The United Nations (UN) was created after World War II as an intergovernmental organisation of states. The constituent instrument that created the UN and gave the Security Council its enforcement powers (the UN Charter) reflects this state-centred focus. The collective security provisions that empower the Council to determine threats to the peace and decide what enforcement action to take were aimed at preventing interstate war. 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’ for the Council to ‘deter individual states from taking matters into their own hands’. Because they are imposed under Chapter VII of the UN Charter, sanctions must be implemented by all states. This extraordinary power was to be limited to specific and concrete threats. When threats receded, the sanctions would be withdrawn.

With the Security Council in stalemate during the Cold War these powers were rarely used. During the first forty-five years of the UN’s existence, sanctions were only imposed twice. It was only with the post-Cold War political consensus in the Council that the potential of this powerful global tool began to be innovatively developed and explored. During the 1990s, UN sanctions were issued against Iraq, Libya, Angola, Liberia, Somalia, the former Yugoslavia, Sudan, Cambodia, Rwanda,

---

5 Rhodesia (S/RES/232 (1966)) and South Africa (S/RES/418 (1977)).
Sierra Leone and Afghanistan. What were considered ‘threats to international peace and security’ capable of justifying Council intervention were elastically reinterpreted – with sanctions imposed for promoting human rights, restoring democratic leadership and furthering arms control.\(^6\) Non-state actors were targeted for the first time, reorientating the interstate focus of collective security. UN sanctions also started being triggered by domestic violations internal to states – encroaching on the sphere of state sovereignty long deemed the foundational and inviolable principle of world order.

This global governance activism ushered in a new rationale for security intervention based on ‘global law and community values rather than international peace per se’ and facilitated the Council’s governance of terrorism as a novel threat.\(^7\) After the 1998 Al-Qaida attacks on US embassies in Kenya and Tanzania, the Council adopted Resolution 1267 (1999) which required all states to ‘freeze the funds and other financial resources, either directly belonging to or indirectly benefitting, the Taliban’.\(^8\) The original aim was to pressure the Afghan regime to extradite Osama bin Laden and stop providing ‘safe haven’ to members of Al-Qaida. To facilitate this, a Sanctions Committee was set up – composed of the permanent members of the Security Council – to draft and administer a blacklist of individuals and entities associated with the Taliban. After the bombing of the USS Cole in Yemen in 2000, the Council broadened the scope of the regime to anyone deemed ‘associated with’ Osama bin Laden or Al-Qaida.\(^9\) According to the Committee: ‘A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature’.\(^10\) In other words, listed individuals are not targeted for acts they have done but for things designating states believe they might do in the future.

After the 9/11 terrorist attacks in 2001 the ‘global war on terror’ began on many fronts. States passed draconian emergency legislation, massively expanded executive powers and engaged in preemptive


\(^8\) S/RES/1267 (1999), para. 4(b).


security actions that undermined constitutional protections at home and disregarded human rights abroad. ‘America’, we were told, ‘will never seek a permission slip to defend the security of our country’.¹¹ From the indefinite detention of ‘enemy combatants’ in Guantanamo Bay and extraordinary rendition of suspects to secret black-sites around the world to the torture and abuse of prisoners at Abu Ghraib and the military invasions of Iraq and Afghanistan, the world was given an unequivocal message by the USA and its allies: ‘Either you are with us or you are with the terrorists’.¹²

Yet, despite all this unilateralist rhetoric, the most far-reaching legal developments in the global war on terror developed from the UN Security Council. New binding resolutions required states to change their laws to criminalise terrorism and terrorist financing, effecting a fundamental ‘change in the legal bases of state action’.¹³ The Council was transformed from an executive policing body into a new global legislator, ‘imposing general and permanent obligations on states . . . not tied to any particular conflict’.¹⁴ After 9/11 the Al-Qaida listing regime was altered into something that bore little resemblance to the UN sanctions of the past. The need for any geographic connection with Afghan territory was removed, allowing the sanctions to be applied to individuals wherever they were in the world. Time-limitations were abolished, allowing listing decisions to be applied for a potentially unlimited duration.¹⁵ Within three years the UN1267 list was radically repurposed into a preemptive legal weapon for disrupting global terrorist networks and their perceived supporters worldwide, with unprecedented powers (temporally and spatially unlimited in scope) for the Security Council to target individual terrorism suspects using secret material suggesting potential ‘association with’ Al-Qaida. In 2015, the list was extended once more to target the Islamic State in Iraq and the Levant (ISIL).¹⁶

---

¹² George W. Bush, ‘Address to Joint Session of Congress and the American People’ (21 September 2001). Available at: cnn.it/2JigZeY.
This book critically examines the UN ISIL and Al-Qaida listing regime as a novel form of global security law. It shows how the list works as an ordering device to render the uncertain future threats of global terrorism amenable to legal intervention in the present. I argue that the Law of the List is radically altering the relationship between national and international law and is best understood as a global legal assemblage. It is also generating new knowledge practices, governance techniques and mechanisms of preemptive security that are reconfiguring how legality works at a granular level. Understanding how law is transformed through globalisation, or how the governance of uncertainty transforms legal practice, requires grappling with the politics of expertise and seemingly mundane technical practices of problem management. Studying global security law empirically from the local sites that it inhabits provides a more dynamic and nuanced account of emergency in motion.

I first came to this research project as a practising human rights lawyer. In 2010 I moved to Germany to work with an international human rights Non-Governmental Organisation (NGO). Whilst there I wrote a public report on terrorism blacklisting and fundamental rights. That initial research opened my eyes to how radically the international legal order was being altered in response to the 9/11 attacks and how far-reaching and exceptional the UN Al-Qaida sanctions regime was. The UN Security Council was developing a unique global legal weapon that made individual terrorism suspects ‘effectively prisoners of the state’ without any political or legal redress. After that report circulated, I was contacted by a Tunisian migrant rights organisation in France to provide legal advice to some listed individuals about their rights. After interviewing these men and learning more about their stories I decided to take their cases on. Together with a network of legal volunteers specifically assembled for the task, we engaged in the lengthy task of preparing and filing delisting applications to the UN1267 Office of the Ombudsperson. Four applications were filed over a four-year period, all resulting in delisting. Since then, more clients have been delisted and more targeted individuals have asked for our assistance.

This experience of working closely with listed individuals on these cases helped me see first-hand how unjust this regime of preemptive security governance is. People were being targeted on what appeared to be little or no grounds at all. And the consequences of being listed are incredibly severe. It is difficult, if not impossible, to work or rent a house.

Your finances are either frozen or under the personal control of appointed central government officials. You cannot travel. And it is a criminal offence for anyone to give you money to help you get by. To be listed is to be subjected to powerful new techniques of 'financial warfare'. One official has likened the effect to a ‘civil death penalty’.

Once you are listed as a member of Al-Qaida, everyone from the local police chief to immigration officials disrupt your life and make it as difficult as possible. In Italy (where my clients lived) listed individuals could take up employment and earn a small amount of money to survive. But regular workplace visits and harassment from intelligence officers ensured that no one could keep down a job for long (‘did you know you are employing a terrorist?’). Clients were told by intelligence officers that their listing might be discontinued only if they agreed to act as informants in their communities for the security services. All had been through criminal proceedings many years before and had been acquitted of international terrorism charges, and so were confused as to why they were being accused again. After reviewing the US Embassy cables released by Wikileaks, I found that even the state that listed them had reviewed their cases years before and concluded there was ‘insufficient grounds’ to keep them designated. And yet here they were, many years later, targeted by the UN Security Council as members of the Al-Qaida global terrorist network. With no real possibility for legal redress and – without pro bono legal advice – likely to stay preventatively targeted forever.

Some might say this is simply the political price to be paid for preempting potential terrorist attacks. That there will always be ‘false positives’ in the global war against terror; that you can’t make an omelette without cracking a few eggs. The ‘one per cent doctrine’ that gained currency with policymakers after 9/11, for example, stipulated that even ‘if there is a one per cent chance of an event coming due’, states needed to ‘act as though it were a certainty’.

Intervening early on uncertain knowledge is how low probability–high consequence risks like global terrorism must be governed. It requires throwing a deliberately broad net

---

20 This process is discussed in more detail later in Chapter 3.
and avoiding what one US Treasury official referred to as ‘paralysis by analysis’ by getting too bogged down in the legal details of individual cases. In the aftermath of 9/11, moreover, governments needed to show demonstrable results. And terrorism listing enabled precisely that. In what was dubbed the 'Rose Garden strategy', the White House held press conferences every two weeks to announce new listings and show the counterterrorism progress it was making. This strategy prioritised ‘speed of designation, number of designations and amount of money blocked’, not preparing strong evidence to justify the listings. It was almost comical’, said former US Treasury General Counsel David Aufhauser, ‘we just listed out as many of the usual suspects as we could and said. “Let’s go freeze some of their assets”. Scores of people (mostly Tunisians and Algerians) were hastily added to the UN list without scrutiny or debate. As Thomas Biersteker put it, the political mood was one of global sympathy and blind trust: ‘if the US wanted a designation made, so the logic went, it must have good reasons’.

But for constitutional and human rights lawyers all of this was rather difficult to stomach. The ISIL and Al-Qaida list blatantly violates basic tenets of what most lawyers in the common law world understand to be due process, the rule of law and the protection of fundamental rights. One Canadian Federal Court judge likened the experience of listed persons to that of Josef K in Franz Kafka’s novel The Trial who ‘awakens one morning and, for reasons never revealed to him . . . is arrested and prosecuted for an unspecified crime’. In its landmark Kadi decision in 2008 – arguably the most powerful rebuke of the Security Council’s authority ever made by a regional court – the European Court of Justice (ECJ) tried to remedy these deficiencies by affirming that individuals have the right to be told the reasons why they are listed, and the EU must respect fundamental rights when implementing UN targeted sanctions.

22 Zarate, Treasury’s War, p. 36.
26 Abdelrazik v. Canada (Foreign Affairs) 2009 FC 580, para. 53.
before the English High Court of Justice and the UN1267 Office of the Ombudsperson I am acutely aware of their differences and the procedural protections that UN listed individuals don’t have. And yet what became equally clear through my legal practice was that human rights discourse was unable to effectively speak to and challenge the novel form of global security law and governance that was emerging here.

Thinking about the list through the lens of human rights – as much of the legal literature on this issue does – allows us to see what it is not. It is not compatible, for example, with the right to fair trial and the right to effective remedy. But that still only shows us a very thin sliver of what the Law of the List is. And it tells us little about how this novel form of preemptive security is reproduced and expanded into new domains.
despite years of human rights litigation in the courts. ‘Non-legality’, as Fleur Johns reminds us, ‘is more than the flip side or remainder of international legal work. Rather, non-legality is, in its own right, a central structuring device of international legal thought and work’.  

That is, if we want to understand what this listing regime is and critique its modes of operation and administration of violence, we need to understand how it works as a global-ordering device; not just define it normatively and negatively in terms of what it lacks, but grasp it as what Michel Foucault calls a ‘positive present’ – a form of productive power analysed through the effects, practices, techniques and ‘methods of subjugation that it instigates’.  

These were the experiences that provided the initial impetus for this study and give shape to its core research questions: how does the ISIL and Al-Qaida list work as a form of global security law and governance? What kind of global law is it, and how is it being made powerful? Existing accounts, as we discuss below, take the Security Council’s authority for granted. How do the practices of global security listing enable that power to emerge, congeal and grow? How, in other words, is the global in global security law produced? Is the list altering national and international legal orders – if so, in what ways and with what effects? Does it inhabit the interstate and international legal system or depart from it, like other transnational governance regimes? And if it exits existing normative frames, what alternative frames might we use to describe it and understand the problems it poses? How is the global governance of transboundary 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 ISIL and Al-Qaida list isn’t just a novel form of global law. It is also a weapon of preemptive warfare. Whilst the turn towards preemption and exceptional governance in contemporary security has been widely examined, the implications of this shift for legal practice are inadequately understood. So, this project also studies the ISIL and Al-Qaida list to understand what happens to legality when it gets tangled up with preemptive security logics and orientated towards the governance of uncertain future threats. How are preemptive security measures like the list


1.1 Four Walls of Scholarship

Given the relative novelty of this form of global security law and the conflicts it has created in the courts, a vast body of legal literature on the UN1267 sanctions regime has emerged. This scholarship is dominated by four key theoretical approaches to postnational law and governance: global constitutionalism, global legal pluralism, global administrative law and international regime theory.

Global constitutionalism suggests that governance beyond the state ‘should be confined by a set of constitutional principles analogous to those developed in the national constitutional context’. 30 It seeks to

order the fragmentation of international law through *containment* via a constituent instrument (like the UN Charter) or through the *transfer* of core domestic constitutional principles such as the rule of law, separation of powers and human rights compliance.  There are at least three different strands of constitutionalist literature on this issue. *Strong constitutionalists* study the list from the apex of the international system (the UN) and stress the conventional hierarchy of legal rules in resolving disputes between normative orders. *Soft constitutionalist* approaches are founded on the ‘assumption of an international community’, an ‘emphasis on universalizability’, and focus on ‘common norms or principles of communication for addressing conflict’ rather than the formal hierarchy of legal rules. In this literature, regime conflicts between different legal orders (like the European Union (EU) and UN) can best be resolved through mutual interaction and a common commitment to shared normative principles (such as respect for the rule of law). *Solange*-based approaches claim the deficiencies of this global listing regime ought to ultimately be resolved at the UN level. But until sufficient procedural protections are put in place there, indirect review by national and regional courts – and the ‘constitutional conversation’ it stimulates – is both justified and necessary.


35 This approach is modelled on the Solange jurisprudence of the German Federal Constitutional Court. In Solange I the court held it could review the constitutionality of EC law so long as EU institutions had not enacted a binding charter of rights consistent with the German Basic Law (*Grundgesetz*). In Solange II the court decided to no longer assert this competence because the ECI provided a level of fundamental rights protection equivalent to the *Grundgesetz*. See BVerfG 29 May 1974, BVerfGE 37 at 271 (Solange I) and BVerfG 22 October 1986, BVerfGE 73 at 339 (Solange II).