entitled to ‘an in principle, full review’ extending to ‘the substantive assessments of the Sanctions Committee itself and the evidence underlying’ their decisions.<sup>174</sup> In *Kadi II* the ECJ found this review to be too expansive in scope and held that the EGC had erred by failing to consider ‘the many material obstacles that exist to the communication’ of underlying material from the UN to the EU - including that ‘the source of that information and evidence is ... subject to a requirement of confidentiality due to its sensitivity’.<sup>175</sup>

So in what is arguably the most far-reaching aspect of their decision the ECJ held that the only information needed for EU institutions to put or maintain someone on the list was the ‘statement of reasons’ provided by the UN Al-Qaida Sanctions Committee.<sup>176</sup> That is, the short summary excluding all underlying material, previously dismissed by the EGC as nothing more than ‘general, unsubstantiated [and] vague’ allegations,<sup>177</sup> was now accepted as a valid basis for listing. Crucially, it is only when listed individuals commence judicial review proceedings that EU institutions are actually expected to turn their mind to whether the reasons for listing are well founded. And it only then that one substantiated ground must be given to the Court so they can subject the listing decision to judicial review.<sup>178</sup>

This judicial innovation produces four important effects. First, it affirms that empty box-tick decision-making is lawful for the overwhelming majority of listed individuals who do not, or cannot, challenge their listing before the EU courts. Second, it frees executives from the burden of having to disclose all relevant material, allowing them to strengthen their hand by strategically cherry-picking what they would like to reveal and hide from the court. This means that if there is torture material justifying the listing decision or material indicating the listed person is not associated with Al-Qaida this can readily be kept outside of the court.<sup>179</sup>

Third, by alleviating EU institutions from having to take reasoned decisions when placing someone on the list and lowering the standard of review, the Court dramatically diminished their own power to challenge the legitimacy of the UN Al-Qaida listing regime. By dissolving the threat of ‘regime collapse’ by watering down what can be expected of the Commission and Council, the ECJ fortified the Al-Qaida list in the EU legal order in ways directly counterposed to their earlier decisions in this case. For one member of the Commission Legal Service

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<sup>173</sup> Richard Barrett, Comments in relation to *Kadi II* judgment (29 July 2013), *Economic Sanctions Listserve* (copy with author).

<sup>174</sup> *Kadi* 2010 (n 30) paras. 173 - 174 and 129 - 133.

<sup>175</sup> *Kadi II* (n 36) para 79. Whilst in this citation the Court is referring to the submissions of the Commission, Council and United Kingdom, it is clear that this position is implicitly accepted by the Court in its reasoning at paras 117–29 and by its regard for ‘the preventative nature of the restrictive measures at issue’ (para. 130).

<sup>176</sup> *Ibid*, para. 111

<sup>177</sup> *Kadi* 2010 (n 30). The ECJ qualified this requirement in *Kadi II* (at paras. 116 - 118) by insisting that the statement of reasons must be specific and concrete enough to comply with Art 296 Treaty on the Functioning of the European Union (TFEU).

<sup>178</sup> *Kadi II* (n 36) para. 130.

<sup>179</sup> As Cuyvers points out, allowing the executive to ‘select which evidence is presented and which is withheld ... may undermine the court’s ability to establish the material truth’ by enabling, for example, exculpatory material or material obtained through torture to be excluded from the review process - Cuyvers (n 43) 1775.

I spoke with this depoliticisation was the most profound effect of the decision. After the EGC's 2010 *Kadi* decision I was told that further EU legal challenges by UN listed individuals might cause the listing regime to fall apart.<sup>180</sup> But when we spoke again after the ECJ's *Kadi II* decision this official was remarkably upbeat. Whilst 'there was widespread pessimism after the judgment' from states like France and the UK, 'the Commission was, surprisingly, the only one not so pessimistic because we highlighted ... that there are certain positive aspects in the decision' - including, most importantly, that 'everything doesn't collapse' now in the event of further legal challenge.<sup>181</sup> Now listing litigation, according to this official, will only pose specific problems to be determined 'on a case by case basis' - 'either we will win or we will lose. But the whole regime does not collapse'.<sup>182</sup> *Kadi II* was crucial then for diminishing the scope of conflict around the list to a much more manageable 'battle of one by one'.<sup>183</sup> Put differently: whatever generative political space the 2008 decision succeeded in prising open on this issue, the 2013 decision effectively closed down.

Finally, this case disrupts the conventional nexus between judicial review and its object (ie, an executive act of administrative decision) and alters the temporal orientation of review by bringing the listing decision *forward in time* and rendering it more processual. Through this judgment, the site of decision is relocated as something that can unfold during the litigation itself rather than prior to legal proceedings and 'when the box was ticked', as had been the case. It's a discrete temporal move, but one that stands to alter the rationale of EU judicial review in significant ways. Before these reforms and decision, for example, an EGC judge whom I interviewed described their role in listing litigation in the following terms:

Remember *we are reviewing what the Commission has done*. If the Commission is saying, 'We are not looking at it' [*ie, intelligence-as-evidence*], we are going to say: 'Excuse me. We are an Administrative Court reviewing the legality of your acts. We are not making our separate assessment of whether if you had looked at that material you could have come to that conclusion. *We are just looking at what you say you did and ... the materials that supported you in doing what you were saying you were doing*'. ... We are not a first instance court making our own assessment ... We can only review what they have actually done.<sup>184</sup>

Judicial review is represented here in its traditional form as a retrospective process hinged upon a prior act of executive decision and the evidence informing it. But the *Kadi II* case disaggregates decision and evidence, and brings them both into a more fluid judicial process. The idea of the EU Courts 'just looking at what you say you did' no longer holds with respect to the Law of the List. As with cases concerning uncertain future environmental risks where 'the Court is forced by the grounds invoked to judge the scientific validity and the conclusiveness of the scientific arguments' raised,<sup>185</sup> so too the EU judiciary must likely now make their own assessments as to whether potential fragments, inferences and 'little mosaic scraps' can be assembled in ways that allow the future threats of global terrorism to emerge. Judicial fact-finding, in other words, comes to be concerned with assembling a security mosaic. This spatiotemporal move - performed for the first time in the *Kadi II* and consolidated via reform of the rules of the Court - translates and embeds pre-emptive security knowledge practices into the core of the judicial review legal fact-finding procedure.

Given the novelty of these changes it's too early to predict how their shockwaves will be felt.

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<sup>180</sup> Interview A.

<sup>181</sup> Interview R.

<sup>182</sup> *Ibid*

<sup>183</sup> *Ibid*

<sup>184</sup> Interview N.

<sup>185</sup> Marjolein B.A van Asselt and Ellen Vos, 'The precautionary principle and the uncertainty paradox' (2006) 9(4) *Journal of risk research* 313, 326.

But if the 2015 EGC decision in *Abdulrahim* provides any reliable indication, we can expect *more* uncertainty about what the proper judicial role in listing litigation actually is.<sup>186</sup> The case, brought by an individual listed as a suspected member of Libyan Islamic Fighting Group (LIFG), was particularly interesting because it provided a testing ground for the new post-Kadi II review procedures to be applied.<sup>187</sup> But the EGC's review was limited because the Summary of Reasons in this case failed to establish that Abdulrahim was 'associated with' Al Qaida 'on the date he was listed'<sup>188</sup> and the Commission failed to provide any further relevant underlying material in support of the listing allegations. Crucially, what additional information the Commission *did* provide – consisting of press articles and academic articles, witness statements from earlier UK legal proceedings and public statements concerning the merger of the LIFG and Al Qaida - was promptly dismissed by the court as:

*a priori of no relevance since, for the most part, they post-date both the listing of Mr Abdulrahim's name in the Sanctions Committee list and the adoption of Regulation No 1330/2008 and since they consequently could not have been taken into consideration, by either the Sanctions Committee or the Commission, in order to assess whether the freezing of Mr Abdulrahim's funds was appropriate.*<sup>189</sup>

So whilst in *Kadi II* the ECJ brought the listing decision *forward in time* as something assembled during the judicial review process itself, in *Abdulrahim* the EGC *looked back* towards material 'taken into consideration' by executive actors when putting someone on the list and excluded subsequent material as irrelevant. But the substance could not actually be evaluated because the Court did not know what material was used to take the listing decision. As the decision was not appealed, this divergence is now effectively settled as law.

For the UN Al Qaida Monitoring Team, the *Abdulrahim* case is significant because it 'demonstrates that European Union courts have no interest in reversing course following the momentous decision of the Court of Justice of the European Union in *Kadi II*'.<sup>190</sup> But it is also worrying because it signals that the EU courts 'require more substantial and timely evidence than may have been envisaged following the *Kadi II* decision', although 'it remains to be seen just how much and what type of evidence will be regarded as adequate'.<sup>191</sup>

But the issue isn't merely one of evidential quantity and quality. This confusion points to a much more complicated problem concerning the proper relation between listing decisions, the use of intelligence-as-evidence and the EU judicial review process. Is global terrorist listing something amenable to traditional judicial review or something co-produced by the courts through legal challenge due to its particular spatiotemporal and epistemological features? If the former, how can this retrospective movement be adequately reconciled with the pre-emptive logic of the list and its mosaic epistemology? And if the latter, how does this exceptional practice discretely rearrange the judicial fact-*finding* function? Unsurprisingly, the EU courts are exploring divergent approaches to these problems and still seem uncertain, in my analysis, about how to pin down and review this complex form of global law.

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<sup>186</sup> Case T-127/09 RENV *Abdulrahim v Council and Commission* [2015] Nyr

<sup>187</sup> *Ibid*, paras 62 - 71

<sup>188</sup> *Ibid*, para. 89

<sup>189</sup> *Ibid*, para. 90

<sup>190</sup> UN Doc. S/2015/441. *Seventeenth report of the Analytical Support and Sanctions Monitoring Team concerning Al-Qaida and associated individuals and entities* (16 June 2015), para. 45.

<sup>191</sup> *Ibid*

(v) Knowledge Circulation, Diffusion and Scalar Complexity in Legal Governance

'Knowledges', as Valverde, Levi and Moore point out, 'are always circulating, changing, being taken apart and reassembled in new shapes by new actors' and legal sites provide particularly fertile terrain for novel risk knowledge forms and formats to take root and spread.<sup>192</sup> The aim of global sociolegal scholarship in such conditions is not so much 'to discover that concept X or norm Y is originally, and hence truly, the property of this or that group or institution' or to ascertain whether courts 'are impervious ... or subordinated to science' or some other extra-legal source of risk, but rather 'to try and capture this creative movement in our analysis' by dynamically mapping 'the different effects of particular circuits of risk information' that emerge through these hybrid encounters.<sup>193</sup>

One effect of the entanglement of pre-emptive security logics and rule of law practices that my analysis of the EU courts highlights is the process that I describe as 'dis-location'. Judicial review is usually orientated retrospectively towards the 'decision' of the authority under challenge. But using intelligence-as-evidence for terrorism listing shifts this site of decision-making elsewhere and challenges the judicial process, because the decision supposedly under review is, strictly speaking, not there - as the 'box ticking' example above succinctly shows. Wherever one looks for some kind of independent list decision-making process, as the EU courts have persistently done, one instead finds emptiness and deferral to some other actor further along the transnational chain and presumably closer to the 'source' of the decision. Yet the 'source' of the decision is never made plain - either because it is generated through the diffuse knowledge practices of listing experts examined or the apparent use of secret intelligence material as evidence.

I use the term 'dis-located law' to refer to this spatiotemporal move and argue that it is a constitutive part of the listing assemblage. This term is intended to both draw attention to the material site of decision-making that is taken elsewhere and denote a sense of fracture with the way things ordinarily work. Judicial review proceedings commonly challenge the legality of executive decisions, for example, on the grounds that irrelevant considerations were taken into account or relevant considerations were not. In so doing the first question the court asks is: '*What material did the decision-maker have before them at the time that they took their decision?*'? *Did they fail to take something relevant into account? Did they give each element its proper weight etc?*' But when the source of the listing decision is not made apparent this evaluative process starts breaking down. How can judicial review work when answering this most basic of evidential questions is obscured through pre-emptive logics and security concerns? The Al-Qaida list, in my account, is a *dis-located* form of law. List decision-making eludes consideration by the courts. Judicial review persists but is increasingly emptied of substance through a spatiotemporal move. In light of this dis-location, one might well ask: 'where precisely *is* the site of decision-making located here?'

To address this problem I start with comments made by the UK Minister for Europe, David Lidington MP, when explaining why the EU court rules were being changed to allow closed material to be used. Whilst his interlocutors in the House of Lords Select Committee on this issue kept stressing that secrecy of national intelligence was the critical factor justifying these reforms, Lidington pointed towards other crucially important catalysts for procedural change which are elaborated in more detail below:

It would be wrong to think that when we are talking about confidential material we are talking

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<sup>192</sup> Mariana Valverde, Ron Levi and Dawn Moore, 'Legal Knowledges of Risk' in Law Commission of Canada (ed.) *Law and Risk* (University of British Columbia Press, 2005) 89.

<sup>193</sup> *Ibid*

only about material that might have an intelligence origin. *Sanctions that have been imposed originally at UN level are quite likely to have been based on information contained in a confidential report from a UN-mandated group of experts.* It is very possible that disclosure of that material in detail could lead to witness intimidation or damage international relations. Individuals, Governments or organisations might have given information in confidence to that UN group of experts, and the CMP provisions in Article 105 should help to ensure the secrecy and confidentiality of that UN information.<sup>194</sup>

Here it is the deformed processes of expert-led global listing examined earlier in this book that are identified as providing *the* critical source of information for the list.<sup>195</sup> Not the formal deliberations of the Sanctions Committee P5 states and their foreign ministries in conjunction with national intelligence agencies, as is commonly suggested. As I have shown, these global listing processes are marked by ‘distributed knowledge production’ practices and a ‘diffusion of evaluative labour’.<sup>196</sup> If this is what provides the key ‘source’ of decision-making in this domain it is little wonder the EU courts have had such problems locating ‘a decision’ to review. ‘Liquid authority’, as Nico Krisch has observed, ‘is dynamic, difficult to locate and thus hard to grasp for actors who seek to challenge it’. When ‘there is no one point of decision-making, but instead a continuous ... process in which standards are made and remade by different actors’, judicial review inevitably ‘suffer[s] from the lack of a suitable target’.<sup>197</sup>

So despite the legal architecture positing the list at the apex of the global legal order and its representation as an edict emanating from the ‘international community’, it is executive agencies and security officials within select national states and listing experts relatively autonomous from the formal political apparatus of the Security Council that are populating the list with its targets. The listing regime effectively allows pre-emptive security decisions taken by sub-national actors enrolled into new transnational networks to be given the force of global law. This enables national accountability constraints to be weakened, loosens the ‘shackles’ of international security law-making based on sovereign equality and state consent and explains why global security law seen such a remarkable uptake by states around the world.<sup>198</sup> The Security Council appears to provide little more than a shell of institutional cover for this rescaling process. But, as discussed earlier, the strategic advantage goes both ways. Aligning disparate actors into a common security program and building a new optic for seeing global terrorism also extends the authority of the Council and the technical expertise administering the list. The net effect of global security law, as Kim Lane Scheppele points out, ‘has been an increase in the power of transnational bodies and an increase in the power of domestic governments at the same time’.<sup>199</sup> Security governance capabilities are being stretched at both scales through new legal weapons like the Al-Qaida listing regime.

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<sup>194</sup> Lidington (n 47) 10.

<sup>195</sup> For Koskenniemi, deformalisation, refers to ‘the increasing management of the world’s affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively’: Martti Koskenniemi, ‘Global Governance and Public International Law’, (2004) 37(3) *Kritische Justiz* 241, 243.

<sup>196</sup> Anya Bernstein, ‘The Hidden Cost of Terrorist Watch Lists’ (2013) 61 *Buffalo Law Review* 461, 464 and 485.

<sup>197</sup> Nico Krisch, ‘The Structure of Postnational Authority’ Available at SSRN 2564579 (2015).

<sup>198</sup> The literature on the decline of classical international lawmaking and rise of new global governance mechanisms in relation to transnational problems is vast. For an overview, see: Koskenniemi (n 195); Krisch *Ibid*; Nico Krisch, ‘The decay of consent: international law in an age of global public goods’ (2014) 108 (1) *American Journal of International Law* 1; Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, ‘When structures become shackles: stagnation and dynamics in international lawmaking’, (2014) 25(3) *European Journal of International Law* 733; Kenneth Abbott and Duncan Snidal, ‘International regulation without international government: improving IO performance through orchestration’, (2010) 5(3) *The Review of International Organizations* 315. On the uptake of post-9/11 global security law, see: Kim Lane Scheppele, ‘The International State of Emergency: Challenges to Constitutionalism after September 11’, (21 September 2006) *Yale Legal Theory Workshop* (unpublished manuscript).

<sup>199</sup> Scheppele *Ibid*, 9

## Spatiotemporal Dynamics and Global Legal Assemblage

So what can empirically studying legal spatiotemporal dynamics tell us about the kind of global law the Al-Qaida list is? The first part of this chapter analysed the list as a non-synchronous form of law that uses intelligence-as-evidence and brings divergent temporal dynamics and epistemic practices together into productive relation. Most research on the list foregrounds the normative conflicts between international security and human rights law in cases like *Kadi* and suggests that the legal problems with the list can be adequately resolved through existing constitutional frameworks.<sup>200</sup> Whilst this conflict is important I have argued that it is driven and shaped in large part by the temporal complexities of the list and its mosaic epistemology. Intelligence material is orientated towards a radically uncertain future, reframed in the present as dots to be connected and potential associations to be drawn through imaginative, abductive reasoning. Evidence is orientated retrospectively to demonstrate, through inductive reasoning, that an act did or did not take place in accordance with a given standard of proof. Because the list brings intelligence and evidence together, it generates both temporal and epistemological conflict.

I have argued that changing the rules of the EU General Court to allow judges to handle closed material without disclosure is an attempt not only to mitigate the clash of colliding norms (between the EU and UN), but also to attenuate the conflicting temporal dynamics at play that are in important ways driving these legal conflicts. But my interviews with members of the EU judiciary and analysis of recent EU case law shows that this experiment in problem management is not as straightforward as it may seem. And that in trying to ameliorate the worst effects of the Al-Qaida list, the judiciary are forging recombinant techniques that embed and stretch it in novel ways. One common narrative suggests that the rise of pre-emption brings with it a corresponding decline in the rule of law and that legal and political institutions recede in the face of incalculable risks. But when pre-emptive security is studied empirically as a governmental technology a more textured account of legal assemblages emerges. In my analysis, law does not stand apart from the security practices it seeks to temper, but is rather reorganised at a very granular level as a result of this encounter. Being attentive to these shifts in legal knowledge production and ‘practices of reference’<sup>201</sup> can provide important insights into how jurisdictional conflicts are diffused, global security law is enacted and pre-emptive security governance is made more durable and expansive.

The second part of the chapter explored how this non-synchronicity reorientates the spatial dynamics of EU judicial review. Following critical examination of baseless decision-making at key nodes in the assemblage I argue that the mosaic epistemology of the list generates particular spatial effects: namely, it works to perpetually defer or shift the source of formal decision-making elsewhere. The list’s reliance on intelligence-as-evidence, in other words, enacts a corresponding dynamic of dis-location. Two recent EU listing decisions by the EU courts were scrutinised to show these dynamics at work. The first case (*Kadi II*) tried to locate a listing decision for the purposes of review by bringing it *forward in time* and into the litigation process itself. This move stands to transform the conventional rationale for EU judicial review - ie, a retrospective process hinged upon a prior act of executive decision and the evidence informing it - into something more plastic and fluid. The second case (*Abdulrahim*) took a different approach and *looked backwards* towards a listing decision presumed to have taken place in the past. Whilst the prevailing literature suggests that the

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<sup>200</sup> For Cian Murphy, citing Euripides, ‘the EU rule of law remains robust in the field of targeted sanctions. In the EU, in this field, ‘force yields place to law’ - Murphy (n 42) 282. For Justice Garlicki the ‘constitutional law of today is better-than-ever prepared to address the challenge of national security, including issues relating to how to handle secret information and intelligence’ - Justice L. Garlicki, ‘Concluding Remarks’ in Cole, Fabbrini and Vedaschi (n 12) 337.

<sup>201</sup> Johns (n 14) 23.

EU courts are robustly defending the rule of law from attack via this UN listing regime, my analysis suggests this relation is more complicated in practice. The list is not only changing how the judiciary produces legal knowledge but also modulating and altering, in potentially far-reaching ways, the judicial review process itself.

The empirical findings in this chapter show a global regime that is 'patchy', composed through diverse knowledge practices and temporal dynamics and enacted through pre-emptive security networks. Because it uses intelligence-as-evidence the political relations that constitute it are more fragmented and bilateral than all-encompassing and global. Analysing the Al-Qaida list through the lens of the EU courts trying to attenuate the intelligence-as-evidence problem and perform judicial review reveals a complexity of scale often observed in other transnational governance arrangements. The Law of the List is 'neither national nor international ... at the same time as being both'<sup>202</sup>. Or, as Saskia Sassen suggests in her study of global assemblages, it 'continue[s] to inhabit ...the nation-state and the inter-state system' but is 'no longer part' of both 'as historically constructed'.<sup>203</sup>

Realist state-centred approaches to international law and governance therefore fail to adequately capture how the Al-Qaida listing actually regime works. Because the national is not so much engaged here as a sovereign state determinative of relations in a Westphalian international sphere, but as networks of executive actors and experts aligned through a particular governance technology and taking pre-emptive security action 'that is more across, beyond or through states than it is between or amongst' them.<sup>204</sup> IR scholars have long emphasised how national executives 'collusively delegate'<sup>205</sup> and pool their authority at the supranational level to 'loosen domestic political constraints'<sup>206</sup> and increase their autonomy vis-à-vis other actors in the domestic sphere.<sup>207</sup> Network theorists like Anne-Marie Slaughter have argued that the state is not disappearing under globalisation so much as 'disaggregating into its separate, functionally-distinct parts' to facilitate transnational cooperation between domestic actors on particular issues.<sup>208</sup> But the spatiotemporal dynamics analysed in this chapter do more than redistribute the space for governmental action or underscore the fragmentation of international law into functionally differentiated regimes. I argue that disaggregation and differentiation in this context are linked to the task - as this chapter's epigraph points out - of using the global law and international organisations 'more effectively as a weapon in the war against terrorism'.<sup>209</sup>

The spatiotemporal dynamics of the list have particular epistemic and legal governance effects. They transform existing legal knowledge production processes, dis-locate decision-

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<sup>202</sup> Craig Scott, "'Transnational Law' as Proto-Concept: Three Conceptions' (2009) 10(7) *German Law Journal* 868.

<sup>203</sup> Sassen 2008 (n 6) 63 and 61.

<sup>204</sup> Scott (n 202). As Krisch observes, 'the UN sanctions regime today bears little resemblance to the classical ways in which international law is created and implemented': Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2012) 156.

<sup>205</sup> Mathias Koenig-Archibugi, 'International Governance as the New Raison d'État? The Case of the EU Common Foreign and Security Policy' (2004) 10(2) *European Journal of International Relations* 147.

<sup>206</sup> *Ibid*

<sup>207</sup> Klaus Dieter Wolf, 'The New Raison d'État as a Problem for Democracy in World Society' (1999) 5(3) *European Journal of International Relations* 333.

<sup>208</sup> Anne Marie Slaughter, 'The Real New World Order' (1997) 76(5) *Foreign Affairs* 184.

<sup>209</sup> US Embassy Cable 06USUNNEWYORK1609 (dated 22 August 2006). This is not to suggest that international law was not already 'weaponised'. As David Kennedy argues: 'Law and force flow into one another. We make war in the shadow of law, and law in the shadow of force': David Kennedy, *Of War and Law* (Princeton University Press, 2006) 165. The flipside of 'weaponising' international law is to work outside them. The 2010 *US National Security Strategy* speaks of 'the shortcomings of international institutions that were developed to deal with the challenges of an earlier time' and urges the government to instead 'harness a new diversity of instruments, alliances, and institutions' (at 3 & 46). Available at: <http://1.usa.gov/1K7rnRU>. The *Global Counterterrorism Forum* (GCTF) exemplifies this shift towards deformed global security governance: See: <http://bit.ly/1DgUeLZ>.

making sites and enable an array of listing authorities to exercise legal violence over individuals without any consideration as to why.<sup>210</sup> That is, whether by design or unintended consequence, the spatiotemporal dynamics of this list are deeply entangled in assembling a form of global exceptional security governance. Exceptional not in terms of some lawless black hole or sovereign decision but rather as something prosaic and legally assembled.<sup>211</sup>

For constitutionalist scholars, like Jean Cohen, such effects comprise the dark logical flipside of the 'responsibility to protect' (R2P) doctrine and the post-Cold War transformation of the Security Council's Chapter VII powers into an 'enforcement model' grounded in 'global law and community values, rather than international peace per se'.<sup>212</sup> For Cohen, going forward, 'we really only face two choices today: strengthened international law or imperial projects by existing and future superpowers'.<sup>213</sup> Whilst Martti Koskenniemi disagrees with the 'conceptual architectonics'<sup>214</sup> of UN Charter reform, he argues these effects are a consequence of the 'fall'<sup>215</sup> of international law and its replacement by functional regimes and their idioms of expertise. The key critical legal task ahead involves contesting the instrumentalism of global governance by redeeming international law's promise as a project of critical universalism and 'placeholder for the vocabularies of justice and goodness'.<sup>216</sup> For Neil Walker global security law is problematic because it 'sets aside the symmetrical logic of both particularism and universalism' - it struggles both 'to speak in the name of ... a new putative global community' and 'justify itself ... in the name of timeless universal values'.<sup>217</sup> Whilst this 'unsettles much of what we imagine the moral and cognitive high ground of law to be', it also opens an important 'threshold debate' about whether the global security law issued by the Security Council 'deserves the title of "legislation"' or whether it is merely 'a centralised form of coercion by influential powers' executed through legal means.<sup>218</sup>

These cosmopolitan turns and lament for the loss of the majesterial in international law may well be valid concerns. But I argue that new global security law and governance regimes might just as well be critiqued by better understanding the complexities of how they work. That is, by ethnographically remapping the particular techniques, spatiotemporal moves, legal knowledges and practices through which these ensembles achieve their effects. In short, by delving more deeply into the dynamics of nascent global legal governance arrangements, rather than flying away from them as some have suggested. Examining how global security laws are materially assembled in this way is both a descriptive and critical endeavour. It highlights the 'frailty'<sup>219</sup> and contingencies of new arrangements of power, reappraises what 'existing technical knowledge does ... and what latent possibilities it might hold'<sup>220</sup> and

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<sup>210</sup> 'Public' is used broadly here with reference to 'any kind of governance activity . . . [which] determines individuals, private associations, enterprises, states, or other public institution'. Armin Von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', (2008) 9 *German Law Journal* 1375, 1376.

<sup>211</sup> David Dyzenhaus, 'The Rule of (Administrative) Law in International Law', (2005) 68 *Law and Contemporary Problems* 127, 164. On the legally assembled exception, see: (n 14).

<sup>212</sup> Jean Cohen, *Globalization and sovereignty: Rethinking legality, legitimacy, and constitutionalism* (Cambridge University Press, 2012) 270.

<sup>213</sup> Jean Cohen 'Whose sovereignty? Empire versus international law' (2004) 18(3) *Ethics & International Affairs* 1, 24.

<sup>214</sup> Martti Koskenniemi, 'Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism' (2013) 11(3) *International Journal of Constitutional Law* 818, 821.

<sup>215</sup> Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law 1870–1960* (Cambridge University Press, 2001)

<sup>216</sup> Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 361.

<sup>217</sup> Walker (n 4) 43.

<sup>218</sup> *Ibid*, 44, 45

<sup>219</sup> Latour (n 3) 176.

<sup>220</sup> Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011) 224.

empirically charts 'the transformations that had to take place in order for new structures of knowledge to have emerged'.<sup>221</sup> Studying global legal assemblages, in other words, enables us to 'experience the international legal field afresh and, potentially, to acquire a new 'feel' for the political possibilities available within it'.<sup>222</sup>

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<sup>221</sup> Arnold I. Davidson, 'Structures and Strategies of Discourse: Remarks towards a History of Foucault's Philosophy of Language', in Arnold Ira Davidson (ed.), *Foucault and His Interlocutors* (University of Chicago Press, 1997), 11. Cited in Anne Orford, 'In praise of description', (2012) 25(3) *Leiden Journal of International Law* 609, 618.

<sup>222</sup> Johns (n 14) 27.