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How UN Counter-Terrorism Sanctions Are Made

Anton Moiseienko

GAVIN SULLIVAN. *The Law of the List*. Cambridge, UK: Cambridge University Press, 2020.

INTRODUCTION

Gavin Sullivan's encounter with UN counter-terrorism sanctions began in 2010. Then, as a practicing human rights lawyer, he a wrote a report on the subject, which resulted in him being in touch with several Tunisian men in France who found themselves on a sanctions list:

> 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. (4)

In and of itself, this provided Sullivan with valuable experience of how UN sanctions operate, including through making representations on behalf of his clients to the Office of the Ombudsperson to the ISIL (Da'esh) and the Al-Qaida Sanctions Committee. In this book, however, it is augmented by not only an exhaustive analysis of existing literature on UN sanctions, but also several dozen expert interviews. These include interviews with members of the UN counter-terrorism sanctions committee and monitoring team, former UN Ombudsperson Kimberly Prost, and—remarkably—two unnamed judges on the EU's General Court and Court of Justice (xxiv). Excerpts from those interviews are interspersed throughout the book, sometimes as illustrations of Sullivan's broader points and sometimes as objects of thoughtful critique.

The title of the book, *The Law of the List*, gives the reader a glimpse into its principal argument, namely that UN counter-terrorism sanctions involve "an assemblage of norms, knowledges and techniques" of far greater complexity, and impact, than might appear at first sight (250). The depth of Sullivan's engagement with this central proposition is compelling. However, his work is so rich in theory that, for most, much patience will be required to unlock its insight. This does not detract from the quality of Sullivan's analysis, but the book is tilted heavily toward a theoretically

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inclined audience and written in language that makes few concessions to the practitioner, policy maker, or generalist reader.

WHAT DID WE KNOW ABOUT SANCTIONS?

The Law of the List addresses one of the most intrusive, and legally fraught, sanctions regimes, namely UN-imposed asset freezes and travel bans against suspected terrorists. Those sanctions date back to the restrictions against the Taliban imposed in 1999 under Resolution 1267, subsequently expanded to encompass other terrorist organizations, including Al-Qaida and ISIS. By virtue of the UN Charter, these measures are binding on all UN member states.

The human rights deficit of this arrangement is well known. The 1267 sanctions committee, operating on behalf of the Security Council, adds people to the sanctions list (hence, Sullivan's "List"). Those sanctions are then implemented by UN members, such that those targeted are automatically barred from international travel and have their assets frozen. This is the basic pattern that has resulted in some of the landmark cases, for instance that of the financier Youssef Kadi, whose property had been frozen for over ten years before the Court of Justice of the European Union (CJEU) invalidated the EU's implementation of UN sanctions.[1]

These developments have not gone unnoticed in academia. The operation of UN sanctions has been studied extensively, and anyone writing a book on the subject is entering a crowded space. To appreciate Sullivan's book, it is useful to situate it within the multiple strands of existing scholarship.

First, there is the voluminous discussion of the tensions between UN sanctions regimes and international human rights law. One of the earliest scholars to explore the contradictions between UN sanctions listings and international human rights standards was Iain Cameron, who prepared a report on subject for the Swedish Foreign Office. A slew of academic articles followed, written by Cameron and others (for example, Cameron 2003). Since then, there has been no shortage of developments. The *Kadi* saga has culminated in its protagonist's triumph after the CJEU decided it could review the legality of the EU's sanctions implementation without impugning the lawfulness of the UN sanctions being implemented. In response, the United Nations introduced a number of due process reforms, which resulted in the establishment of the Office of the Ombudsperson for counter-terrorism sanctions.

The evolution of the United Nations' counter-terrorism sanctions regime has also given rise to, and been accompanied by, a strand of scholarship focusing on the powers, procedures, and institutional structure of the Security Council. This includes general overviews of the Security Council's sanctions powers and procedures (Farrall 2007); consideration of the limits (if any) on the Security Council's sanctioning power inherent in the UN Charter (de Wet 2004); the scope (if any) for states to disobey the Security Council and refuse to implement the sanctions they mandate (Tzanakopoulos

1. The *Kadi* litigation unfolded between 2005 and 2013 and culminated in Council and Commission v. Kadi, Court of Justice, Judgment of 18 July 2013 in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P.

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2011); and the revised due process protections afforded by the listing process (Hovell 2016).

Then, there is a veritable smorgasbord of literature on terrorist financing, both doctrinal and empirical. Since counter-terrorism sanctions lead to the freezing of the assets of those allegedly involved in terrorist activities, it is both natural and necessary to consider them through the lens of the objectives of the international counter-terrorist financing regime. Recent work in this area ranges from a critical examination of the effectiveness (or otherwise) of targeted financial sanctions depending on the nature of the terrorist group being targeted (Keatinge and Keen 2020) to Juan Zarate's autobiographical account of the emergence of US counter-terrorist financing measures and sanctions programs in the aftermath of 9/11 (Zarate 2013). That and other related literature speaks to the role of targeted sanctions as one component of the overall counter-terrorist financing effort.

All in all, it is fair to say that UN counter-terrorism sanctions are a well-researched area of contemporary law and practice—and this is even before one considers literature on sanctions writ large, such as the copious amount of work on their effectiveness or otherwise (for example, Hufbauer et al. 2007). As a result, saying anything meaningfully new about the topic is no mean feat. As we shall see below, Sullivan succeeds in that task at the very least by providing new empirical knowledge about the development and operation of UN counter-terrorism sanctions, although it appears that his primary ambition lies more in the domain of theory, which I am ill-suited to comment on.

WHAT DOES SULLIVAN TELL US ABOUT SANCTIONS?

The Law of the List is an unusual book, and Sullivan cautions that "the chapters don't need to be read in any particular order" (50). In line with that precept, I will begin by discussing the book's second chapter, entitled "Global Listing Technologies and the Politics of Expertise."

Processes

As the title suggests, the chapter is concerned with what happens under the bonnet of the Security Council's sanctions-making. To my mind, this is where the book's most valuable contribution is to be found, namely the window it opens into some of the processes that shaped the evolution of the Security Council's counter-terrorism sanctions regime.

Part of the chapter covers fairly familiar ground, namely the flexible, pragmatic manner in which the 1267 committee went about the designations. However, Sullivan's interviews and personal experience of representing those listed under that sanctions regime provide additional color and texture. For instance, it is one thing to understand that, in the absence of a robust legal standard for listing, the Security Council must be selective and strategic about whom to target. It is quite another thing to read in *The Law of the List* the reflections by a member of the sanctions monitoring team on the type of terrorist actor most susceptible to targeted sanctions (85–87) or an account of how the

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Security Council would on occasion target people at the periphery of terrorist activities specifically to incentivize them to "flip" on those of greater counter-terrorism value (100).

Enlisting Nonstate Partners

Perhaps of greatest note is the hitherto untold story of the 1267 sanctions committee's interaction with the International Civil Aviation Organization (ICAO). The conventional understanding of the mechanics of UN-promulgated travel bans is something like this: the UN publishes the name of the person concerned, and then member states seek to stop them at the border, with all the challenges that divergent spellings, missing identifying details, or fake passports present. As Sullivan shows, there is a plot twist. Following 9/11, compliance with the ICAO's security standards, verified via the ICAO's Universal Security Audit Program, is effectively treated as indispensable for a country's airports to continue to take part in global civil aviation. To leverage the ICAO's influence, the 1267 sanctions committee enlisted its help in ensuring that the ability to process data on blacklisted individuals formed part of those standards (124–27). Thus, instead of simply relying on member states to comply with their obligations under the UN Charter, the 1267 committee harnessed the power of an organization whose work keeps international aviation functioning on a practical level. This is an illustration of the Security Council seeking to enlist other organizations in support of its work, as opposed to simply relying on domestic governments giving effect to sanctions as they are required to do under the UN Charter.

A likewise insightful story is told in the book's third chapter, entitled "The List as a Multiple Object: The Office of the Ombudsperson." In it, Sullivan details how from 1998 onward the Watson Institute, a research center at Brown University, came to play a quasi-think-tank role for the 1267 committee, pushing the sanctions committee to address due process concerns in the name of effective implementation (155–63). More broadly, Sullivan makes a convincing argument that the CJEU's adverse judgments were not only a legal impediment for the Security Council to overcome, but also detracted from the legitimacy and credibility of UN sanctions listings. That credibility was central to national governments' buy-in and therefore to domestic implementation around the world. For Sullivan, credibility is therefore one of the defining characteristics of the sanctions list (136).

Missing: Asset Freezes

There is also a curious, albeit by no means fatal, omission in the book. While treating the reader to these rarely understood details about the operation of travel bans, it does not seek to offer any comparably rich treatment of the implementation of asset freezes, or of the role of the Financial Action Task Force (FATF) in supporting them. For many if not most observers, asset freezes are *the* primary way in which sanctions affect the lives of those targeted. The interviews that Sullivan cites brim with acknowledgments of this. For instance, in the book's first chapter sanctions are

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presented as "powerful new techniques of 'financial warfare,'" described by one UN official as leading to a "civil death penalty" as a result of the target's complete exclusion from commercial interactions (5).

The enforcement of asset freezes is an issue at least as important and complex as that of travel bans, if not more so. The transmission mechanism from the Security Council publishing a list of names to those individuals' assets being identified and frozen is anything but straightforward. To a significant extent, the enforcement of UN counter-terrorism sanctions relies on banks worldwide complying with their anti–money laundering and counter-terrorist financing obligations. Those, in turn, stem from the FATF's technically nonbinding but widely observed recommendations.

Surprisingly, the FATF is only mentioned twice in the book, both times in interview quotes (126, 235). Nor does *The Law of the List* appear to include any other material on the enforcement of asset freezes. From the standpoint of contributing to our collective knowledge of the field, this is a perfectly defensible choice as the FATF's work has been amply discussed elsewhere. Indeed, after the publication of *The Law of the List*, another list-themed monograph—*The Bankers' Blacklist*—came out that studies in detail how the FATF's recommendations are underwritten by regulatory enforcement in key financial hubs (Morse 2022). But, insofar as Sullivan's book on its own terms is concerned, one cannot help but wonder why its innovative exploration of the ICAO's role is not matched by at least some analysis of the FATF's work.

THEORY PUZZLES

As should be evident from the overview above, *The Law of the List* is a book that rewards the patient reader. Nevertheless, Sullivan's intent to provide a "detailed sociolegal account" also presents major challenges to legal scholars and perhaps to empirical researchers as well. Sullivan intends to offer readers "a box of tools." In doing so, he seeks to embrace the scholarly fields of "global governance and human rights, Science and Technology Studies (STS) and sociology of knowledge, the 'practice turn' in international relations, ethnographies of globalization, humanitarian governance, international and transnational law and critical security studies" (50). These goals create a difficult field to navigate for readers untutored in such theoretical frames.

It is instructive to read Sullivan's characterization of existing scholarship, which he depicts as "dominated by four key theoretical approaches to postnational law and governance: global constitutionalism, global legal pluralism, global administrative law and international regime theory" (9). All those approaches represent, in essence, different ways of thinking about the tension between the Security Council's sanctions, international human rights law, and domestic constitutional standards. According to Sullivan, none of those modes of thinking is fully satisfactory, either alone or in conjunction (13–16). He, therefore, proposes to move beyond them by making "three distinct analytical moves" (16).

First, he aims to develop a "framework of global legal assemblage to analyses the ISIL and Al-Qaida listing regime and its effects," which draws on previous theorists' attempts to "describe the symbiotic cofunctioning of heterogeneous elements across different domains" (16). We are told, then, that "[t]his idea of assemblage, as the forging

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of connections between heterogeneous elements, is closely related to what Science and Technology Studies (STS) scholars call an 'actor-network'" (17). But the closest that Sullivan comes to summarizing what this analytical move actually entails is to suggest that his aim is to "chart how this novel form of global preemptive security governance [i.e., UN sanctions] is created, configured and stretched through practice" (18).

The second analytical move is to "study risk and preemption as practices of governmentality" (23). What is meant by "practices of governmentality," however, is only expanded on through the medium of Michel Foucault's quotes, as an "ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics, that allow the exercise of this very specific albeit complex form of power" (26). But what it might mean in practice is difficult to discern.

Finally, the third analytical move is to "rethink the problem of the exception in assemblage terms through [Sullivan's] empirical study of the list" (28). In doing so, Sullivan appears to reject the view that counter-terrorism sanctions are an instance of exceptional exercise of emergency powers. He points out that the design and enforcement of sanctions is a bureaucratic, mundane, and ongoing process that does not sit easily with many accounts of "exceptional" measures taken by the executive. According to Sullivan, this means that "we see a variegated topology of global exceptional governance emerging. One that is provisional and diffuse yet dense, jurisgenerative and powerful" (30).

Of course, opting for this style and approach is legitimate. Regrettably, Sullivan thereby forgoes the opportunity to speak to a broader audience keen to engage with, and benefit from, his learning. Even more problematic is the barrier that this puts in the way of this book informing further empirical study that is crucial to understanding "the law of the list."

THE UN SECURITY COUNCIL AND BEYOND

In summary, I would describe *The Law of the List* as a welcome collection (assemblage?) of vignettes dealing with various aspects of designing, litigating, and enforcing the Security Council's counter-terrorism sanctions. There is a diverse cast of characters involved in doing so, including Security Council members, experts on the 1267 committee's monitoring team, the Office of the Ombudsperson, domestic governments, the CJEU, and so on. In their actions, all of them are influenced, albeit in different ways and to varying extents, by competing considerations, such as: respecting legal constraints; mitigating adverse humanitarian impact; keeping sanctions up to date; facilitating compliance; and ensuring the credibility of sanctions (136). How all of that shapes and gives effect to sanctions is, in essence, the Law of the List.

It appears to me that the notion of the Law of the List—as a convenient umbrella term that encompasses the totality of sanctions law and practice—could be a useful focal point for future comparative analysis. While Sullivan's book is concerned specifically with UN counter-terrorism sanctions, some of the similar dynamics play out in "autonomous" sanctions regimes adopted by states without the Security Council's mandate.

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There, too, a varied range of actors is involved in the design and enforcement of sanctions, from various government agencies to banks and other regulated businesses. Interestingly, in relation to certain sanctions programs—such as US Global Magnitsky sanctions—this includes significant input from civil society organizations worldwide. No doubt, all of those actors are guided by virtually the same range of key considerations that Sullivan has identified in relation to the UN, but their relative weight in a particular jurisdiction and for a particular actor will differ. Understanding how those factors affect the decision making of government and private-sector actors whose actions collectively make up a state's sanctions regime can perhaps be a more useful way of comparing and contrasting different states' sanctions frameworks than a black-letter comparative legal analysis.

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