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The Law of the List

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The Law of the List: Summary (English)

The United Nations was first created after World War II as an intergovernmental organisation of states. Economic sanctions were conceived as political measures for disciplining recalcitrant states deemed threats to international peace and security. They offered a means of intervention ‘between words and war’¹ for the Council to ‘deter individual states from taking matters into their own hands’.² But with the end of the Cold War the Security Council began governing the transboundary threats of terrorism for the first time. And the UN collective security system was re-orientated away from inter-state war towards targeting suspected nodes in diffuse global terrorist networks.

After the 1998 Al-Qaida attacks on US embassies in Kenya and Tanzania, the Security Council adopted Resolution 1267 (1999) which required all states to ‘freeze the funds and other financial resources, either directly belonging to or indirectly benefitting, the Taliban’.³ The original aim was to pressure the Afghan regime to extradite Osama bin Laden. To facilitate this, a Sanctions Committee was set up - composed of the permanent members of the Security Council - to draft and administer a list of individuals and entities associated with the Taliban. After the bombing of the USS Cole in Yemen in 2000, the regime was broadened to anyone deemed ‘associated with’ Osama bin Laden or Al-Qaida.⁴ Following the 9/11 terrorist attacks in 2001, the need for any geographic connection with Afghan territory was removed, allowing the sanctions to be applied to *whoever* was listed *wherever* they were located in the world. Time-limits were abolished, allowing listing decisions to be applied for an unlimited duration.⁵ Within three years the UN Al-Qaida list was radically repurposed into a pre-emptive legal weapon for disrupting global terrorist networks and their supporters worldwide, with unprecedented powers (temporally and spatially unlimited in scope) for the Council to target individual terrorism suspects using secret material allegedly showing ‘association with’ Al-Qaida.

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

The core research questions of this study include the following: How does the Al-Qaida list work as form of global security law and governance? What kind of global law is it and how is it being made powerful? How does global security listing enable the Security Council’s power to emerge, congeal and grow? How, in other words, is ‘the global’ in global security law produced? Is the list altering national and international legal orders - if so, in what ways and

¹ Peter Wallensteen and Carina Staibano (eds.) *International Sanctions: Between Words and Wars in the Global System* (Frank Cass, 2005)

² Jeremy Greenstock ‘The Security Council in the Post Cold-War World’ in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds.) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2010) 248.

³ S/RES/1267 (1999), para. 4(b).

⁴ S/RES/1333 (2000), para. 8(c).

⁵ S/RES/1390 (2002)

with what effects? Does it easily inhabit the inter-state and international legal system or depart from it – and, if so, what alternative frameworks might we use to describe it and understand the problems it poses? How is the global governance of trans-boundary problems like terrorist networks changing the role of expertise in international law and decision-making? And what can UN terrorism listing practices tell us about how law and collective security is transforming under conditions of globalisation?

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

The aim of this book is to open up novel ways of thinking about global security law and governance by providing a detailed sociolegal account of the listing assemblage in motion. The book is structured around three empirical chapters that examine the listing assemblage from different sites. Each chapter engages with a particular problem and traces how it is negotiated by a range of different actors to help me address the key research questions. There is no overarching narrative linking the different parts into a coherent whole, but key concepts run transversally across the text and are iterated at the different sites under study. The book is primarily written as a global law text with a focus on the politics of counterterrorism. But it aims to have interdisciplinary appeal for those interested in sociolegal studies, global governance and human rights, STS and sociology of knowledge, the 'practice turn' in international relations, ethnographies of globalisation, humanitarian governance, international and transnational law, and critical security studies.

Chapter 1 introduces the scope of this study and sets out my key research questions, as outlined above. It explains how I first came to this research project as a human rights lawyer representing people on the Al-Qaida list and why I wanted to understand this novel domain of global law as a form of *productive* power. After highlighting the limitations of existing legal scholarship on this issue, I introduce the three key analytical moves of this book - studying global law as a legal assemblage, examining risk and pre-emption as practices of governmentality, and rethinking the problem of exceptional governance. The introductory chapter also positions this book as a methodological experiment in situated knowledge production. Drawing on Science and Technology Studies (STS) scholarship, I argue that methods are performative. They enact and interfere with the worlds they describe and so are intensely political. This leads to a discussion about how my own positioning within this assemblage as a practising lawyer conditions and shapes my findings. But rather than trying to discount this as something that detracts from the veracity of the study, I argue that my background as a practitioner and advocate within the listing regime helps to develop new insights and foster a research ethic of situated engagement. Three distinct methodological moves of this book are also highlighted - studying the list as a multi-sited research object and the global as 'an emergent dimension of arguing about the connection between sites';⁶

⁶ George E. Marcus, 'Ethnography in/of the world system: The emergence of multi-sited ethnography' (1995) 24 *Annual Review of Anthropology* 95, 99.

empirically examining the role of *practices* in global security law and governance; and using leaked documents to assemble my research fields and study a domain of global law that would otherwise be obscured in secrecy.

Chapter 2 focuses on the UN1267 Al-Qaida Analytical Support and Sanctions Monitoring Team - an expert group supporting the Sanctions Committee (made up of the Security Council P5 states) to administer the list. This chapter engages with the practical problem of how to target 'global terrorism' - an issue that has eluded all earlier attempts at definition and that is shrouded in political and epistemic uncertainty. Drawing from actor-network theory and governmentality scholarship, I show how the technology of the list itself plays a crucial role in rendering this elusive problem governable - by building a 'global optic' for seeing dispersed terrorist networks and ordering an otherwise dis-organised global threat. I analyse the practice of UN listing experts engaged at two specific sites - in 'consultation meetings' with national security and intelligence officials directed at populating the list with potential targets and in collaboration with experts from other international organisations to make the list interoperable with global policing data (Interpol) and the passenger data held by the global aviation industry (ICAO and IATA). These seemingly innocuous technical practices that aim at better implementing the list have escaped academic attention. But this chapter shows how analysing expert knowledge practices can reveal important insights into how global security law is being made into something powerful, durable and global. If we are interested in understanding how new forms of global administrative violence are forged in the shadows of formal law and the Security Council's Chapter VII authority, then empirically studying the techniques and practices of listing expertise is something critically important.

Chapter 3 shifts the focus to the enduring problem of accountability in global governance and follows what happens when UN sanctioning powers originally designed to discipline recalcitrant states deemed threats to international peace are recalibrated to directly target individuals suspected of being nodes in global terrorist networks. It provides a detailed genealogical account of the emergence of the UN1267 Office of the Ombudsperson - a novel procedural mechanism created by the Security Council in 2009 to provide redress to listed individuals who believe that they have been wrongly targeted. This conflict about 'fair and clear procedures' in Security Council sanctions has animated the Al-Qaida listing regime since its inception. All the key actors across the listing assemblage debated this critical issue for the better part of a decade. Whilst there is still disagreement as to whether the Ombudsperson goes far enough to protect due process rights, everyone tends to agree that it is an important step in the right direction towards greater human rights compliance.

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

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

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

The conclusion of the book draws together the key findings of this project and points the way ahead toward global security problems that require further investigation and research. In my analysis pre-emptive security is not supplanting existing legal practices, but rather reorganising them in novel ways that demand empirical attention if we want to understand how global security law is governing the uncertain future threats of terrorism in the present. Global security law is not the brave new world that many lawyers claim it to be. It is something far more fragmented, heterogeneous and complex. Securing the world from trans-boundary terrorist threats is transforming domestic and international legal ordering in far-reaching ways and consolidating new forms of exceptional governance. This book maps these transformations and provides a detailed forensic account of global emergency law in motion. It doesn't end by spelling out a corrective program of legal or political reform. But I argue that showing how security problems are being governed and global legal regimes assembled through the list is an important critical project in its own right. It brings the economies of power and conditions of possibility of the list to the analytical surface, shows them as something historically situated and contingent and offers insights into how things might be made otherwise. It is an approach that aims to offer what Michel Foucault calls a 'historical ontology of ourselves' - where 'the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them'.⁷

⁷ Michel Foucault, 'What is Enlightenment?' in Paul Rabinow (ed.) *The Foucault Reader* (Pantheon Books, 1984) 50.