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Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise

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Abstract

Security measures taken in the name of the 'war on terror' have frequently been understood to operate through a domain of exception, defined as an extra-legal space of intervention where normal rules of juridical protection and due process are suspended. Yet whilst most analyses of the exception are critically reliant on notions of legal threshold, they are largely dismissive of the potentially productive nature of legal contestation. This article inquires into the dynamic confrontation between law and exception in the context of the UN 1267 sanctions system, focusing on the Office of the Ombudsperson as an institutional experiment designed to remedy the fundamental rights deficiencies of the regime. Drawing on Agamben's analysis of the exception as a 'hybrid space' and Dyzenhaus's concept of the 'legal grey hole', our analysis of the Ombudsperson demonstrates the emergence of novel, hybrid procedures and evidentiary standards being deployed in the 1267 delisting process. First, we assess the Ombudsperson's logics of decision-making and argue that their appeals to fairness hinge on the production of a temporal chasm that legitimizes the deployment of intelligence material in listing cases. Second, we show that the Ombudsperson is in the process of carving out novel evidential standards that are more attentive to notions of inference and speculation than conventional standards of proof. These standards serve to fortify the use of sanctions as a pre-emptive security measure and do not, in principle, appear to exclude material that may be obtained by torture.

Key words

exception; pre-emption; targeted sanctions; UN 1267 Ombudsperson; terrorist listing

1. Introduction: the paradox of legitimacy

The security measures taken in the name of the 'war on terror' have frequently been understood to operate through a domain of exception, defined as an extra-legal space of intervention where normal rules of juridical protection and due process are suspended.[1] The operative mode of such exceptional security politics post-9/11 can be understood through the lens of pre-emption or precaution, whereby legal

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1 G. Agamben, *The State of Exception* (2005); J. Edkins, V. Pin-Fat, and M. Shapiro (eds.), *Sovereign Lives: Power in Global Politics* (2004).

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protections are circumvented in the name of an extraordinary urgent, if largely unknowable, threat.[2] For Giorgio Agamben, whose thinking on this subject draws heavily on the work of Carl Schmitt,[3] the 'state of exception' – enacted through measures like indefinite detention of so-called enemy combatants and the establishment of military tribunals in Guantánamo Bay – is 'not a special kind of law (like the law of war)' but entails 'a suspension of the juridical order itself', thus defining 'law's threshold or limit concept'.[4]

Despite a number of well-founded critiques of conceptualizations of the exception, Agamben's formulations offer an attractive and important template to understand contemporary extraordinary security measures. Agamben's exception enables a critique of illiberal practices as the 'limit condition and constitutive threshold' of contemporary societies rather than the re-emergence of archaic forms.[5] This paper deploys Agamben's analysis of the exception as a legal threshold and 'hybrid space' in order to analyse the UN 1267 targeted-sanctions regime as an exceptional security measure. At the same time, we find Agamben to be largely dismissive of the potentially productive nature of legal conflict, challenge, and determination. As Humphreys has noted, the 'importance of the judiciary' is largely absent from Agamben's account – even if legal contestation has an important bearing on the way in which exceptions concretely take shape.[6] For Agamben, legal challenges and rights claims are posited as hopelessly inadequate in the task of restraining exceptional measures, because they affirm, rather than grapple with, the fundamental biopolitical schism (the production of bare life) that runs through the core of sovereign power.

But when contemporary practices of exceptionalism – and the spaces for the unaccountable exercise of executive power they seek to open up – are subjected to legal challenge, the outcomes are more varied, novel, and productive than Agamben's approach suggests. Audrey Macklin, for example, reflecting on her legal defence and support work with the Canadian Guantánamo detainee Omar Khadr, speaks of the bind that Khadr's lawyers found themselves in when confronted with the exceptional procedures of the Military Commissions at Guantánamo Bay: 'The better they performed, the worse they did', writes Macklin, 'The more zealously they denounced the injustice of the process, the more they proved that the system was just because it provided Omar with zealous defense counsel.'[7] According to Macklin, the work undertaken by Khadr's lawyers and the trial observation undertaken by Human Rights Watch served simultaneously to critique the legal proceedings and

2 C. Aradau and R. van Munster, *The Politics of Catastrophe* (2011); O. Kessler and W. Werner, 'Extrajudicial Killing as Risk Management,' (2008) 39 (2–3) *Security Dialogue* 289; S. Krasmann, 'Law's Knowledge: On the Susceptibility and Resistance of Legal Practices to Security Matters', (2012) 16(4) *Theoretical Criminology* 379.

3 Although Schmitt strongly influences Agamben's work on the exception, a proper review of Schmitt (though deserved) is beyond the limited scope of this paper. For Agamben's reliance on Schmitt, see principally G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), 15–29; and Agamben, *supra* note 1.

4 Agamben, *supra* note 1, at 4.

5 A. Neal, *Exceptionalism and the Politics of Counter-Terrorism: Liberty, Security and the War on Terror* (2009), 96.

6 S. Humphreys, 'Legalizing Lawlessness', (2006) 27(3) *European Journal of International Law* 677, at 684.

7 A. Macklin, 'The Rule of Law, the Law of Men, and the Rule of Force', in J. Williamson, (ed.), *Omar Khadr, Oh Canada* (2012), 226.

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to guarantee their compliance with minimum legal standards, thus legitimizing the procedures and infusing them with a measure of respectability. Legal contestations of exceptionalism therefore remain caught within what Macklin terms a 'paradox of legitimatization'[8] – the more successful juridical critiques and challenges of exceptional security measures are, the more they work to legitimate and modulate those very practices.

Our article takes this dynamic as its starting point and examines what happens when exceptional security measures are challenged and confronted by legal expertise.[9] The paradox of legitimatization, in our reading, entails a productive force that creates novel procedures and measures that we seek to capture with notions of 'hybridity'. Juridical contestations of exceptional security politics result in the emergence of hybrid procedures constituted through what Andrew Neal calls 'novel recombination[s] of already existing ... mechanisms and modalities of power'.[10] In other words, the notion of hybridity here draws attention to the way in which law and exception co-evolve through juridical contestation – carving out new procedures that neither overturn pre-emption nor leave it intact.

We develop this argument by focusing empirically on recent European challenges to the UN 1267 al Qaeda targeted-sanctions regime, which led the UN Security Council to establish (in 2009) a new mechanism for adjudicating delisting decisions: the Office of the Ombudsperson.[11] Whilst much has been written about the Ombudsperson's compatibility with fundamental rights norms[12] there has been no examination of the Ombudsperson as a specific model of legal expertise that produces novel adjudication procedures as an effect of, and foundation for, emergency governance. Given its theoretical debt to Schmitt and Agamben and their emphasis on sovereign decision, most literature on law and the exception takes the domestic sphere as its point of departure. Instead, we situate our analysis of this dynamic within the context of global counterterrorism law – a field increasingly characterized by 'procedural and institutional ambiguity, fragmentation and collision'[13] and a plurality of competing normative orders. This has been described as an 'international state

8 Ibid.

9 L. Amoore, 'Risk before Justice: When the Law Contests Its Own Suspension', (2008) 21(4) *Leiden Journal of International Law* 847.

10 Neal, *supra* note 5, at 124.

11 Unless indicated otherwise (through direct citation), we use the terms 'Office of the Ombudsperson' and 'Ombudsperson' interchangeably throughout this paper to refer to the procedural mechanism for delisting enacted by S/RES/1904 (2009) rather than the individual office-bearer (Ms Kimberley Prost) herself.

12 See, for example, M. Scheinin, Human *Rights/Counter Terrorism: The New UN Listing Regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on Human Rights and Counter Terrorism*, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E; C. Forcese and K. Roach, 'Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads', (2010) 42 *George Washington International Law Review* 217; K. Tünde Huber and A. Rodiles, 'An Ombudsperson in the United Nations Security Council: A Paradigm Shift', (2012) *Anuario Mexicanode Derecho Internacional: Décimo Aniversario* 107; A. J. Kirschner, 'Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?', (2010) 70 *ZaöRV* 585; J. Kokott and C. Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance', (2012) 23(4) *European Journal of International Law* 1015; and D. Tladi and G. Taylor, 'On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting', (2011) 10 *Chinese Journal of International Law* 771.

13 B. Saul, 'Terrorism and International Criminal Law: Questions of (In)coherence and (Il)legitimacy', in G. Boas, W. A. Schabas, and M. P. Scharf (eds.) *International Criminal Justice: Legitimacy and Coherence* (2012).

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of emergency,'[14] marked by an increased interplay between national executives and the UN Security Council in shaping the legal contours of emergency power.

In the first part of this paper we examine Agamben's theory of exception in more detail and outline an analytical framework for understanding the hybrid relation between law and exception. After sketching the political and legal context from which the Office of the Ombudsperson emerged, the latter part of the paper analyses two specific characteristics of the 1267 delisting process – namely, (i) the Ombudsperson's decision-making powers and (ii) the evidential standards that are deployed. We argue that these characteristics – which were developed through the legal contestation of the sanctions regime as an exceptional security measure – function as relatively novel adjudication procedures founded on the recombination of existing standards and practices that transform law and legal practice in significant ways, thus highlighting the role that legal expertise plays in shaping a politics of pre-emption.

2. Law, exception, hybridity

Agamben conceptualizes the relationship between law and exception as profoundly 'indistinguishable':[15] the taking 'outside' of law that is produced by exception is still interrelated with law in important ways that cannot be adequately captured by an inside/outside distinction. Rather, for Agamben the state of exception operates as a 'threshold, a zone of indifference, where inside and outside do not exclude each other but rather *blur* with each other'.[16] The normalization of the exception and its tendency to become the rule is spatially manifested in the camp – which Agamben suggests is the '*nomos* of the political space in which we still live'.[17] The camp is outside the normal juridical order but 'not simply an external space'. It is 'a zone of indistinction between outside and inside, exception and rule' – Agamben calls it a '*hybrid of law and fact in which the two terms have become indistinguishable*'.[18]

Agamben's understanding of the space of exception as a liminal hybrid space in which law and politics (or norm and sovereign will) are indistinguishable and operate unpredictably is useful to our analysis of the productive contestation of exceptional measures. It is important to note, however, that such notions of hybridity have largely been written out of the analysis in much of the legal literature on this issue that draws on Agamben to argue that the exception functions as an empty or ajuridical space. Such literature represents the most visible anomalies of the 'war on

14 K. L. Scheppele, 'The International State of Emergency: Challenges to Constitutionalism after September 11', (21 September 2006) *Yale Legal Theory Workshop* (unpublished manuscript).

15 Agamben, *supra* note 3, at 27.

16 Agamben, *supra* note 1, at 23 (emphasis added). This is one of Agamben's key points of departure from Carl Schmitt, who sought to rigidly distinguish norm from exception so as to preserve a space for sovereign decision. Whilst Agamben relies heavily on Schmitt, he critiques him for 'fallacious[ly] ... seek[ing] to inscribe the state of exception indirectly within a juridical context by grounding it in the division between ... norm and decision'. Agamben, *supra* note 1, at 50–1. For a good analysis of Agamben's approach to Schmitt see T. Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (2010), 95–143.

17 G. Agamben, *Means without End: Notes on Politics* (2000), 36.

18 Agamben, *supra* note 3, at 170 (emphasis in original).

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terror' (such as Guantánamo Bay) as sites that are defined by being 'beyond the rule of law',[19] 'a legal no man's land'[20] and/or an 'exceptional "rights-free zone"'.[21] Indeed, Agamben's own formulations of the state of exception as 'a zone of anomie' and of Guantánamo Bay as 'a detention ... entirely removed from the law', sometimes sit uneasily with his analysis of the exception as a threshold or hybridized space.[22]

This notion of the exception as an empty space is inconsistent with the material dynamics of how law and regulation are thoroughly imbricated within, and together give shape to, exceptional security practices.[23] According to Macklin, present debates on exceptionalism insufficiently recognize the 'legally saturated' nature of the political order of the US and the 'proliferation of rules' at Guantánamo: 'The "state of exception" both obscures and flattens the variegated legal and political topography of Guantanamo Bay in ways that do not do justice to the injustice.'[24]

It is the absence of historical specificity, empirical situatedness, and political contestation that has contributed to compelling critiques of Agamben's work by those who regard it as 'formalist'. William Connolly, for example, finds that Agamben's account possesses a (too) 'tightly defined logic', as if 'an account of the logic of sovereignty reveals ironclad paradoxes, paradoxes that could be resolved only by transcending that logic altogether'. For Connolly, practices of sovereignty are 'more messy, layered and complex' than Agamben's tight paradox allows.[25] Claudia Aradau, furthermore, proposes the notion of 'concrete exception' as a way to understand the ongoing transformations in the function of law rather than simply the originary constitution of law itself: 'what is important is not the distinction between exception and law, but what practices are deployed and how'.[26] Kim Lane Scheppele similarly signals a clear need to move beyond the focus on sovereign decision by developing a conceptual approach to the exception that is transnational in scope and defined less by its formal normative qualities (for example, a space without law, formal decision to suspend or derogate, etc.) than it is by its substantive and/or empirical characteristics (including the unaccountability of executive power, the displacement of procedural protections, and the degree of anticipatory violence).[27]

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19 D. Hope, 'Torture', (2004) 4 *International and Comparative Law Quarterly* 807.

20 J. Paust, 'Post 9/11 Overreaction and Fallacies regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention and Due Process in Military Commissions', (2004) 79 *Notre Dame Law Review* 1335, at 1346.

21 H. Koh, 'On American Exceptionalism', (2003) 55 *Stanford Law Review* 1479, at 1509. Harold Koh subsequently became the State Department Legal Adviser for the Obama administration, where (until stepping down in January 2013) he publicaly and legally justified the US targeted killing program on an exceptional basis. See, for example, H. Koh, Legal Adviser, US Dep't of State'. Address at the Annual Meeting of the American Society of International Law (25 March 2010).

22 Agamben, *supra* note 1, at 4.

23 W. Connolly, 'Complexity of Sovereignty', in Edkins, Pin-Fat, and Shapiro, *supra* note 1; D. Gregory, 'The Black Flag: Guantanamo Bay and the Space of Exception', (2006) 88(4) *Geografiska Annaler* 404; F. Johns, 'Guantánamo Bay and the Annihilation of the Exception', (2005) 16(4) *European Journal of International Law* 613.

24 Macklin, *supra* note 7, at 225; see also Johns, *supra* note 23, 614, 617; N. Hussain, 'Beyond Norm and Exception: Guantanamo', (2007) 33(4) *Critical Inquiry* 734, at 740–1.

25 Connolly, *supra* note 23, at 29; also Amoore, *supra* note 9.

26 C. Aradau, 'Law Transformed: Guantanamo and the "other" exception', (2007) 28(3) *Third World Quarterly* 489, at 491. For a good example see Gregory, *supra* note 23.

27 Scheppele, *supra* note 14, at 51.

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Agamben's critics thus invite us to pay more detailed attention to the legal expertise and governing procedures that saturate this exceptional relation, both as important in their own right and as a challenge to the lawlessness and decisionism that is often attributed to Agamben's approach. As Bonnie Honig suggests, the juridical contestation of emergency politics causes law to *enter into* the production and modulation of the exception by contesting, reversing, accepting, and normalizing particular aspects of pre-emptive security politics.[28] In this sense, she gestures toward the hybridization of law and exceptional security practice and underscores the 'need to own up' to legal expertise's own implication in the concrete histories of emergency.[29] Understood thus, legal challenges to exceptional practices provide more than the 'chemical catalyst' for rendering exceptional power visible.[30] As suggested in this paper in the context of targeted sanctions, they can also be profoundly co-productive in the unfolding of exceptional law.

Such criticism does not just call for more empirical specificity, but highlights some of the more fundamental problems associated with the Agamben's teleological and legal positivist approach. One of the main tenets of Agamben's thought is that the exception is now becoming the rule and that all men are therefore potentially becoming *homo sacer*.[31] However, the idea that exception has become the rule in contemporary (security) politics does little to elucidate how either law or exceptionality work in practice.[32] Furthermore, Agamben's relative disregard toward the processes through which law is constituted in the emergency context reflects his formal and somewhat positivist approach to law as rule. Agamben argues that because official acts undertaken during a state of exception are neither 'legislative, executive [nor] transgressive' they therefore 'escape all legal definition ... and are situated in an absolute non-place with respect to the law'.[33] Such an approach fails to grasp how legal discretion can be (and is) exercised in both exceptional and ordinary times beyond the dictates of positive law. As Dyzenhaus points out, Agamben adopts a 'view of general legal theory ... which, shorn of Schmitt's political baggage, is also shared by H. L. A. Hart [and] Kelsen, the last century's most eminent legal positivists'.[34] Consequently, he ignores jurisprudence which argues that 'it does not follow from the fact that a problem is ungovernable by rules, that is by highly determinate legal norms, that necessarily a decision about its solution takes place in a legal void'.[35]

To understand how legality functions in times of emergency, Dyzenhaus instead posits a continuum. At one end there is the 'rule of law' where all institutions work together to realize the substantive principles that restrain the arbitrary exercise of

28 B. Honig, *Emergency Politics: Paradox, Law, Democracy* (2011), 1.
29 Ibid, at 10.
30 M. Foucault, 'The Subject and Power', (1982) 8(4) *Critical Inquiry* 777, at 780.
31 See, for example, Agamben, *supra* note 3, at 20.
32 See, for example, O. Belcher et al., 'Everywhere and Nowhere: The Exception and the Topological Challenge to Geography', (2008) 40(4) *Antipode* 499. M. Dillon, 'Correlating Sovereign and Biopower', in Edkins, Pin-Fat, and Shapiro, *supra* note 1, at 55.
33 Agamben, *supra* note 1, at 50–1.
34 D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006), 60.
35 Ibid., at 61.

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state power against individuals and underpin 'the rule-of-law project'. At the other end there is 'rule by law' – where 'as long as there is legal warrant for what the government does, government will be considered to be in compliance with the rule of law'.[36] Rule by law begets 'black holes' and 'grey holes'. Black holes are spaces where the government is empowered to act without legal constraint – for example, legislation that 'explicitly exempts the executive from the requirements of the rule of law or explicitly excludes judicial review of executive action'.[37] Grey holes are spaces where there is a façade or form of the rule of law but no substantive constitutional protections in place. They can often be seen in the 'imaginative experiments in institutional design' developed in the national security context that are nominally 'designed to uphold the rule of law [but] run the risk of undermining it'.[38]

Within Dyzenhaus's schema, the normative status of grey holes is ambiguous. Whether they turn out to be disguised black holes (that ultimately lack the legitimacy of law) or genuine attempts to further the rule-of-law project turns on the rationale for their design and the practice of the institutional actors involved. Grey holes deliberately aimed at creating spaces free from law are more dangerous than black holes because they allow governments to claim that they 'govern in accordance with the rule of law and thus garner the legitimacy that attaches to this claim'.[39] But institutional experiments that genuinely seek to preserve legality and realize fundamental rule-of-law principles legitimately demonstrate (contrary to Agamben and Schmitt) that 'there is a substantive conception of the rule of law that is appropriate at all times'.[40]

When no remedies are available to individuals affected by international organizations (such as the UN Security Council), Dyzenhaus therefore argues that institutional reforms must be implemented that render power compliant with underlying rule-of-law principles.[41] Such reforms help to harmonize the norms of the domestic and international legal orders, properly apprehending both spheres as a part of a greater unity, whilst realizing a 'global rule of (administrative) law' where 'all institutions of legal order, whether international or domestic, serv[e] the values articulated by the rule of law'.[42] Absent such reform, Dyzenhaus (citing Kant) suggests that the international legal order will remain in 'a state of self-incurred immaturity', porous with holes and unable to make the 'important movement from the misery of the state of nature'.[43]

36 Ibid., at 201.

37 Ibid., at 3. Crucially, for Dyzenhaus (following Dicey) 'it is possible to use rule by law to take one right off the continuum of legality', at 201. Thus, whilst laws creating black holes might be legally valid in the positive sense, they may lack the legitimacy of law properly so called.

38 Ibid., at 215, 211.

39 Ibid., at 3.

40 Ibid., at 206.

41 For example, by 'afford[ing] those affected by some public decision the opportunity to have their cases properly heard'. D. Dyzenhaus, 'The Rule of (Administrative) Law in International Law', (2005) 68 *Law and Contemporary Problems* 127, at 152.

42 Ibid., at 128, 162.

43 Ibid., at 152, 162.

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3. Exception, contestation and the UN 1267 Ombudsperson

The UN 1267 targeted-sanctions regime – which imposes asset freezes and travel bans on individuals and entities deemed to be 'associated with'[44] al Qaeda and/or associated groups – was introduced and continues to function as an exceptional security measure. Because the resolutions establishing the sanctions system were adopted under the provisions contained in Chapter VII of the UN Charter empowering the Security Council to counter perceived threats to international peace and security, they must be strictly implemented by member states irrespective of any conflict with domestic or constitutional requirements.[45] The sanctions themselves are expressly pre-emptive in scope[46] and founded on secret intelligence that cannot be disclosed to the listed parties. According to the Guidelines of the 1267 Sanctions Committee: 'A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventative in nature'.[47] The exceptionality of the regime has stimulated considerable criticism from a variety of different actors. Those critiques are now well documented – in sum, they point out that the global sanctions system (i) prevents individuals from exercising their right to an effective remedy[48] and substantively challenging their listing before national or regional courts and (ii) forces states to violate their own constitutional commitments concerning the protection of fundamental rights; and at the same time (iii) enables states to take 'executive decisions with far-reaching consequences' at the international level, 'apparently unconstrained by domestic judicial review or the international human rights treaties by which they are bound'.[49] That is, it constitutes a particular form of exception founded on a novel interrelationship between domestic and international law in the global security field.

Within the field of critique and contestations of targeted sanctions, the 2008 decision of the European Court of Justice (ECJ) in the case of *Kadi* and *Al Barakaat* (hereafter, the *Kadi* case)[50] warrants special mention. This case effectively subjected decisions of the UN Security Council to judicial review by a regional court (despite

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44 'Associated with' is the applicable standard in relation to the 1267 sanctions. S/RES/2083 (2012) most recently broadened the standard to include association with someone on the 1267 list – that is, association with an associate.

45 If Chapter VII resolutions come into conflict with any other international agreement or domestic rule of law, Art. 103 of the UN Charter stipulates that states must ensure that their Chapter VII obligations are given priority. For an overview of state obligations regarding Art. 103, see Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the EU and Commission of the EC*, [2005] ECR II-3533, at para. 206; Case T-315/01, *Yassin Abdullah Kadi v. Council of the EU and Commission of the EC*, [2005] ECR I-3649, at para. 153.

46 M. de Goede, 'Blacklisting and the Ban: Contesting Targeted Sanctions in Europe', (2011) 42(6) *Security Dialogue* 499; G. Sullivan and B. Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights* (2010).

47 UN 1267 Sanctions Committee, Guidelines of the Committee for the Conduct of Its Work (30 November 2011), at para. 6(d).

48 That is, access to a review mechanism that is accessible and independent and affords individuals the opportunity to contest the allegations and put forward their case. See variously Art. 8 UDHR; Art. 2(3) ICCPR; Arts. 6 and 13 ECHR.

49 B. Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/67/396 (2012), at para. 14.

50 Joined Cases C-402/05 P and C–415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*, [2008] ECR I–6351 (hereafter, the *Kadi* case). See also T-85/09, *Kadi v. Commission*, [2010] OJ C317, 29 (hereafter,

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the express intentions of the judges) and declared the implementation of their listing decision unlawful within the European legal order for breach of fundamental rights. In so doing, the decision threatened the legitimacy not only of the 1267 regime, but also of the other targeted-sanctions regimes adopted by the Security Council under Chapter VII of the UN Charter[51] and implemented throughout the EU.[52]

It was within this context of heightened legal and political conflict that the UN Security Council acted in 2009 to create a new mechanism for adjudicating 1267 delisting decisions: the Office of the Ombudsperson.[53] Listed individuals are now able to seek their removal from the List by petitioning the Office of the Ombudsman, who is charged with considering their application and making a recommendation to the Security Council. Given the reluctance of the Security Council to revise its practices and the political restraints of the context within which it operates, the creation of this new office has been described as nothing short of a 'miracle'.[54] Publicly, the Security Council have been loath to acknowledge the constitutive role of the European courts in catalysing this procedural innovation. To do so would create a perception that the Council are responding to the findings of a subsidiary legal organ and ceding their authority in practice. Privately, however, it has been made clear that the Ombudsperson would never have been created were it not for the European Court's decision in *Kadi*.[55]

We analyse the Ombudsperson as new figure of expertise and 'imaginative'[56] institutional experiment as discussed by Dyzenhaus, produced through a specific encounter between the exception and its legal contestation and in the process of being consolidated as the de facto decision-maker concerning UN terrorism delisting decisions. One view of this procedural innovation is that it successfully brings the exceptional security measure of targeted sanctions back within the remit of international human rights norms by enabling listed individuals to properly exercise their defence rights.[57] It is along this crucial vector that key institutional alignments

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the *Kadi* 2010 case). The literature concerning this litigation is vast. For a succinct overview of the procedural history of the case, see Sullivan and Hayes, *supra* note 46, at 57–61.

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

52 *Kadi*-like decisions and orders have indeed been recently issued by the EU courts in relation to the Côte d'Ivoire, Iran, and Burma sanctions regimes. See, for example, Case C-417/11P, *Council of the European Union v. Nadiany Bamba*, [2012] OJ C 311; Joined Cases T-439/10 and T-440/10, *Fulmen and Fereydoun Mahmoudian v. Council*, [2012] OJ C 133, 24; and C-376/10 P, *Tay Za v. Council*, [2012] OJ C 133, 6. The EU now tends to delist parties before the EU courts have the opportunity to adjudicate. See, for example, Case T-436/11, *Afriqiyah Airways v. Council*, [2012] OJ C 08, 24; Case T-285/11, *Charles Kader Gooré v. Council*, [2012] OJ C 49, 24.

53 Deleted.

54 See US Embassy Cable 10USEUBRUSSELS212, (24 February 2010).

55 In private interviews undertaken between the first author and various members of the UN 1267 Sanctions Committee, October 2012. See also UN Doc. S/PV.6557 (2011): 'The improvements made to ... the sanctions regime against Al-Qaeda allow us to respond to the criticisms that have been made, including by judicial authorities in Europe and elsewhere', at 5.

56 Dyzenhaus, *supra* note 34.

57 This approach has been refuted, however, by the European Court of Justice's 2013 appeal decision in the *Kadi* case – see Joined Cases C-584/10 P, C-593/10 P, C-595/10 P, *United Kingdom v. Kadi* (18 July 2013) [unreported].

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and positions are currently being forged.[58] However, other approaches highlight the persistence of core deficiencies and suggest that the Ombudsperson is incapable of effecting compliance with international due-process standards. The critical issues highlighted here are independence and impartiality – namely that so long as the Ombudsperson is only able to make recommendations (rather than binding decisions) for delisting, it is the Sanctions Committee that remains both the quasi-executive body that decides whether individuals ought to be placed on the 1267 list and the quasi-judicial body that decides whether their own listing decisions are justified.[59]

Our analysis seeks to move beyond the question whether the Office of the Ombudsperson brings sanctions back into the remit of international human rights law or fails to do so and expressly avoids the normative debate about whether the Ombudsperson is a 'good' development or not. Indeed, the competing views of the Ombudsperson's role and authority raise the question how she operates in practice to reconfigure existing norms, rights, and standards of international law within the executive demand and desire for pre-emptive security. The *Kadi* case clearly demonstrates the unfolding 'paradox of legitimacy' where legal contestation and exceptional power stand in a co-constitutive relation. To concretely understand how this relation is consolidated it needs to be analysed through its productive, procedurally innovative, and hybridized effects. Accordingly, we examine the ways in which the Ombudsperson fulfils her mandate, takes decisions, and produces novel and recombinant forms of legal reasoning that neither reincorporate listing decisions into the normative frame of international human rights law nor leave them in a lawless zone of exception. We focus on two elements of her work: first, her decision-making powers; and second, the evidential standards she deploys.

4. Delisting, decision, and fair adjudication procedures

The first element to be examined in relation to the novel and hybridized nature of the Ombudsperson's practice lies in the very singular and specific nature of her decision-making processes and their appeals to fairness. Whilst the Ombudsperson concedes that she is not the ultimate decision-maker with regard to delisting, she does not believe that this means the Sanctions Committee reviews their own decisions as suggested by the critics of her office. Instead, she maintains that the decisions taken by the Sanctions Committee to place someone on the list and remove them from the list are 'completely separate'. She only assists the Committee in the latter decision by

See also A. G. Bot, Opinion in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi*, (19 March 2013) [unreported].

58 See, respectively: UK intervention at the Interactive Dialogue with Ben Emmerson, Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism (2 November 2012), available at: www.ukun.fco.gov.uk/en/news/?view = PressS&id = 830740482; 12th and 13th Report of the 1267 Monitoring Team, at paras. 32 and 11 respectively; Fourth Report of the Ombudsperson to the Security Council, UN Doc. S/2012/590 (2012), at paras. 30–32; and T. Biersteker and S. Eckert, *Due Process and Targeted Sanctions: An Update of the Watson Report* (2012).

59 See, in particular, *Kadi* 2010, *supra* note 50; Emmerson, *supra* note 49, at para. 35; M. Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/65/258 (2010).

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making a recommendation (for listing or delisting) in her report.[60] In this process, the Ombudsperson does not 'look back' or 'presume to know what was before the Committee at the time of listing'.[61] She does not review the original listing decision – which in her view 'would be impossible and ... would [not] work in this context unless you have all the information the agency had that made the decision'.[62] Instead, her analysis and decision are solely focused on the present and the question 'whether today the continued listing of the individual or entity is justified based on all of the information now available'.[63]

This exclusive focus on the present has undoubtedly functioned to facilitate the removal of individuals from the list. However, the introduction of this temporal chasm into the delisting process also produces a number of significant effects within and across the UN 1267 listing regime. First, it effectively frees states and their intelligence agencies from the obligation to have to explain the underlying basis of listing decisions, whilst assuaging their concerns about the disclosure of classified material and the threat of independent review. This consolidates the sanctions regime as an executive security practice. According to the Ombudsperson:

> The fact that I focus my analysis on present day circumstances solely has been very important. I would not have been in the job long if I had attempted to start reviewing ....
>
> I keep completely out of the question and I avoid ... the whole issue of what was the basis for the listing because ... there is all sorts of information in these cases, in many of these cases that I'm not receiving ... It's very important that I can say [to states]: 'I accept that when you listed this person you may have known all sorts of things [and that] you may still know all sorts of things, but this is all I'm looking at today'.[64]

Second, this procedure provides a pragmatic, face-saving solution for the delisting of those individuals for whom the original reasons for listing are either manifestly unfounded or unknown – which deflects potential conflict between institutional actors and deepens the legitimacy of the sanctions as an exceptional regime. Contrary to what is commonly assumed, the Sanctions Committee does not have access to the classified material underpinning their own decisions.[65] Instead, they approve proposed designations using a confidential 'no-objection' procedure that precludes any

60 Interview with UN 1267 Ombudsperson, New York, 5 November 2012 (by G. Sullivan). Unless indicated otherwise, all subsequent references to the Ombudsperson in this paper originate from this interview.

61 Ibid.

62 Ibid.

63 Office of the Ombudsperson, Approach to and Standard for Analysis, Observations, Principal Arguments and Recommendations (2011), available at: www.un.org/en/sc/ombudsperson/approach.shtml.

64 Prost, *supra* note 60.

65 See, for example, L. Ginsborg and M. Scheinin, 'Judicial Powers, Due Process and Evidence in the Security Council 1267 Terrorist Sanctions Regime: The Kadi II Conundrum', (2011) *EUI Working Papers: RSC*: 'Such intelligence may be discussed bilaterally between concerned member states of the Security Council in advance of reaching consensus on a particular listing but is actually not presented collectively to the 1267 Committee as a whole', at 9–10. US Embassy cables released by Wikileaks corroborate this view. See, for example (i) 10BRUSSELS219: where lawyers of the European Council speak of the 'multiple cases involving UN designations' before the EU courts where both '*EU institutions have little or no [supporting] information*' and (ii) 09ROME652: where it is explained that 'on behalf of the US, Italy had proposed numerous candidates for designation' on the 1267 list '*about which they knew little*' and that they will have difficulty justifying their listing decisions 'unless they get ... [background] information' from the US government.

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substantive consideration of the grounds.[66] The Ombudsperson's *de novo* approach to delisting complements this diplomatic process by providing a mechanism for annulling unfounded listing decisions without the risk of damaging precedent and political conflict associated with adverse judicial findings by a public court:

> A state can choose whatever information they want to give me. I know states are choosing not to give me certain pieces of information and that's fine. It might not even be classified information. ... Some states have just decided: 'Well we had this information way back then, but we don't want to bother [because] we are not opposed to delisting'. So they just don't give me information and that's also perfectly fine. ... Can I do a proper review? I can do a proper review of the decision I have to make ... because it will be based solely on what they give me.[67]

Third, this temporal cut enables the Ombudsperson and her supporters to advance an argument that her decision-making procedures are fair because they enable listed individuals to know the case against them. This claim comes, however, with an important caveat: 'when I say that I believe [listed individuals] have been told about the case, it's the case against them *such as has been given to me*'.[68] At the same time, the Ombudsperson acknowledges that her understanding of the cases is partial and fragmentary, often based primarily (if not exclusively) on the 'general, unsubstantiated, vague and unparticularised'[69] Narrative Summary of Reasons released by the Sanctions Committee 'and nothing more. That does not mean that there *is* nothing more but that *I have* nothing more'.[70] For the Ombudsperson, this disparity does not generate an inequality of arms between the listing and listed parties. Instead, she insists that the process remains fair because her recommendation and the Sanctions Committee's decision concerning delisting are based on exactly the same information – 'If that wasn't the case [then] I would say that it is an unfair process.'[71]

However, when situated in the context of the Ombudsperson's unique decision-making powers and the exceptional Chapter VII powers of the Security Council that delimit them, these claims to fairness are rendered problematic. The Ombudsperson does not possess the power to decide whether individuals ought to remain listed or not but only retains a power of recommendation. Even if she decides that an individual ought to be removed from the list it remains entirely open for the Sanctions Committee to keep them there. Yet because her recommendations have so far been accepted by the Security Council, the Ombudsperson (and her institutional supporters) claim that they effectively carry the binding force of decision and that she therefore provides listed individuals with access to de facto judicial review.[72]

However, how can one know that the Ombudsperson and the Sanctions Committee base their respective and separate decisions on the same information – which is

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66 S. Chesterman, 'The Spy Who Came in from the Cold War: Intelligence and International Law', (2006) 27 *Michigan Journal of International Law* 1071, at 1115; V. Baehr-Jones, 'Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions', (2011) 2 *Harvard National Security Journal* 447.

67 Prost, *supra* note 60.

68 Ibid. (emphasis added.)

69 *Kadi* 2010, *supra* note 50, at para. 157.

70 Prost, *supra* note 60 (emphasis added).

71 Ibid.

72 Biersteker and Eckert, *supra* note 58, at 24.

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at this core of the de facto review argument? There are no legal rules restricting the types of information the Committee can take into account, no procedural guidelines limiting the exercise of their discretion; and their decision-making processes still ultimately remain secret.[73] There are any number of pragmatic, political, or diplomatic reasons why the Sanctions Committee might agree to remove individuals from the list – all of which have nothing to do with either the arguments presented by listed parties or the recommendations made by the Ombudsperson. As the former chair of the 1267 Committee has plainly acknowledged with respect to delisting: 'At the end of the day it's a political decision based on a political process'.[74] 'Losing the battles' of individual 1267 listing cases to 'save the wars' enabled by this novel use of Chapter VII UN Charter powers has certainly been implied before as a pragmatic way for the Security Council to avoid facing 'the option of abandoning its tool of sanctions or risk waiting until it is taken from it'.[75] If, as we suggest, the endgame for the Security Council is to legally consolidate their exceptional sanctioning powers by protecting them from further judicial attack – which, as the 1267 Monitoring Team has pointed out, 'challenges the legal authority of the Security Council in *all matters*, not just in the imposition of sanctions'[76] – then this is likely to be the most important consideration motivating the delisting decisions that the Committee have taken to date.[77]

Claims concerning the fairness of the Ombudsperson's decision-making, therefore, are critically important to the legal consolidation of the 1267 sanctions regime as an exceptional security measure founded on secret evidence.[78] In the recent *Kadi* appeal the European Court of Justice heard submissions concerning the degree of

73 The Committee does have a nominal obligation (under S/RES/2083 (2012), Annex II, para. 14) to set out its reasons to the Ombudsperson who can, in turn, provide those reasons to the petitioner. However, in practice this reasoning is both minimal and generic and far less specific than even the vague and imprecise allegations contained in the Narrative Summary. In one successful delisting application handled by the first author, for example, the sole reason provided by the Committee for delisting an individual (who had been targeted for more than eight years) was that: 'There is nothing in the Petitioner's personal circumstances to indicate that his lack of current involvement with Al-Qaida is attributable to anything other than a personal choice'.

74 Press Conference on Security Council Al-Qaida and Taliban Sanctions Committee, 2 August 2010, available at: www.un.org/News/briefings/docs/2010/100802_Sanctions.doc.htm.

75 R. Barrett, 'The United Nations and Terrorism: The 1267 Sanctions Regime Directed against Al-Qaida, the Taliban and Their Associates', *RCAS Policy Papers 2011/03: European and United States Counter-terrorism policies, the Rule of Law and Human Rights*, at 8: Barrett – the Co-ordinator of the UN 1267 Monitoring Team – specifically argues that the time for a 'reassessment' of the sanctions regime is overdue and has advocates for the list to be pared down to an absolute minimum to include 'only the best known terrorists and their supporters, against whom there [is] clear evidence of ... complicity in terrorism', excluding those who have either 'no symbolic value [or] no assets'.

76 11th Report of the 1267 Monitoring Team, UN Doc. S/2011/245 (2011), at para. 30 (emphasis added).

77 In March 2012 the US District Court for the District of Columbia refused Kadi's application for removal from the US Specially Designated Terrorist (SDGT) List on the grounds that his designation was 'amply supported' by both open and closed evidence demonstrating support for al Qaeda. Yet in October 2012 the UN 1267 Sanctions Committee (of which the US is the influential permanent member) approved Kadi's removal from the 1267 list despite the fact that the Ombudsperson had more fragmentary and limited access to the evidence than did the US Courts. This incongruence highlights the relative autonomy of the Sanctions Committee vis-à-vis the Ombudsperson and the broader political motivations that animate their delisting decisions. See *Kadi v. Geithner*, Case No. 09–0108 (Memorandum Opinion 19 March 2012) and UN Doc. SC/10785, available at: http://www.un.org/News/Press/docs//2012/sc10785.doc.htm.

78 If reliance on secret evidence is the core problem underpinning the sanctions regime, for example, then endorsement of the Ombudsperson's delisting process by the European Court is critical to its resolution.

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procedural fairness that the Ombudsperson affords listed individuals.[79] In their decision the Court ultimately declined to consider the status of the Ombudsperson in detail despite being invited to do so by the parties. By interfacing with the EU courts in this way, these fairness claims therefore carry potential to profoundly shape the legal terrain upon which European fundamental rights claims and pre-emptive security practices are constituted and legitimated. Only when the law–exception dynamic is grasped through its productive effects does this broader, co-constitutive dimension come into clearer focus.

This dynamic both illustrates and potentially deepens the 'disorder of orders'[80] that marks the transnational legal environment. It also suggests, as contended by Scheppele, that we cannot adequately understand how law and exception interconnect in the contemporary context unless 'we can see both international and domestic law together in thinking about the slide into emergency powers'.[81] The temporal cuts effected by the Ombudsperson's novel decision-making powers and consequent claims to fairness at the UN level are transformative of due-process rights to an effective remedy and the legal consolidation of exceptional security measures at the regional level. Law is not strictly suspended here but rather saturates and delimits the entire field in both hard (for example, Security Council resolutions, European Convention on Human Rights) and soft forms (for example, procedural guidelines, evidential standards). The rules establishing the Ombudsperson's unique relationship with the Sanctions Committee – which 'encourage' (but do not require) the Committee to share information and carefully restrict the Ombudsperson's legal authority to the confines of 'recommendation' (rather than decision) – are of particular importance here, as are the novel evidentiary standards she applies, which we now turn to consider.

5. Speculative standards

A second distinct feature of the Ombudsperson's delisting procedures are the novel legal standards that are being produced in and through her work. As mentioned in section 3 above, the question of effective remedy is a crucial critique of terrorist listing practices and a problem that the Office of the Ombudsperson is charged to repair. Much debate has taken place on the proper evidentiary standard to be applied in listing procedures – that, through the express intentions of the Security Council, operate below criminal standards. As the UN Special Rapporteur on Countering Terrorism notes, 'there is a range of familiar legal standards between mere suspicion and the internationally recognized criminal standards' that could be deployed by the Ombudsperson.[82] The Special Rapporteur himself recommends that a civil 'balance of probabilities' standard and proportionality assessment be applied.[83]

79 *Supra* note 57.
80 N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6(3–4) *International Journal of Constitutional Law* 373.
81 Scheppele, *supra* note 14, at 6.
82 Emmerson, *supra* note 49, at paras. 20–21.
83 Ibid., at paras. 56–57.

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The practice of the Ombudsperson departs from existing recognized standards for assessing evidence – and from the recommendation of the Special Rapporteur – to produce a novel, hybrid assessment that we call a 'speculative standard'. Two standards are examined in this section – first, the standard for the assessment of delisting requests; second, the standard applied to material that may have been produced through torture. In both cases, the Ombudsperson produces new standards that recombine existing legal procedures and functions to consolidate exceptional practices.

5.1. Standards for delisting

First, when considering delisting requests the Ombudsperson applies an evidential standard of whether there is 'sufficient information to provide a reasonable and credible basis for the continued listing'.[84] Whilst this standard is loosely based 'on concepts generally accepted as fundamental across legal systems',[85] it is novel insofar as it has no direct equivalent in either domestic or international law and has been criticized for being insufficiently clear and too low given the 'quasi-penal consequences' of the listing decisions.[86] According to the Ombudsperson, the applicable standard has to deliberately be kept 'a bit fuzzy and a bit lower'[87] than conventional criminal and/or civil standards of assessment because the sanctions are designed to be 'preventative in nature'.[88] In effect, this is because her decision-making hybridizes the assessment of two very different kinds of information – intelligence and evidence:

> [With intelligence] you have to be looking at what the inferences are much more than you do with evidence. With evidence, you know you're looking at concrete facts ... But here, it's more about can you draw inferences from ... certain activities? ... It's not just [in] the information but in the inference [that petitioners] have a chance to respond ... and explain.[89]

The intelligence underlying the listing decision is never seen by the targeted individual. Since 2008, sanctioned individuals receive from the Sanctions Committee a Narrative Summary of Reasons for Listing, which is expressly designed to exclude all confidential information and is too vague to enable them to launch an effective challenge.[90] The Ombudsperson seeks to improve this process by putting questions to the petitioner during the 'dialogue' phase of the delisting procedure that aim to work what she knows of the classified material into the background. According to the Ombudsperson, this process – which is closely vetted by the states involved – allows listed individuals to know 'the contours of the case' whilst at the same time assuaging their concerns by excluding the 'details' and 'particulars' contained

84 *Supra* note 63.
85 Ibid.
86 Emmerson, *supra* note 49, at para. 55.
87 Prost, *supra* note 60.
88 Ibid.; Preamble to S/RES/2083 (2012).
89 Prost, *supra* note 60.
90 *Kadi* 2010, *supra* note 50, at paras. 157, 177.

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in their intelligence.[91] According to lawyers who have represented individuals in delisting proceedings, however, this dialogue remains generic and sheds very little light on the nature of the secret allegations against their clients.[92]

The Ombudsperson's procedural innovation of engaging in a dialogue on the basis of secret intelligence during delisting procedures produces a speculative standard that asks petitioners to address inferences that might be drawn from the 'contours' of the case. This procedure is quite far removed from enabling targeted individuals to properly contest the allegations against them, especially when no intelligence is provided to the Ombudsperson. In such cases, lawyers representing listed individuals in delisting proceedings have been told by the Ombudsperson to make 'reference to ... any information the petitioner *may* ... *suspect* as to the basis for his or her inclusions on the list, along with any explanations ... relating to the same'.[93] In directing individuals to address their own suspicions and draw inferences from either vague or unseen material to account for why they are being targeted, the application of what we call a speculative standard effects a subtle reversal of the onus of proof from the state to the targeted individual. Comparable adjudication procedures (such as Closed Material Procedures before SIAC) at least have special advocates who can attempt to nominally mitigate this inequality of arms by accessing the classified material and making submissions. Given that no analogous mechanism exists in the 1267 delisting process – nor could it given the overall reluctance of states to engage in multilateral intelligence-sharing in this context[94] – this reversal of onus clearly compounds the unfairness of the regime. As Lord Bingham of the UK House of Lords observed in the comparable context of SIAC proceedings: 'It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.'[95] Yet requiring listed individuals to explain their alleged behaviour to a standard of inference applied in secret by the Ombudsperson to material that they will never be allowed to see is precisely what takes place in 1267 delisting process – paradoxically providing the foundation for the claim that the Ombudsperson's procedures are both fair and clear.

5.2. Torture material

Second, and following from the 'dialogic' incorporation of secret intelligence material in delisting procedures, the Ombudsperson has to develop in practice a standard concerning the assessment of information that may have been obtained by torture. Lawyers representing listed individuals have long warned that torture material is

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91 Prost, *supra* note 60. According to the Ombudsperson: 'sometimes they will say, "This is the only way we would allow that information to be put" or I might say "I'm going to ask this question, is that okay?"'.

92 Letter from the Like-Minded Lawyers to UN Special Rapporteur on Countering Terrorism, 13 August 2013, Questions Concerning the 1267/1989 Al Qaida Sanctions Committee, the Ombudsperson and the De-Listing Process (copy with authors). The first author was one of the six joint authors of this correspondence.

93 Ibid. (emphasis added).

94 For an excellent analysis of the problems of secret evidence in this context, see Forcese and Roach, *supra* note 12. See also C. Murphy, 'Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?', in D. Cole, F. Fabbrini, and A. Vedaschi (eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (2013).

95 *A v. Secretary of State for the Home Department (No 2)*, [2005] UKHL 71, at para. 59.

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being used in this context. In one case (involving a UK national) such material appears to have been the sole basis for the designation[96] and in another (involving the Canadian national Abousfian Abdelrazik) it is clear that some of the evidence used against him was obtained by torture.[97] According to the UN Special Rapporteur on Countering Terrorism, 'intelligence derived from torture has been used to justify the designation of individuals'.[98]

The use of torture material is firmly prohibited – it is both *jus cogens* and contrary to the UN Convention against Torture (UNCAT), which requires states to 'ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings'.[99] But because these prohibitions are designed to apply at the state level there is uncertainty about whether they apply to the 'special' context within which the 1267 listing and delisting decisions take place. According to the UN Special Rapporteur on Countering Terrorism, UNCAT clearly applies to the Ombudsperson's procedures and so strict procedural rules need to be introduced requiring the Ombudsperson to investigate how allegedly tainted information was obtained and (if tainted) to exclude such material from her consideration.[100]

The Ombudsperson has admitted that she may indeed consider torture material and that she does not necessarily exclude it from her decision-making process.[101] She maintains that evidentiary rules empowering her to exclude torture material would be unhelpful in this context and that whilst allegations of torture can affect the weight accorded to the evidence, it should not affect its admissibility per se:

> I am not prepared to apply any exclusionary rules of evidence because that takes me down a path that I *do not* want to go down. ... I think my job is more like an investigating judge in the civil-law context than the traditional Ombudsperson ... I gather all the information and I look at the individual pieces of it for questions like reliability and credibility and a key issue would be if the petitioner says, 'Listen ... I was tortured', those kinds of cases come up. So I look at all those factors, but not in this common-law tradition of exclusion – even though I know that's coming from the Torture Convention. I look at it more of, you know, looking at all the factors.[102]

Such an approach nominally brings the Ombudsperson much closer to her former role as judge for the International Criminal Tribunal for the Former Yugoslavia (ICTY),[103] where judges are allowed to 'admit any relevant evidence which it deems to

96 *Supra* note 92.

97 Mr Abdelrazik's Narrative Summary alleged that he 'was closely associated with Abu Zubaydah', thought to be an al Qaeda operative, but as the American government has conceded elsewhere, it caused Mr Zubaydah to be waterboarded (i.e. tortured) at least 83 times during August 2002.

98 Emmerson, *supra* note 49, at para. 47.

99 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 15. For decisions concerning the exclusion of torture evidence at the domestic level see *A and Others* (No. 2), *supra* note 95; Oberlandesgericht (OLG), OLG Hamburg, Decision of 14 June 2005, reprinted in (2005) 58 *Neue Juristische Wochenzeitschrift* 2326; *Hamdan v. Rumsfeld*, 548 US 577.

100 Emmerson, *supra* note 49, at para. 49.

101 See, for example, O. Bowcott, 'UN "May Use Torture Evidence to Impose Sanctions on Terror Suspects"', *The Guardian*, 11 November 2012.

102 Prost, *supra* note 60. (emphasis added).

103 For a brief professional biography of the current Ombudsperson (Ms Kimberly Prost) see: http://www.un.org/en/sc/ombudsperson/bio.shtml.

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have probative value' and 'may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'.[104] However, the implicit adoption of a 'probative-value' standard to material obtained by torture goes much further than existing international tribunals. The ICTY has not yet had the opportunity to expressly adjudicate on the admissibility of torture evidence and – according to Kai Ambos's in-depth analysis of the ICTY, ICTR, and ICC jurisprudence on this issue – should such an opportunity arise, supranational torture evidence would necessarily need to be excluded from the tribunal's consideration because of the damage it brings to the integrity of the proceedings.[105] The Ombudsperson's probative-value standard and approach to material obtained by torture therefore appear to go beyond that of other extant decision-makers in the international legal context. Furthermore, because the standard for analysis is set so low and the sources of intelligence material are never disclosed, it effectively frees states to rely on torture material against terrorist suspects in novel ways that would be unlawful if pursued at the domestic or regional levels and inadmissible before comparable international tribunals. This, in turn, risks stimulating new markets for the acquisition of tainted information[106] and institutionalizing state reliance on torture.

Both of the novel standards analysed above illustrate a co-constitutive dynamic between the Ombudsperson's exercise of discretion and legal expertise (on the one hand) and the exceptional and pre-emptive nature of the targeted-sanctions regime (on the other), with new forms of executive power consolidated or embedded in the process. The probative standard applied to torture material, for example, is not simply an effect of the Ombudsperson's discretion in choosing not to exclude tainted material per se. The crucially important factor that shapes her approach to this issue is the pre-emptive nature of the sanctions regime itself – or, in the words of the Ombudsperson, the fact that the sanctions are expressly designed by the Security Council to function as 'preventative measures':

> Jack Bauer, you know, on *24*. He tortured a lot of people [and] he got information [that] there is a bomb about to go off. Nobody would suggest that you shouldn't use or rely on that information and go look for the bomb. So taking that in a preventative context here, if ... you've got information and it indicates from a preventative point of view that you should be using the sanctions, I don't think anyone would argue that you shouldn't, from a prevention point of view, rely on that information.[107]

The exceptional context also serves to limit the actual substantive efficacy of the standard. Because listing decisions are intelligence-based the sources and methods

104 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Rule 89 (C)–(D), UN Doc. IT/32/Rev. 42 (1994) (amended 4 November, 2008) and Rule 89 (D). According to Baehr-Jones, the adoption of such a standard would 'allow the UN to initiate judicial review of 1267 designations' by freeing states to rely on illegally obtained evidence and withhold information that does not originate with them, thus encouraging the disclosure of classified material to the Sanctions Committee and 'provid[ing] those designated with access to the intelligence evidence used against them'. However, Baehr-Jones does not countenance the ways such a standard may facilitate the institutional reliance on torture material. See Baehr-Jones, *supra* note 66, at 481.

105 See K. Ambos, 'The Transnational Use of Torture Evidence', (2009) 42 *Israel Law Review* 362.

106 See J. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/16/52 (2011), at para. 536.

107 Prost, *supra* note 60.

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used to obtain the information are disclosed neither to the Sanctions Committee nor to the Ombudsperson. Even if the Ombudsperson were to obtain access to classified information, so long as the sources are withheld she will be unable to assess the reliability of that information to determine whether it was likely obtained by torture.[108] Since undertaking the interview upon which our analysis of this issue is based, for example, the Ombudsperson has issued a public statement and reported to the Security Council claiming that if she is satisfied to the applicable standard that information has been obtained through torture she will not rely on it.[109] However, because the sources of the underlying information are never disclosed to her, it remains entirely unclear how such an assessment could actually be undertaken and findings of 'inherent unreliability' drawn. As Lord Bingham has observed in the comparable context of SIAC proceedings: 'despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture *will* be laid before SIAC *because its source* will not have been "established"'.[110] The deliberately 'fuzzy' standard applied in delisting proceedings and the procedural changes that we suggest it generates are not just effects of the Ombudsperson's assertion of a particular approach or sovereign decision. They are produced and delimited by the pre-emptive nature of the sanctions, their reliance upon intelligence as evidence and the practical need for the Ombudsperson to hybridize both types of information into her decision-making processes. Shifting the burden of proof from the state to the targeted individual, for example, would ordinarily be in breach of the core principles of international justice that the accused does not have the burden of proving their innocence but rather the accuser has the burden of proving guilt.[111] Because of the exceptional nature of the sanctions regime, however, it is a misnomer to speak in terms of 'guilt' and 'innocence' – for the Security Council the sanctions 'are preventative in nature and are not reliant upon criminal standards set out under national law'.[112]

The increasing indistinction between intelligence and evidence fostered through pre-emptive security is generating novel standards that hybridize law and expertise. In the case of *Rehman*, for example, the UK House of Lords had to determine whether it was appropriate for SIAC to apply a civil standard when reviewing the executive's assessment of the future security risk posed by alleged terrorist suspects. According to Lord Hoffman:

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

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108 Forcese and Roach, *supra* note 12.

109 K. Prost, 'Approach to the Assessment of Information, Including Information Alleged to Have Been Obtained by Torture', available at: http://www.un.org/en/sc/ombudsperson/approachtoinfo.shtml.; Fifth Report of the Ombudsperson to the Security Council, UN Doc. S/2013/71 (2013), at para. 57.

110 *A and Others* (No. 2), *supra* note 95, at para. 59 (emphasis added).

111 See, for example, the comments of Justice Zinn in *Abdelrazik v. Canada,* 2009 FC 580, at para. 53.

112 Preamble of S/RES/1989 (2011).

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> *seriatim* and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment.[113]

In other words, because the review of intelligence material alleging 'association with' terrorism necessarily involves making assessments of risk founded on inference rather than determinations as to whether specific acts occurred, existing standards of proof would be incapable of providing the decision-maker with any assistance.

One might therefore suggest that the novel standards deployed by the Ombudsperson, and the institution of her Office more generally, might best be understood as 'legal grey holes'. Prior to the introduction of the Ombudsperson, Dyzenhaus argued that the 1267 listing regime was so normatively flawed that giving it domestic legal effect allowed the Security Council 'to establish a kind of legal black hole internationally and domestically'.[114] The Office of the Ombudsperson clearly transforms this hole from black to grey – it is precisely the kind of 'imaginative experiment in institutional design' discussed by Dyzenhaus that is 'designed to uphold the rule of law [but] run[s] the risk of undermining it'.[115]

Whilst the novel evidential standards analysed above aim to provide a modicum of procedural fairness to the delisting process they are more attentive to notions of inference and speculation than conventional standards of proof; they also serve to fortify and legitimize pre-emptive and intelligence-based executive measures and – when viewed in the broader transnational legal context – to help alter the field within which normative claims (to fairness or due-process compliance) are made possible at the regional and domestic levels.

6. Conclusion

Our analysis suggests that the Office of the Ombudsperson can to some extent be understood as a 'legal grey hole' because it is an imaginative institutional design with profound normative flaws. The Ombudsperson was created by the Security Council to repair the acknowledged human rights deficiencies within the 1267 sanctions regime. Yet this innovation does not so much repair these problems and bring the system within the remit of human rights so much as create novel procedures and hybrid appropriations of legal standards that fortify and legitimize the use of pre-emptive executive measures. As we have shown, the Ombudsperson's lack of decision-making power and inability to examine the reasons why individuals have been designated on the 1267 list effectively precludes any kind of review procedure consistent with conventional rule-of-law principles – by enabling, for example, affected individuals the right to have their cases properly heard. The Security Council have deliberately confined the Ombudsperson to issuing recommendations in order to ensure that their exercise of Chapter VII UN Charter powers remains absolutely

113 *Secretary of State for the Home Department v Rehman*, [2001] UKHL 47, at para. 56 (emphasis added).
114 Dyzenhaus, *supra* note 41, at 164.
115 Dyzenhaus, *supra* note 34, at 211.

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unrestrained, thus freeing national executives from having to account for the targeting decisions that they take. The Ombudsperson's appeals to fairness also hinge on the production of a temporal chasm that complements and further legitimizes the deployment of intelligence material in listing cases. The novel evidential standards that are being deployed are accordingly more attentive to notions of inference and speculation than prior standards of proof and troublingly do not, on principle, exclude evidence that may be obtained by torture.

We therefore regard the Office of the Ombudsperson as a 'legal grey hole' that is in some ways more 'dangerous' or detrimental than a black hole because it accords a veneer of legitimacy to exceptional practices and renders it more difficult to question the political assumptions behind, and fundamental rights implications of, the 1267 listing regime. However, we also accord more importance to political contingency and the ongoing contestation surrounding targeted sanctions than both Dyzenhaus or Agamben allow. Dyzenhaus envisages the slow development of a liberal constitutional order at the international level where domestic and international norms begin to harmonize and grey holes beget innovative institutional designs that move inexorably towards the rule of law. Agamben assumes that the exception inevitably 'comes more and more to the foreground as the fundamental political structure and ultimately begins to become the rule', thus rendering everyone potentially *homo sacer* in the drive of exceptional politics.[116] Our analysis suggests that both of these implicit teleologies are insufficiently attentive to the fragmented and disparate assemblage of legal procedures and novel recombinant standards that are marking and shaping the emergent pre-emptive security field at the global level.

The effects of the Ombudsperson's hybrid standards and procedures, for example, go beyond mere 'rubber stamping' and are not merely non-law as Dyzenhaus might suggest.[117] As demonstrated by the *Kadi* litigation before the EU courts, these effects feed back to reconfigure the transnational juridical landscape within which rights claims take place, further exacerbating the fragmentation of the international legal landscape.[118] The development of both the 1267 system and the Ombudsperson's role within it depends, to a large extent, on the outcome of the *Kadi* litigation before the ECJ as well as the impact of other ongoing juridico-political challenges and conflicts affecting the regime.[119] Given the structural nature of the core deficiencies at play, however, it is difficult to see how such procedures could ultimately render the Ombudsperson's practice consistent with substantive rule-of-law principles and

116 Agamben, *supra* note 3, at 20.

117 For Dyzenhaus, grey holes function more 'like a rubber stamp ... than a forum in which executive claims are properly tested'. Dyzenhaus, *supra* note 34, at 3. For the notion of emergency law sliding 'off the continuum of legality' see Dyzenhaus, *supra* note 37.

118 As Forcese and Roach point out, *supra* note 12, the 2010 Kadi decision (and the problem of 'intelligence as evidence' underpinning it) has facilitated a deepening disconnect between UN and domestic legal systems that will in turn stimulate further legal conflict, fragmentation, and pluralism.

119 Including, inter alia, the outcome of the plethora of Iranian sanctions cases currently proceeding before the EU courts (most of which similarly rely on classified material: *supra* note 52) and the ongoing impact of the reform recommendations made by the UN Special Rapporteur on Countering Terrorism in his September 2012 report to the UN General Assembly (Emmerson, *supra* note 49).

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facilitate the global rule of (administrative) law.[120] The 1267 Ombudsperson may prove, therefore, to be both a more durable and a more contingent exceptional measure than conventional theories of the exception allow.

120 For Dyzenhaus, institutional experiments (such as SIAC) that require executives to justify their acts to an independent tribunal are consistent with the spirit of legality if they have access to all relevant information said to justify the decision. The Ombudsperson, however, does not have such comprehensive access to closed material and (given her lack of decision-making power) cannot in any way approximate an independent tribunal. See Dyzenhaus, *supra* note 34, at 204–5.

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