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### The Law of the List

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

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## 5. Conclusions

The primary aims of this book have been to understand how the UN Al-Qaida listing regime works as a form of global security law and governance and find out what happens when legality becomes entangled with pre-emptive security logics and orientated towards countering uncertain future threats. To that end, each chapter has followed the list to different empirical sites to examine the problems being negotiated there by different actors and analyse the techniques that these actors are forging. My aim has been to show how these practices are *producing* and sustaining this domain of law in distinctive ways. I have argued that the Law of the List is a unique legal weapon in the global war against terrorism and a far-reaching new form of global security law. It is transforming the relation between national and international legal orders and stretching what the collective security system is capable of doing in practice. It is generating new governance techniques, knowledge practices and mechanisms of pre-emptive security that are reconfiguring how legality works at a granular level. The Al-Qaida list is a permanent and radical new form of global exceptional governance.

This final conclusion chapter is structured in three parts. First, I revisit the key arguments made by providing a brief summary of each chapter. Second, I highlight six original contributions that this book makes to the study of global security law and governance. Finally, I close the book by pointing the way ahead for the Law of the List and highlighting potential areas of further research.

### The Law of the List: Key Arguments

Chapter 1 introduced the scope of this study and set out my key research questions. It explained how I first came to this research project as a human rights lawyer representing people on the Al-Qaida list and why I wanted to understand this novel domain of global law as a form of *productive* power. After highlighting the limitations of existing legal scholarship on this issue, the three key analytical moves of this book were introduced - studying global law as an assemblage, examining risk and pre-emption as practices of governmentality, and rethinking the problem of exceptional governance. I argue that these analytical moves set this sociolegal study of UN terrorism listing apart from the other existing research on this issue. They have also helped generate broader insights about the nature of global law and governance of relevance to those working in different fields - such as international law, sociology, anthropology and critical security studies - as discussed below.

The introduction also positioned this book as a methodological experiment in situated knowledge production. Drawing on STS scholarship, I argue that methods are not just epistemological tools. They are also performative and enact different ontologies. They interfere with and help constitute the worlds they describe and so are intensely political. This led to a discussion about how my own subject positioning within this assemblage as a practising lawyer has conditioned and shaped my findings. But rather than trying to discount this as something that detracts from the veracity of the study - as is the case in social science research which values dispassionate detachment - I argue that my positioning as a practitioner and advocate within the listing regime has helped bring new insights to the fore and fostered a research ethic of situated and sustained engagement. Three distinct methodological moves of this book were highlighted. First, studying the list as a multi-sited research object and the global as 'an emergent dimension of arguing about the connection between sites'.<sup>1</sup> Second, empirically examining the crucially important role of *practices* in

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<sup>1</sup> George E. Marcus, 'Ethnography in/of the world system: The emergence of multi-sited ethnography' (1995) 24 *Annual Review of Anthropology* 95, 99.

global security law and governance. And finally, using leaked documents to assemble my research fields and unlock the black box of a domain of global law that would have otherwise remained obscured in secrecy.

Chapter 2 examined the crucial role of background listing expertise in global security governance. We followed the list to two specific sites where the UN 1267 Monitoring Team were undertaking list implementation work - in 'consultation meetings' with security and intelligence officials aimed at populating the list with potential targets, and in collaboration with other IOs to make the list interoperable with global policing data (Interpol) and the passenger data of the global aviation industry (ICAO and IATA). I argue that these seemingly innocuous practices of list implementation are doing far-reaching global security governance work. They are not just implementing the list but rather are stretching the scope of what the listing regime can do. The mundane technical practices of UN listing expertise, in other words, are important and profoundly jurisgenerative. The Al-Qaida list also emerges from this analysis as a crucial actant of global security law. It exerts agency in its own right, performs important legal assemblage work, builds new ensembles of relations and helps to produce global terrorism of the future as a governable object in the present.

Chapter 2 analysed how the technology of the list works as an inscription device and 'global optic' for quantifying and ordering terrorism into something amenable to governmental intervention. We saw how the list enrolled a diverse array of actors into new global pre-emptive security networks to see the threat in the same way. The list performs crucial governance work in bypassing the vexing problem of having to define what terrorism is before governing it. The list also allows individuals and groups that may ordinarily have no relation to each other to be associated together, made commensurable and governable. Drawing from STS and governmentality scholarship, I argued that list and listing expertise are working together to produce a 'centre of calculation' for enabling new forms of 'government at a distance' to take place.<sup>2</sup> The Security Council emerges from this account as an IO that governs trans-boundary problems like terrorism through epistemic techniques and practices, not just through binding Ch. VII counterterrorism resolutions.<sup>3</sup> We also saw how UN listing experts aimed to counter unknown future terrorist threats by establishing an 'equilibrium of possibilities'.<sup>4</sup> This entailed targeting a very broad potential threat population deemed at risk of radicalisation, which is dramatically at odds with the rhetoric of 'targeted' governance usually justifying UN sanctions policy and the notion of 'concrete threat' thought to limit Ch. VII intervention to particular situations. This shows how the list works as a hybrid legal form pursuing a novel program of global biopolitical management. My analysis of these 'consultation meetings' changes the locus of where we should look to find global security law. It also underscores the urgent need for more empirical research on global governance technologies and the constitutive role of technical practices.

My analysis of list interoperability developed toward the end of chapter 2 also underscored the crucial importance of the politics of formatting. My analysis of the problem of trying to 'build the third hurdle' to better implement the list travel ban shows technical reformatting to be a creative, jurisgenerative and profoundly political governance move that performs what STS scholars call a 'translation'.<sup>5</sup> It doesn't simply move the list from context A to context B - it

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<sup>2</sup> Bruno Latour, *Science in Action: How to follow scientists and engineers through society* (Harvard University Press, 1987) 215 - 257; Peter Miller and Nikolas Rose, 'Governing Economic Life' (1990) 19(1) *Economy and Society* 1.

<sup>3</sup> On this point, see also: Christian Bueger, 'Making Things Known: Epistemic Practices, the United Nations and the Translation of Piracy' (2015) 9 *International Political Sociology* 1.

<sup>4</sup> Interview with current member of the UN 1267 Monitoring Team, New York, June 2014 ('Interview B').

<sup>5</sup> On translation, see, for example: Michel Callon and Bruno Latour, 'Unscrewing the Big Leviathan: how actors macro-structure reality and how sociologists help them to do so' in Aaron V. Cicourel and Karin Knorr-Cetina (eds.)

*changes* the list in accordance with the new ordering practices and spatiotemporal dynamics that condition the different formats. Translation, in other words, is a legally and politically generative process. My argument is that examining the politics of translation is critically important because it shows us how global security law can be embedded and stretched through listing practice, without attributing agency to powerful actors or deferring to some kind of master-plan.<sup>6</sup> This helps to explain how global security law continues to expand into new governance domains despite sustained criticism by reform orientated states, human rights advocates and the courts.

Chapter 3 shifted our focus to the problem of accountability in global governance and provided a detailed genealogical account of the emergence of the UN1267 Ombudsperson - the procedural mechanism created in 2009 to allow targeted individuals and groups to make delisting requests to the Security Council. Most literature posits the Ombudsperson as an improvement and much needed step in the right direction towards realising 'fair and clear procedures' in UN sanctions. My account complicates this teleological narrative of global legal progress and reframes the Office of the Ombudsperson as a governance effect arising from multiple conflicts across the listing assemblage: a composite figure born out of diverse institutional struggles under conditions of legal fragmentation.

Chapter 3 shows that the divergences between actors in this domain run deeper than usually suggested. The list accountability conflict isn't just about different perspectives being brought to bear on the same problem, in a process ultimately mediated by the Security Council. Drawing on the STS insight that objects are enacted through practice, I argue that the different actors across the assemblage that engage with this conflict, enact fundamentally different versions of the list – including the Legal List of the courts, the Humanitarian List of targeted sanctions scholar-experts, the Living List of listing experts, the Complaint List of the UN Special Rapporteurs on Counterterrorism, and the Credibility List of the Security Council P5 states. As my 'praxiographic' study shows, each list frames the accountability conflicts of the Al-Qaida sanctions regime in radically different ways and seeks procedural redress for divergent purposes.<sup>7</sup> My analysis in this chapter reframes the list as a multiple object and reveals the heterogeneity of the listing assemblage.

The latter part of chapter 3 analysed the assemblage work of the UN1267 Ombudsperson as an experimental figure of global legal expertise. Drawing from interviews with the former position holder and my own professional experience representing targeted individuals in delisting proceedings, I examine the novel decision-making processes, 'dialogue' meetings and evidential standards that the Ombudsperson has crafted to work in this special environment. I argue that these inventive practices help mute underlying political and legal tensions, contain multiplicity and hold the disparate strands of the listing assemblage together. In my account, the UN 1267 Ombudsperson performs crucially important global legal assemblage work by facilitating convergence between the different versions of the list that might otherwise engender legal fragmentation and political conflict. The particular expertise of the Ombudsperson, moreover, lies in her recombining existing legal categories and practices into novel quasi-judicial forms tailored towards embedding pre-emptive security logics. Existing accounts suggesting that the Ombudsperson provides a mechanism of 'de facto judicial review' to listed persons show little understanding of the inequities and

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*Advances in Social Theory and Methodology: toward an integration of micro and macro-sociologies* (Routledge, 1981) 277, 279.

<sup>6</sup> Tania Murray Li, 'Practices of Assemblage and Community Forest Management' (2007) 36(2) *Economy and Society* 263.

<sup>7</sup> Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press, 2002).

asymmetries this mechanism carves out in practice.<sup>8</sup> So whilst most scholarship frames the Ombudsperson as a procedural improvement and postnational accountability solution, my analysis recasts it as a unique conduit of global exceptional governance and ongoing political and legal problem.

Finally, in chapter 4 we followed the list to the EU courts and examined the practice of judicial review. In this chapter we explored what happens when the pre-emptive security logics and mosaic epistemology of the list meets the principles of judicial proof that the courts have long used to determine legal truth. Most legal scholarship on the Law of the List focuses on the high-profile clash between the EU courts and the UN Security Council in the *Kadi* case, with global constitutionalists and global legal pluralists battling it out to determine whether the courts got the answers to that conflict 'right' or 'wrong' and to outline their normative case as to how this conflict ought to best be resolved. My analysis went beneath the legal reasoning of the courts to empirically study their procedural practice, by charting the recent reforms of the General Court's rules to allow judges to handle intelligence material as evidence without disclosure for the first time.

The key puzzle that chapter 4 sought to understand was how a court vested to protect fundamental rights was so readily enlisted to construct this legally authorised state of exception. This problem was analysed by bringing the latent spatiotemporal dynamics and epistemic qualities of the list to the analytical surface. Drawing on the work of Boaventura de Sousa Santos, I argued that the listing assemblage is a paradigmatic form of non-synchronous law – that is, a legal form composed of divergent temporalities that are literally 'out of sync'. Using intelligence-as-evidence pulls the Law of the List in radically different directions. In short: the evidence is grounded on a 'past-present axis' and tethered to acts undertaken in the past, whilst intelligence is hinged on a 'present-future axis' and orientated towards making radically uncertain futures knowable.<sup>9</sup> I argue that bringing these two knowledge formats and temporal logics together puts non-synchronous dynamics in play and this is generating legal conflict. These procedural reforms aim to allow EU judges to manage this conflict, but they are serving to engender further complexity in practice. Judicial review is retrospectively orientated towards a 'decision' that has taken place in the past. But in chapter 4 we also saw how reliance on intelligence-as-evidence defers this space of decision and confounds this judicial process because the decision supposed to be under review is not there. The phrase 'dis-located law' was used to try and capture this dynamic process of fracture and deferral. My empirical analysis highlighted how this process of dis-location works in practice to render key sites of formal decision-making across the assemblage substantively baseless. I argued that empirically mapping the spatiotemporal dimensions of legal governance can provide important insights into how global emergencies come to be normalised, stretched and made durable through legal means.

When we analyse the Al-Qaida listing regime through the lens of the Security Council resolutions that formally constitute it, global security law might seem to be broadly encompassing and representative of the international community it purports to protect. But empirically analysing how pre-emptive security problems are being mediated by the courts reveals this global security regime to be something far more 'patchy', dynamic and fragmented. Because global law is usually posited in abstract normative terms, moreover, spatiotemporal dynamics tend to be discarded as extra-legal. But chapter 4 shows that if we

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<sup>8</sup> See for example: Sue Eckert and Thomas Biersteker, *Due Process and Targeted Sanctions: An Update of the 'Watson Report'* (Watson Institute for International Studies, Brown University and the Graduate Institute, Geneva, 2012) 37.

<sup>9</sup> Brian Massumi, 'The future birth of the affective fact' *Conference Proceedings: Genealogies of Biopolitics* (2005). Available at: <http://bit.ly/1Dvcq4B>

want to understand how global law works we need to take the spatiotemporal dynamics of governance much more seriously.

The following section highlights six original contributions that this book brings to the study of global security law and governance. Rather than specifically focusing on the Al-Qaida listing regime and the scholarly debates associated with it, I have underscored elements of this study that readers from related fields (such as post-national law, international organisations studies, global governance, critical security studies, sociolegal scholarship) may find valuable for their own research projects.

### Original Contributions of the Study

#### (i) Global Legal Assemblage

As discussed above, most scholarship in this area examines the relevant UN Security Council resolutions and tracks how they have been indirectly challenged by domestic and regional courts. Normative conflicts are highlighted (such as the *Kadi* case) and normative theories for resolving those conflicts - global constitutionalism, global legal pluralism, international regime theory, global administrative law - are debated. These debates are important, but this book also shows them to be reductionist. They reveal only a small part of what are more complex legal and political problems and tell us little about why fundamental rights have such limited purchase over this novel form of pre-emptive security governance.

So the first contribution of this study lies in opening a radically different way of understanding global security law. This book has studied the Law of the List as an assemblage of knowledge practices, governance techniques, spatiotemporal dynamics, artefacts and novel legal relations, or what Rose and Valverde call a 'legal complex'.<sup>10</sup> This approach removes us from the reified terrain of static models and normative debates about whether the courts were 'right' or 'wrong', and allows us to examine global security law as something very much emergent, expansive and in motion. As I have shown, moving outside legal doctrine, judicial reasoning and the Ch. VII decrees of the UN Security Council allows more variegated and textured conceptions of global security law to come into view. Globalisation is driven by dynamics situated within the interstate and nation-state system that transform old capabilities into new organising logics and governance capabilities.<sup>11</sup> It is not a zero-sum game between the 'national' and 'global' but something marked by processes of recomposition and rearrangement. Reframing the Al-Qaida list as a legal assemblage helps us to get at these novel processes of re-ordering. What emerges is a global regime that inhabits yet exceeds existing frames of international and national law and that is stretching the UN collective security system in practice.

By honing in on EU judicial review and the problem of assessing intelligence-as-evidence in chapter 4, for example, we were able to see that there are no decisions (in the public law sense) animating this regime, despite its public international law origins. Instead, we have intelligence agencies and executive actors sharing information bilaterally or not at all, on a need to know basis and circulating 'narrative summaries' to placate targeted individuals, regime critics and courts. Dis-locating listing decisions in this way has confounded the EU judiciary and prompted far-reaching changes to their evidential rules. Judges accustomed to conventional retrospective processes of judicial proof must now assemble future-orientated security mosaics from informational scraps and inferences. Global security law is thereby

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<sup>10</sup> Nikolas Rose and Mariana Valverde, 'Governed by Law?' (1998) 7(4) *Social and Legal Studies* 541, 542 - 543.

<sup>11</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

embedded and stretched through micro-processes of reorganisation. And the list is changing the ways that justice is done inside the EU courts. Analysing the Law of the List from this site allowed us to see how fragmented, novel and jurisgenerative it is. The Al-Qaida list is unlike any other UN sanctions regime or international law instrument. It is a unique pre-emptive legal weapon in the global war against terrorism that is generating profound legal and political effects.

Analysing assemblage practices sheds a very different light on how governmental programs are constructed. The key insight that I draw from STS scholarship here is that objects are produced through practice.<sup>12</sup> This means that when we are faced with conflicts in postnational governance about particular institutions, objects or governmental programs we not only dealing with different perspectives on the same problem. Instead, we have multiplicities characterised by overlapping clashes and conflicts between different versions of reality, as discussed above. That is, differences between actors are not just epistemological but ontological as well. This is what makes assemblages *heterogeneous* and why the hard work of pulling divergent strands together into contingent wholes is so important. Enlisting and aligning different actors into networks, managing conflicting claims, translating the will of others to your own: this is how global security law and governance is materially assembled and reproduced.

Most legal accounts reduce these differences to questions of normative interpretation and compliance. Analyses of the UN 1267 Ombudsperson, for example, argue about whether this institution brings UN sanctions within the remit of international human rights norms or not and whether the courts should show more deference to the Security Council as a result. GAL scholars see the Ombudsperson pre-figuratively and in evolutionary terms, as an important step in the right direction, sanitising its contested history and glossing over its conflicts and problems. But analysing global law as an assemblage allows to grasp differences as something more radical and generative. So when actors clash in post-national legal space its not only a conflict of norms, but also competing versions of reality in friction that are vying for institutional dominance. So as outlined above, chapter 3 analysed the emergence of the UN1267 Ombudsperson through the lens of the Multiple List and traced how different actors in the assemblage enact different versions of the list through their divergent listing practices. Highlighting these divergences helped underscore how the Office of the Ombudsperson does much more comply or not comply with pre-existing norms. It functions as an institutional 'boundary object' that aligns different actors, embed pre-emptive security logics, mute political tensions and hold the different versions of the list together.<sup>13</sup> The Ombudsperson, in other words, is a crucial figure of expertise and global legal assemblage.

Numerous scholars have called for more innovative approaches to understand how globalisation and the governance of trans-boundary problems are transforming law.<sup>14</sup> This book has sought to address this call by performing an important analytical reorientation - shifting focus from normative and positivist questions like '*what* is global law' or '*what ought* global law be' to the more empirical question of '*how* is global law assembled and sustained' in the face of ongoing tension. I argue that this shift is important not only for those interested

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<sup>12</sup> Mol (n 7)

<sup>13</sup> Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations' and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology 1907-39' (1989) 19(3) *Social Studies of Science* 387.

<sup>14</sup> See, for example: Peer Zumbansen, 'How, Where and for Whom? Interrogating Law's Forms, Locations and Purposes', *Inaugural Lecture, King's College London* (28 April 2016); Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013); Mireille Delmas Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Publishing, 2009); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*. (Cambridge University Press, 2002).

in the Al-Qaida list, but for those engaged with post-national legal problems more generally. When global law is reframed as ‘a practical and contingent achievement’, our attention is drawn to the diverse practices, alignments, translations and techniques involved in making that achievement possible.<sup>15</sup> That is, decentring the Law prompts a much needed ‘expansion of the dimensions of legality’.<sup>16</sup> And I argue that this kind of expansion is critically important if we want to make sense of the complexities of global legal ordering unfolding in the present. We need to broaden our understandings of what law is and experiment with constructing theories from the material conditions and conflicts that global law creates and inhabits. It is this kind of empiricism that allows us to ‘find the conditions under which something new is produced’ and to think about how new global security regimes might be made otherwise.<sup>17</sup>

(ii) Studying the Global from Structure-Making Sites: the Politics of Scale Production

A second contribution that this book makes concerns the nature of scale. Law is often implicitly spatialised through logics of verticality and encompassment - with the global up on top, the regional and national further below, and the local down the bottom.<sup>18</sup> Because each scale is thought to encompass the other as one ascends the international hierarchy of norms, more of one is usually taken to mean less of the other. And so the local, national and global scales through which legal ordering and governance is arranged ends up being reified and locked into a zero-sum game. If international lawyers and political geographers were asked to explain a particular global problem, for example, they would likely give wildly divergent responses tethered to differing notions of scale. Geographers might talk about logistics chains, algorithmic architectures, geopolitical stacks or flows of infrastructural space.<sup>19</sup> Complex topologies would be outlined showing how ‘heterogeneous techniques, technologies, material elements, and institutional forms are taken up and assembled’.<sup>20</sup> But lawyers will still likely frame the problem jurisdictionally in abstract normative terms, talking about the global as if it is something ‘up there’ and local ‘down here’. Framing law in this way can offer helpful shortcuts and be a useful figure of speech. But global law and the politics of legal scale just aren’t as straightforward as that. And postnational norm conflicts are underscoring just how ill equipped conventional forms of legal analysis are in grappling with fluid global governance problems that are multi-scalar and trans-boundary in nature.

This book addresses this problem of scale by taking ‘the global’ in global security law seriously. It has followed the list to local sites where global structure-making practices are being forged and put into circulation. And it has shown how governance scales are empirical problems that require detailed examination, not a priori conditions that can be taken for granted in our analyses.

As we saw in chapter 2 powerful new forms of global counterterrorism governance are being produced from localised sites through fragile alignments of knowledge practices, techniques,

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<sup>15</sup> Andrew Barry, *Material Politics: Disputes Along the Pipeline* (Blackwell Publishing, 2013) 183.

<sup>16</sup> Sally E. Merry, ‘New Legal Realism and the Ethnography of Transnational Law’ (2006) 31(4) *Law and Social Inquiry* 976.

<sup>17</sup> Gilles Deleuze and Claire Parnett, *Dialogues* (the Athlone Press, 1987) vii.

<sup>18</sup> James Ferguson and Akhil Gupta ‘Spatializing states: toward an ethnography of neoliberal governmentality’ (2002)

*American Ethnologist*, 981.

<sup>19</sup> See respectively: Deborah Cowen, *The Deadly Life of Logistics: Mapping Violence in Global Trade* (University of Minnesota Press, 2014); Luciana Parisi, *Contagious Architecture: Computation, Aesthetics and Space* (MIT Press, 2013); Benjamin Bratton, *The Stack: On Software and Sovereignty* (MIT Press, 2015); Keller Easterling, *Extrastatecraft: The Power of Infrastructure Space* (Verso, 2014).

<sup>20</sup> Stephen Collier, ‘Topologies of Power: Foucault’s Analysis of Political Government beyond “Governmentality”’ (2009) 26(6) *Theory, Culture and Society* 78, 89 - 90.

infrastructures and relations. By aligning diverse actors into pre-emptive security networks through the technology of the list, for example, UN listing experts are constructing new ways of seeing and governing global terrorism. List and listing expertise are working together to build what Bruno Latour has called a 'centre of calculation' for enabling 'action at a distance' to take place.<sup>21</sup> We also saw how making the Al-Qaida list interoperable with the PNR data used by the global aviation industry dramatically expands its scope. Reformatting the list does more than move it from context A to context B. It performs an act of translation that is crucially important, as discussed in more detail below. The list needn't be applied at national borders any more because it is enacted electronically at points of sale when someone buys an airline ticket.

These examples draw attention to the hard work of making global law operative and powerful. Bringing actor-network theory into this domain helps us to 'flatten the landscape' of global security governance.<sup>22</sup> The key insight drawn from STS scholarship throughout this book is that 'global' actors are not necessarily 'bigger' than any other, but are made more powerful by virtue of their relative connectedness and the inscription technologies they use.<sup>23</sup> In other words: the Law of the List is made global through scale-producing practices and techniques that can be empirically scrutinised. I argue that when we cease taking governance scales for granted, we can get a much better sense of how they are being rearranged through new forms of legal ordering and governance practice. And this in turn can give us a much richer sense of how law is being transformed through globalisation.

The other effect that this approach to scale brings is more forensic and political in nature. If powerful actors are made powerful precisely through their scale producing activities and making others small in comparison, then empirically charting how these processes work opens space for disturbance or what Michel Callon and Bruno Latour call 'unscrewing the Big Leviathan'.<sup>24</sup> When we show how global structures are produced, we reveal the material conditions through which powerful actors are able to 'dominate on a large scale'.<sup>25</sup> This reminds us that global law and governance are not merely things that powerful global actors hold and wield, but relational effects and material constructions that are much more contingent and potentially reversible than is usually suggested.<sup>26</sup> 'To take the fabrication of various scales as our main center of interest', as Latour notes, 'is to place the practical means of achieving power on a firm foundation'.<sup>27</sup> By taking scale production seriously, powerful institutional formations and agency in global governance are recast as effects of practice.

### (iii) Mapping the Politics of Expertise in Global Law-Making

Much contemporary legal scholarship is concerned with managing the anxieties surrounding international legal fragmentation. This book has shown what the fragmentation and functional differentiation of international law looks like in practice. Analysing how trans-boundary threats of global terrorism are being countered through novel governance techniques and practices has taken us squarely into the politics of expertise. The kind of technical legal assemblage work that we have examined in this book is usually dismissed by legal scholars as something peripheral. But this study suggests that the background workings

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<sup>21</sup> Latour, Miller and Rose (n 2)

<sup>22</sup> Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005) 182.

<sup>23</sup> Callon and Latour (n 5).

<sup>24</sup> *Ibid*

<sup>25</sup> Bruno Latour, 'Visualization and Cognition: Drawing things together' (1986) 6 *Knowledge and Society* 12.

<sup>26</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972 – 1977* (Pantheon, 1980) 98.

<sup>27</sup> Latour (n 25) 27

of functional expertise needs to be closely examined and taken much more seriously. Because this is where some of the most experimental and expansive global security law-making and pre-emptive security governance is being assembled. So a third key related insight to be drawn from this book is that global security law is not only powerful because it is issued by the Security Council under Chapter VII of the UN Charter. It is *made* powerful through the assemblage work of functional expertise and the knowledge practices that experts are crafting, so these 'background' expert practices require close empirical analysis.

We have seen in chapter 2, for example, how UN listing experts performing seemingly mundane tasks (like enhancing list implementation) are stretching the list in far-reaching ways and transforming it into a powerful global legal weapon. Improving implementation of the travel ban requires altering global aviation standards, building new pre-emptive bordering capabilities and putting new security arrangements in place that stand to affect all air travellers worldwide. This isn't list implementation so much as global legal ordering and security governance in motion. But because it is seen as mere technical work, the politics of listing expertise goes unnoticed and unchallenged.

In chapter 3 we analysed how academic experts motivated by the possibility of global humanitarian reform became engaged in targeted sanctions policy. After 9/11 these scholars were revalorised as counterterrorism financing experts. I have argued that the assemblage work these scholar-experts have performed has been crucial for the Law of the List. They have enlisted a diverse range of actors into their networks, framed debates about the accountability problems of the list in managerial terms and shaped this domain of global security law in profound yet unacknowledged ways.

For Koskenniemi the main problem with such deferral to expertise is that it instrumentalises law and recasts it in a technical idiom. The key critical task we now face involves redeeming international law as 'a placeholder for the vocabularies of justice and goodness' and reclaiming law as a transcendent project that embodies 'the regulative idea of universal community'.<sup>28</sup> For Kennedy there are three ways to challenge the hegemony of expertise in global governance. We must identify the interests animating expert action, render their latent assumptions visible and reframe expertise as something individuals have discretion and political responsibility over. And we must undertake critical analyses that 'encourage a form of expertise which could experience politics as its vocation'.<sup>29</sup>

These accounts offer important ways of challenging the rise of expertise in global law-making. But the critical stance adopted in this book operates in a different register and direction. Rather than transcending the technicality of functional expertise by turning towards law's promise of universality, I argue that we should develop new forms of *immanent critique* that revalorise the technicalities of expertise as powerful and jurisgenerative. Charting the politics of expertise ethnographically as it unfolds is politically important, because it shows how small shifts in knowledge practices at a micro-level can provide important sources of legal change in powerful macro-organisations like the UN Security Council. And it reveals how institutions become powerful by translating the will of others, building centres of calculation and forging new forms of domination through technical means. As Kennedy notes, 'we need better maps of expertise' but 'mapping the knowledge of experts is complex and technical work'.<sup>30</sup> This book contributes to this task by studying the politics of listing expertise and showing how it shapes this domain of global security law.

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<sup>28</sup> Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 360 - 361.

<sup>29</sup> David Kennedy, 'Challenging Expert Rule: the politics of global governance' (2005) 27 *Sydney Law Review* 5, 24.

<sup>30</sup> *Ibid*, 14

(iv) Governance Technologies as Legal Agents and the Politics of Translation

A fourth key finding of this study is that the governance technologies used to deal with trans-boundary problems are not just means to an end but are in themselves crucial agents of global law-making. Drawing on governmentality and STS scholarship – and building on the growing literature on global indicators, standards and informal law - I have shown that the Al-Qaida list is a powerful protagonist in this domain, deeply entangled in the knowledge objects that come into being through its use. The problem of defining terrorism - and whether the term should extend to include armed national liberation movements or state terrorism - was one of the key political divides of the decolonising world in the late twentieth century. More than 60 proposed definitions were put forward for international agreement between 1936 and 1981 without success.<sup>31</sup> Yet my analysis has shown how this definitional problem has now been effectively bypassed. Terrorism is now something rendered visible and actionable through the technology of the list.

The list is one of the most archaic ordering devices. It is innocuous and simple, yet malleable and - as I have shown throughout this book - capable of performing crucially important governance work. After 9/11 it was the list that helped to 'quantify a threat that no-one could easily quantify' and generate actionable results in the global war on terror.<sup>32</sup> My analysis showed how the list works as a *performative* technology that enables uncertain future threats to be seen and governed in the present. The list *produces* global terrorism as an object of legal intervention by making diverse threats commensurable, optically consistent and targetable. When global constitutionalists and pluralists argue about how the effects of legal fragmentation can best be normatively contained, the list is either nowhere to be found or relegated to the status of an inert instrument. Drawing on the work of Annelise Riles, Fleur Johns, Sally Engle Merry, Mariana Valverde and others working in the sociology of knowledge tradition, I have argued that legal technicalities and tools should be reappraised as important agents of legal change in their own right. As I have shown, technologies of governance are not just appendages of powerful actors that organise pre-existing phenomenon, but actants that help constitute, condition and delimit the very problems they purport to represent or target.

So whilst debates about the lack of a definition of terrorism are important, this book suggests they are somewhat missing the point. In the current era, global terrorism is listed, not defined. Failure to define terrorism is not a source of lack but a condition of possibility. Those interested in global counterterrorism law might benefit from closely analysing how listing works as a knowledge production and ordering technique. So the fourth insight to be gleaned from this study is that understanding global law requires paying close empirical attention to the governance technologies through which it is enacted. This means using analytical tools that can break down conventional distinctions between subjects and objects and structure and agency. A key lesson to be learned from this study is that non-human things - artefacts, technologies, instruments - actively participate in the making of legal and political relations. Objects carry practices and practices carry knowledge that allow new forms of government to emerge and intervene. Understanding the power asymmetries and violence of contemporary global security governance requires more than attributing influence to hegemonic world powers (like the US and other P5 states). It also requires empirical analysis of the inscriptions and technologies being used to make new forms of action at a distance possible - that is, more detailed study of the seemingly mundane technicalities of global legal work.<sup>33</sup>

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<sup>31</sup> Mark Muller, 'Terrorism, proscription and the right to resist in the age of conflict' (2008) 20 *Denning Law Journal* 113.

<sup>32</sup> Interview with former member of the UN1267 Monitoring Team, New York, November 2012 ('Interview A').

<sup>33</sup> On legal technicalities, see: Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011); Mariana Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources

Highlighting the agency of things also helps make the politics of translation visible. That is, the ways that objects, techniques, practices and relations are aligned in particular ways to make new security knowledge and governance possible. Lawyers and political scientists are accustomed to look for causative mechanisms to explain the governance phenomenon that they study. The focus is placed on norms, institutions and the authority of powerful actors. But as shown in this book, this misses much of how global law and governance unfolds in practice. And the ways extending practices and moving objects across different empirical sites and domains generates new knowledge and governance possibilities, as each chapter in this book showed. Studying how potential threats from around the world are collected, transported and sedimented through the technology of the list to enable global terrorism to be calculated and governed, shows how new regimes of global power are constructed and made durable through diffuse translation practices that operate underneath the radar of formal law and authority. When the list is reformatted and made interoperable with PNR data, moreover, it does not stay the same. Changing the material conditions and practices through which the list performs its security work changes the list as well – or rather, renders it multiple - and opens new avenues of intervention.

If power and agency are effects of such practices - and not only effects of institutional authority - then the politics of translation and the agency of governance technologies needs to be rigorously examined. This book has contributed to this task by studying the ways things (like lists and formats and inscription practices) make global security law and governance possible and by arguing that we need to not only study the Law but also the conditions of emergent causality. Michel Foucault showed us that the state was constituted 'on the basis of multiple and very diverse processes which gradually coagulate[d] and form[ed] an effect' – that is, through governmental practices.<sup>34</sup> Timothy Mitchell has shown how 'the economy did not come about as a new name for the processes of exchange that economists had always studied' but rather through 'the reorganization and transformation of those and other processes into an object that had not previously existed'.<sup>35</sup> This book has sought to bring something similar to the study of global security law and governance by deepening our understanding of what difference the technology of the list can make.

(v) Pre-emptive Security Logics and Novel Rearrangements of Legal Practice

This book has analysed the Al-Qaida listing regime to better understand how pre-emptive security logics affect conventional legal practices and principles when the two inevitably come into conflict. There has been little empirical study on how law is transformed through countering unknown risks and future threats. Most accounts suggest that pre-emption is supplanting liberal principles of legality and that we need a new jurisprudence of Future law to grapple with the problems that it generates.<sup>36</sup> The prevailing assumption - in sociology, criminology, and critical security studies - is that law is receding in the face of radically uncertain risks. This has led to calls to defend liberal legality and the rule of law from undue encroachment by pre-emptive security politics.

As a human rights lawyer who has represented targeted individuals in this domain I am sympathetic to the argument that legal protections of listed persons ought to be

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for Theory' (2009) 18(2) *Social and Legal Studies* 139; Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013).

<sup>34</sup> Michel Foucault, *Security Territory, Population: Lectures at the College de France 1977 – 1978* (Palgrave, 2007) 248.

<sup>35</sup> Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press, 2002) 5.

<sup>36</sup> See, for example: Lucia Zedner, 'Preventative Justice or Pre-Punishment? The Case of Control Orders' (2007) 60(1) *Current Legal Problems* 174.

strengthened. As discussed in chapter 3, for example, in my experience the Ombudsperson mechanism is not a form of 'de facto judicial review' that allows for 'fair and clear procedures' as is often suggested, but an experiment in global exceptional governance more akin to a postmodern Star Chamber of our times. Yet as I have shown throughout this book, pre-emption is not supplanting existing legal practices and principles so much as rearranging them into novel hybrids and amalgams. In chapter 4, for example, we saw how EU judges changed their procedural rules to handle intelligence-as-evidence for the first time. We observed how the future-orientated mosaic epistemology of the list and ordinary retrospective processes of judicial proof were becoming comingled into new knowledge production practices in order to judicially review the list. Moreover, the outcome of this process is not something pre-ordained but rather more contingent and uncertain. Global security law is certainly putting principles of liberal legality into motion. But it is stimulating processes of legal reordering - new ways of assessing intelligence-as-evidence (chapter 4), novel mechanisms for reviewing listing decisions and bringing IOs to account (chapter 3), and new techniques for governing global travel (chapter 2). It is not eroding foundational principles of liberal legality, but modulating them in new ways.

Analysing risk and pre-emption as practices of governmentality, as we have done in this book, helps us chart these novel recombinations and grasp how global security law works as a productive power. It provides a useful antidote to the epochal claims made about law's inexorable disappearance in the face of risk, and prompts us to theorise global security law and governance immanently from the empirical problems and problem-management techniques it is generating. Showing global governance effects to be *contingent* to the problems also underscores the fact that things could be otherwise. The novel practices that are being forged, and that I have highlighted in this study, may end up being critical in enabling new forms of global intervention to become embedded or inconsequential. My broader point here is that if we want to understand global security law we need to empirically examine how it is being materially conditioned. We cannot rely on static models or normative theories to define what global security law is or ought to be. We need to theorise from the empirical problems and fragmented international legal landscape that we are situated within.

(vi) Rethinking the Global Exception

The sixth contribution that this study makes is to rethink the problem of the exception. The Al-Qaida listing regime is formally built upon resolutions of the UN Security Council adopted pursuant to emergency provisions contained in Ch. VII of the UN Charter. As Ch. VII measures, listing decisions cannot be reviewed and they must be strictly implemented by Member States even if they come into conflict with domestic or constitutional requirements. The regime 'provides a ready means by which individual states can make executive decisions with far reaching consequences, apparently unconstrained by domestic judicial review or the international human rights treaties by which they are bound'.<sup>37</sup> Listed individuals are targeted for things that designating states believe they might do in the future and are not afforded any real opportunity contest the allegations supposedly made against them. The listing regime, in other words, functions as a novel form of global exceptional governance- albeit one that does not easily fit in the existing ways that exceptions are understood.<sup>38</sup>

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<sup>37</sup> Ben Emmerson QC, *Report of the Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism*, UN Doc A/67/396 (26 September 2012), 5.

<sup>38</sup> On Chapter VII measures of the UNSC as exceptional, see: Jared Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2007) 6(1) *Northwestern University Journal of International Human Rights* 24; Simon Chesterman, 'Unaccountable - The United Nations, Emergency Powers, and the Rule of Law' (2009) 42 *Vanderbilt Journal of Transnational Law* 1509.

This book has argued that if we want to understand the violence of security governance and the ways that exceptions become the norm in postnational space we need to think more innovatively about how emergency law and politics is unfolding. Instead of looking for 'states' of emergency declared by sovereign decisions and defined by the absence of law, I have suggested throughout this study that exceptions should be studied empirically as processes and networks of relations that are materially and legally assembled, often through relatively banal techniques and security practices. Humanitarians working on 'smart sanctions' and deflecting political critique of the regime (chapter 3); EU court officials developing procedures for judges to handle secret intelligence-as-evidence (chapter 4); security experts creating new techniques for translating 'global terrorism' into novel fields of intervention and global aviation officials trying to implement the list by forging new far-reaching techniques for pre-emptively targeting 'inadmissible passengers' (chapter 2). On their own, each of these examples may not amount to much. But when sutured together as an assemblage of co-functioning elements, I argue that we can see a variegated topology of global exceptional governance emerging. One that is provisional and diffuse yet dense, jurisgenerative and powerful.

The adverse effects of global governance are often framed as deficits of (democratic) accountability. But in the global security domain - where security actors work secretly through opaque transnational networks and IOs to target individual terrorism suspects in ways that may be unlawful or unconstitutional if pursued domestically - democratic deficit discourse cannot adequately capture the politics of what is at stake. As the Edward Snowden revelations plainly revealed, we desperately need new ways of conceptualising global emergency rule - not only in relation to global mass surveillance, but also with other transnational security arrangements like targeted killing, counter-radicalisation governance and global terrorism listing regimes. Human rights advocates, civil libertarians and those seeking to challenge the global war on terror usually think and act within their own national jurisdictional silos. But global security governance traverses and redefines these boundaries and works diffusely, beyond the reach of any one particular jurisdiction or site of control.

I argue that reframing exceptional governance as assemblages of relations can help us to rethink global emergency rule and open up potential new avenues of contestation. This book makes three contributions to that project. First, it shows how uncoupling the exception from sovereignty allows us to better analyse how *global* emergencies unfold. With their shared emphasis on national sovereign decision, neither Schmitt nor Agamben (nor the bodies of emergency scholarship they have spawned) offer much help in thinking through postnational exceptional politics. If we are always looking for 'decisions' then we easily miss how exceptions are forged through *practice*. But when we analyse the practices that 'make a difference' in any given domain - that is, if we take an assemblage approach to agency in global security governance - a more dynamic and textured field of exceptional law and politics emerges.<sup>39</sup> I have argued in this study that analysing how such fields are stabilised and stretched is critical for understanding how exceptions are materially reproduced.

Second, foregrounding assemblage practices in this way allows us to see how the well-intentioned activities of different actors situated at different sites and scales can work together to produce dangerous results. As I have shown throughout this book, exceptions aren't just effects of sovereign rule. Different actors working in good faith to resolve problems of list administration have forged new techniques that enable the listing regime to grow in novel and inventive ways. Judges, technical experts, academics have all engaged the

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<sup>39</sup> According to Latour, an actor or actant is any thing that 'makes a difference': 'The questions to ask about any agent are simply the following: does it make a difference in the course of some other agent's action or not?' – Latour (n 22) 71.

list with good intentions. But the problem-management techniques and practices they have constructed have allowed the list to evolve into new amalgams and made these actors important conduits of exceptional governance. So thinking about the exception as something globally assembled has the advantage of prompting us to look for emergency politics in unexpected places and asking different sorts of research questions: How are the techniques and practices being constructed to resolve particular security problems embedding new forms of pre-emptive security? How are sites of contestation and challenge to global security regimes neutralised or muted to make them more durable or achieve more effective results? How are different domains brought together into productive relation or rendered commensurable in ways that enable emergency powers to become more entrenched, transform and grow? Asking these kinds of assemblage questions opens the exception up as a problem that needs investigation.

Finally, this approach helps us think about the exception in material, rather than normative, terms. Most legal scholarship on the state of exception aims to identify the legal limits or constraints that ought to be used to properly contain emergency rule. The key question pursued in that work is how to reconcile and balance illiberal security governance with liberal principles of legality. This work is interesting from the perspective of normative theory, but it does not sufficiently enhance our understanding of how global exceptional governance unfolds and might be challenged in practice. What we need, in other words, is to rethink problems of exceptional governance more concretely. This book contributes to this task and adds to the growing body of scholarship analysing emergencies *empirically* through the material effects and practices they produce. In chapter 4, for example, we saw how the spatiotemporal dynamics and epistemic qualities of the list constructed a global exception. We analysed how the use of intelligence-as-evidence and dis-location of decision-making worked together to make the list globally powerful yet substantively baseless and beyond the scope of judicial review. That is, empirically analysing the dynamics and material conditions of the list produced a more textured account of how it works to enact new forms of exceptional governance. As I have shown throughout this book, global exceptions are not lawless black holes, but saturated and conditioned by legality. To paraphrase Walter Benjamin, we must attain to a conception of global legality that is in keeping with this insight.<sup>40</sup>

### From Al-Qaida to ISIL: The Global Law of Endless War

This study began in 2011 shortly after Osama bin Laden was killed by US Special Forces in Pakistan. At that time, there was speculation that Bin Laden's death and the weakening of 'Al-Qaida central' might prompt post-9/11 legal measures aimed at countering Al-Qaida to be wound down. The global war on terror, so the argument went, had now realised its key objectives. So the state of emergency used to fight that war could finally be brought to an end and a state of normality could be restored.

Two weeks after Bin Laden's death, however, the Security Council issued a press release making it plain that the Al-Qaida sanctions regime would be continuing on regardless. According to Peter Wittig, then chair of the UN1267 Sanctions Committee, whilst Bin Laden's death was a turning point 'it is neither the end of Al-Qaida nor the end of terrorism'.<sup>41</sup> As I have suggested in this book the Law of the List will never be wound down. It is a unique global counterterrorism tool with the enduring capacity to align the Security Council P5 states against a diffuse yet common enemy. Because the list defines and produces the object of global terrorism that it targets, it has a plasticity that allows it to be radically transformed and modified to fight emerging global security threats in the years ahead. It is not driven by

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<sup>40</sup> Walter Benjamin, *Illuminations* (Random House, 1968) 266.

<sup>41</sup> UN Doc. SC/10252 (dated 16 May 2011).

meeting objectives or other instrumental criteria like other policy measures. The Law of the List is now solidified as a permanent exceptional feature of the global security law landscape.

In May 2013 the UN Security Council quietly amended its listing of Al-Qaida in Iraq (AQI), first designated in October 2004, to include two new AKA's: Al-Nusrah Front for the People of Levant (ANF) and the Islamic State in Iraq and the Levant (ISIL).<sup>42</sup> The following year this listing was modified again to separate AQI and ANF into two distinct entries.<sup>43</sup> So by the time the Security Council adopted Resolution 2170 in September 2014, the two groups controlling much of Syria and Iraq had already been listed by the UN1267 Sanctions Committee as being 'associated with' Al-Qaida. In December 2015 the 1267 regime was formally renamed the 'ISIL (Da'esh) & Al-Qaida Sanctions List'.<sup>44</sup> So via minor list modifications undertaken incrementally over a two-year period, the global war against Osama bin Laden and Al-Qaida was repurposed to combat a new threat and enemy of humanity: the movement of foreign terrorist fighters (FTFs) from around the world joining ISIL and ANF in Syria.

Many of the measures introduced to combat foreign terrorist fighters stretch and reorder features of the Al-Qaida list. As we saw in chapter 2, for example, the travel ban on listed individuals (long criticised for being wholly ineffective) is now being recalibrated to build a 'third hurdle' to stem the flow of FTF travel. The threat of ISIL is opening up new avenues for the Law of the List to grow and constituting new domains to secure and govern. In 2006 – 2007 the US sought to extend the list to target Islamists providing ideological support to terrorism through the 'radical ideologue initiative'.<sup>45</sup> But countries trying to co-opt radical imams and turn them into informants or monitoring radical forums to map potential terrorist networks and undertake sting operations were worried that listing extremists as global terrorists and de facto members of Al-Qaida would prove counterproductive.<sup>46</sup> Yet the new global regime against foreign terrorist fighters conflates these targeting categories. Being 'associated with' Al-Qaida for the purposes of UN terrorism listing, for example, now extends to include those who express support for ISIL and the movement of FTFs on the internet and social media.<sup>47</sup> The distinction between extremism and terrorism, or material and ideological support, is being actively dismantled.

This book has analysed the UN Al-Qaida list at a particular historical conjuncture, but the insights it develops can help us navigate the fragmented terrain of global security law and governance more broadly. The war against foreign terrorist fighters is authorising new forms of expertise, generating new mechanisms of informal governance and novel re-combinations of pre-emptive security and legality. Yet the Law of the List remains the standard-setter for delimiting what kind of security governance is possible in this area. And a precedent that shows how powerful global measures rendering uncertain future threats amenable to intervention in the present can be built and sustained despite ongoing legal conflict and political tensions. If the global war on terrorism is indeed an endless war and the Law of the List a permanent exception within it, then this ethnographic study and experiment in historical ontology aspires to offer readers something forensically valuable and politically generative - both in present and the years ahead.

I came into this study as a disenchanting human rights lawyer eager to know how this form of global security law might be challenged. This book hasn't given a silver bullet answer to that

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<sup>42</sup> UN Doc. SC/11019 (dated 30 May 2013).

<sup>43</sup> UN Doc. SC/11397 (dated 14 May 2014).

<sup>44</sup> S/RES/2253 (2015), Preamble.

<sup>45</sup> See, for example: US Embassy Cable 06PARIS5732 (dated 25 August 2006).

<sup>46</sup> See, for example: US Embassy Cables 07RIYADH305 (dated 13 February 2007), 06ROME1708 (dated 7 June 2006) and 06RIYADH8416 (dated 24 October 2006).

<sup>47</sup> S/RES/2178 (2014), para. 18.

question. But it has deepened our understanding of the Al-Qaida list. It has provoked us to 'experience the international legal field afresh' by studying how this domain of global security law is assembled.<sup>48</sup> And by providing a granular empirical account of legal conflict and change it has allowed us 'to acquire a new "feel" for the political possibilities' within it.<sup>49</sup> As Michel Foucault reminds us, 'the role for theory today ... [is] not to formulate the global systematic theory which holds everything in place, but to analyse the specificity of mechanisms of power, to locate the connections and extensions [and] to build little by little a strategic knowledge'.<sup>50</sup> This book is an experiment in strategic knowledge production and an invitation for more situated and critical forms of global legal analysis.

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<sup>48</sup> Johns (n 33) 27.

<sup>49</sup> *Ibid*

<sup>50</sup> Foucault (n 26) 145.