

By the 1970s, however, the climate had changed. Technocracy had come to be questioned for its blind spots, including its problematic relationship with democracy. The likes of Michel Foucault and Jürgen Habermas, in their different ways, formulated critiques of rational technocracy, which led many to argue for a reform of international organizations, perhaps most of all an influential observer such as Tom Weiss, who started his career with an important study of the international bureaucracy¹⁶ and has never ceased to advocate for both the relevance of international organizations and the need to improve them.¹⁷

Steffek's main conclusion is that the rise and fall of technocratic governance need to be understood as resulting from the tension between a desire for self-government and expert government. This should not come as a surprise – most international organizations lawyers will intuitively have understood much the same, and Steffek's conclusion has more than a passing resemblance to traditional legal dichotomies, such as public versus private, domestic versus international or sovereignty versus world community. The great merit of Steffek's work resides not so much in his conclusion but, rather, in the preceding insightful discussions (and sometimes excavations) of thinkers about both international organization and international organizations. One may quibble with the periodization and hope for a further analysis of organizational practices as well, but it is usually the fate of pioneering works that they give rise to further ideas, qualifications and inspirations, and, by that yardstick, *International Organization as Technocratic Utopia* measures as an unqualified success. This is compulsory reading for anyone interested in international organizations (plural) as well as international organization (singular).

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Gavin Sullivan. ***The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law***. Cambridge: Cambridge University Press, 2020. Pp. 371. £99. ISBN: 9781108491921 (hardback). £25. ISBN: 9781108741323 (paperback).

With *The Law of the List*, Gavin Sullivan delivers a thought-provoking account of the politics of global security law, focusing on the United Nations Security Council (UNSC) sanctions regime that was originally established by Security Council Resolution 1267 – that is, 'the List'. Drawing on his background as a human rights lawyer involved in the

¹⁶ T. Weiss, *International Bureaucracy: An Analysis of the Operation of Functional and Global International Secretariats* (1975).

¹⁷ Exemplary is T. Weiss, *What's Wrong with the United Nations and How to Fix It* (2009). Weiss is also the co-founder and co-editor of the Global Institutions book series for Routledge, with 155 titles having been published to date.

delisting process, Sullivan offers an ethnographic study of the institutions and actors involved in operationalizing the List. The result is a unique perspective on how the List is put into practice and shapes global security law.

The background to the List is well known. From the 1990s, the UNSC embraced smart sanctions that target individuals directly by imposing asset freezes and travel bans. It did so in response to the humanitarian crisis that comprehensive (as opposed to smart) sanctions had caused for the Iraqi civilian population in the 1990s. Smart, targeted sanctions were intended to be a more efficient means to put pressure on the person(s) considered responsible for undesirable behaviour directly while avoiding unwanted collateral damage. Today, these measures are the most important non-forcible tools in the Security Council's collective security arsenal.

The initial purpose of the List was to respond to the terrorist threat posed by Al-Qaida. In fact, targeted sanctions were effectively the only counterterrorism instrument at the UNSC's disposal, given that mere statements were insufficient and the 'terrorist enemy' was too elusive to know who to go to war against (as reported in an interview at 77). In 2015, the List was extended to target the Islamic State and the Levant (ISIL).

With respect to its management, the List is overseen by the UNSC's Sanctions Committee, which is tasked with proposing who is placed on it. The discretion involved in such decision-making is extremely wide; since a terrorist threat can emerge from anyone and from anywhere, the question becomes how one should respond to an unknown threat that is located in neither time nor space. The UNSC Sanctions Committee thus aims to respond to the global security threat posed by terrorists pre-emptively, and the List is described as a 'preemptive legal weapon' (at 3). Matters are further complicated by the fact that there is no universal definition of terrorism that would help identify who, in fact, is a terrorist. As discussed below, both obstacles are resolved by the Analytical Support and Sanctions Monitoring Team (Monitoring Team), which suggests that listings should be based on associations drawn from an individual's prior actions that supposedly shed light on what he or she might do in the future.

In Sullivan's words, individuals are selected not on the basis of what 'they have done but for things designating states *believe they might do in the future*' (at 2; emphasis added). The implication – by Sullivan as well as by many observers – is that the listing process runs counter to fundamental human rights and, in particular, the right to due process as individuals are selected on the basis of intelligence as opposed to hard evidence. In response to concerns expressed by commentators as well as by judges, and in order to provide a means of redress, the UNSC established the Office of the Ombudsperson; however, this falls short of providing a substantive review and serves more to shield the List from political and legal scrutiny, enabling the UNSC to keep its powerful instrument intact. Not only that, the List has long-lasting impacts on the legal principles and judicial processes of the jurisdictions that put them into effect, such as the European Union (EU).

The above-mentioned normative parameters of the law of the List are laid bare by Sullivan, who sets out to 'understand how the List works as a global ordering device' (at 8) and how it shapes global security law. He accomplishes this by studying the List

not only as an assemblage – namely, the building ‘of connections between heterogeneous elements’ (at 17) – ‘of norms, knowledges and techniques produced and held together by an array of localised practices at different sites and scales’ (at 250) but also, ethnographically, as a ‘multisited research object’ (at 37). This includes a micro-level, or ‘granular’, empirical analysis of different ‘sites’ where the List is operationalized. It first focuses on the ‘mundane and technical work’ of the Monitoring Team that assists the Sanctions Committee (Chapter 2) and then turns to the Ombudsperson (Chapter 3). It then delves into how law and judicial processes are rearranged by these practices, by zooming in on the regional EU courts (Chapter 4). The main insights derived from these granular analyses are discussed in this review, following which it considers their broader implications.

As part of his review of the ‘mundane and technical work’ of the List’s operationalization, Sullivan recounts how the Monitoring Team, which provides assistance by collecting and sharing information and is the main focus in Chapter 2, engages in ‘assemblage work’ in order to assist the Sanctions Committee. As Sullivan explains, ‘global security law is a project of knowing and countering “global terrorism” before it materialises’, which requires assemblages (at 56). The question that Sullivan addresses is how these assemblages are created and what their impact is on global security. Sullivan shows that individuals who would eventually be considered to pose a terrorist threat are not identified because they fit any given definition of a terrorist (as, after all, there is no such universally accepted definition, [discussed at 67ff]) but, rather, because they engage in activities that would demonstrate an ideological association with Al-Qaida, ISIL or their philosophical remnants (at 79, 82 for examples).

As a member of the Monitoring Team told Sullivan, ‘[t]he 1267 regime covers specific individuals and groups who are considered terrorists *by their actions*, but not because they conform to a definition’ (at 77; emphasis added). By Sullivan’s account, the lack of definition is turned into an opportunity. When faced with the uncertainty of a ‘potential future threat’, the Monitoring Team, as a pre-emptive governance technique, creates these threats. An analogy to quantum physics can be made here. In what is often referred to as the ‘observer effect’, electrons do not have a precise location until they are ‘measured’ at the subatomic level. Like electrons, the terrorist threat, which is not spatially or temporally located, emerges through the Monitoring Team’s production of associations, or relations, that did not exist before (at 78). Individuals are not listed on the basis of facts or, as discussed below, of hard evidence. Instead, their designation stems from speculations, or inferences, that are drawn from their prior behaviour. They are put on the List based on what ‘the observer’ assumes they may potentially do.

In circumventing the definitional issue and focusing on associations, Sullivan shows how the List is able to make an illusive, vague threat ‘visible and actionable’: terrorism appears to exist because potential terrorists are listed, not because it is defined (at 77). The ‘observer effect’ reveals something rather eerie about our physical world for it suggests that nothing exists until it is measured or that our measuring brings it into existence. In the context of the List, the focus on ‘terrorists by association’ raises uncomfortable questions about how global security practices interact

with, or rather shape, law. Sullivan recounts how one of his clients was listed for liking a Facebook page, which seemingly proved he was associated with an Al-Qaida affiliation (at 228). In another example, an individual was listed on the basis of allegations that were eventually deemed unfounded by an Italian court. Although dismissed, these allegations were nonetheless considered sufficient to justify preventively listing the individual (at 241). These examples illustrate just how baseless a listing can be, confirming human rights concerns frequently raised by commentators.

Unsurprisingly, the practice of listing and of targeted sanctions has raised questions of judicial process and evidence. There is no shortage of literature on the topic, especially following European jurisprudence in the wake of the *Kadi* cases.¹ Sullivan's account of how the UNSC responded to criticisms of its listing process – spearheaded by like-minded states, EU courts and non-governmental organizations – makes for interesting reading. Drawing on information drawn from diplomatic cables leaked by WikiLeaks, Sullivan shows that, far from being concerned about human rights, the UNSC's priority was to maintain its authority (at 214). Allowing 'some sort of appeal mechanism' (quoting the interview with the former United Kingdom (UK) Foreign and Commonwealth Office director, at 215) was a means of securing state implementation since resistance to comply would have undermined the UNSC's credibility. As it appears from Sullivan's discussion, for UNSC members, ensuring the List's legitimacy was an investment in the durability of the Council's preventive counterterrorist mechanism and, consequently, its authority in global security governance. Signalling thus played an important part in the creation of the Ombudsperson.

Given the interests that drove it, the mandate of the Ombudsperson – eventually adopted as an 'appeals mechanism of sorts' – was implemented with many structural weaknesses from a human rights perspective (that is, if one believes an independent judicial review would be preferable). The Ombudsperson's actual ability to provide a substantive review remains highly limited by the UNSC. Taking into account the UNSC's sensitivities and the special context of the List, the first Ombudsperson designed a procedure that would assess the listing decision against present-day circumstances rather than against the circumstances that applied when the person was listed as well as on the basis of the Ombudsperson's own evidentiary standard: 'reasonable grounds to suspect'. However, severe limitations remained in place: while the procedure allows for delisting, it gives the individual no insight into the reasons for their targeting in the first place. Furthermore, during dialogue meetings with the Ombudsperson, individuals are often required to defend themselves against vague, unsourced inferences of the sort that justified their initial listing. As Sullivan demonstrates, in some cases, the dialogue could be used to draw new inferences and to add potential terrorists to the List (at 243). The whole procedure therefore falls short of ensuring a fair process and, according to Sullivan, is akin to an 'inquisitorial and exceptional quasi-judicial procedure' (at 244). Ultimately, the role of the Ombudsperson

¹ Joined Cases C-402 & C-415/05P, *Kadi & Al Barakaat Int'l Found. v. European Commission* [2008] ECR I-6352; T-85/09 *Kadi v. Commission* [2010] ECR II-5177; Joined Cases C-584/10 P, C-593/10 P, C-595/10 P, *European Commission and ors v Kadi (hereafter Kadi II)* [2013] ILEC 031.

is not to provide a substantive review but, rather, to coordinate and collect information, and the permanent five members (P5) remain in control over who is listed and delisted (at 220). In the end, Sullivan argues, the Ombudsperson's primary function is to 'help mute underlying political and legal tensions and glue the Al-Qaida ISIL list together as a global governance regime' (at 137).

The Ombudsperson is not the only site where human rights are subjected to UNSC interests and concerns; the same can be said of the EU's judiciary. As noted above, in the context of the List, legal processes were required to adapt and make room for pre-emptive security. Sullivan is clear that, because it relies on intelligence, the listing procedure is incompatible with due process rights and the standard of proof (at 256ff): while the List is forward looking, judicial review looks back at what has occurred through the assessment of evidence. In principle, evidence in judicial proceedings must have probative weight and be disclosed so that the defendant can build their defence. Intelligence, however, provides less concrete information, is speculative and is meant to be confidential.

Even though, in *Kadi*, the General Court and the Court of Justice of the European Union held that the reasons for the listing had to be disclosed – thereby seeming to challenge the use of intelligence – Sullivan shows how European courts eventually came to accept intelligence as evidence (at 261ff). Through reforms, which were actively pushed for by the USA (at 266), they gained access to confidential information that could be shared with the judges but not the person concerned (at 261–262). In Sullivan's words, by agreeing to be accorded such privileged treatment, the European judiciary helped build 'a legally authorised state of exception' to procedural rights (at 271). A global emergency was 'normalised, stretched and rendered durable through legal techniques' (at 255). The aftermath of *Kadi II*² only consolidated this trend. Although it confirmed the procedural rights of designated individuals – in particular, the right to review – it also watered down the scope of the right: all that is required for the EU to sanction an individual is a 'statement of reasons' from the ISIL and Al-Qaida Sanctions Committee. Moreover, only when the listed individual challenges the listing does the EU consider whether it was well founded.

One of the consequences of this approach, according to Sullivan, is that, in circumstances where the individual does not judicially challenge the listing, 'empty box-ticking' (at 291) is permitted. Furthermore, there is deference to another authority that is presumed to be closer to the source, whereas, in reality, there is no clear source. Here, Sullivan quotes the former UK minister for Europe, David Lidington, '[i]t would be wrong to think that when we are talking about confidential material we are talking only about material that might have an intelligence origin. Sanctions that have been imposed originally at UN level are quite likely to have been based on information contained in a confidential report from a UN-mandated group of experts' (at 297). This means that, contrary to what is generally believed, the listing decision does not emerge from the Sanctions Committee, the P5 representatives and their

² *Kadi II* (n 1).

intelligence agencies. Rather, it is taken by 'executive agencies and security officials within select national states and listing experts relatively autonomous from the formal political apparatus of the UN Security Council' (at 298). In other words, the listing procedure is dislocated. As Sullivan puts it, '[t]he ISIL and Al-Qaida list is ... a dislocated form of law that eludes consideration by the courts. Judicial review persists but is increasingly emptied of substance by a discrete spatiotemporal move and the use of intelligence-as-evidence' (297).

At the end of Sullivan's analysis, one is bound to observe that, instead of EU courts shaping how the List operates, the List progressively influences EU judicial review. This in turn reverses the conventional understanding, according to which European courts had brought a measure of due process to the UNSC's practice. Instead, Sullivan's account suggests that the interaction between 'New York' and 'Luxembourg' has led to the decline of rights that the European community aspires to protect – an outcome that is perhaps not desirable in the name of security. So what remains of the List? As mentioned above, the targeted sanctions against individuals that gave rise to its establishment were intended to compensate for the evils of comprehensive sanctions. Yet Sullivan's account suggests that, given the way in which these targeted measures are put in place, the List remains highly problematic. Sullivan does not mince words: the consequence of being listed is 'a civil death penalty' (at 5). When the evidence is so thin, it is not only 'unjust' (at 5), it is 'violent' (at 7) and, one could add, cruel.

Sullivan portrays the List as 'a legal weapon that enables listing authorities to wield legal violence over individuals without any real consideration as to why' (at 255). Sometimes, the states proposing to list a particular individual do so callously, without knowing why. Drawing on the WikiLeaks' cables, Sullivan points readers to a striking example concerning Italy, which had recommended certain individuals be listed upon a request from the USA 'for purely political reasons' without having evidence of its own to justify the listing. When prompted by the UNSC review to justify its decision, the Italians turned to the Americans for insight (at 212–213). In these and other examples, the List appears as the convergence of national interests: states are using the process to tackle their own national terrorists, while the Monitoring Team builds associations where they otherwise do not exist. Or, alternatively, as in the Italian example just given, states add individuals to the List out of political favour to an ally without having the evidence to support the decision (at 213).

What comes across in Sullivan's book is the fact that, through the politics of the List, the lowered standard of review used for the UNSC's listing spills over into the legal systems, with lasting consequences. This spillover happens in spite of the fact that the original intention of those arguing for some degree of control of the List was to improve the listing procedure, be it at the UNSC itself through the Ombudsperson or within the EU through its judicial mechanism. Sullivan is careful to note that the law does not necessarily give way to preventive security. Instead, it is 'reorganized at a very granular level' (at 300) and used as a counterterrorist instrument. Yet, to the extent that law is incrementally shaped by

counterterrorism policies – ‘preemptive security dynamics modulate and rearrange conventional legal practices into novel amalgams and recombinations’ (at 25–26) – one may wonder if this is not a subtle way in which law gives way to counterterrorism policies.

Ultimately, the value of Sullivan’s study – quite apart from enhancing our understanding of the role of targeted sanctions – is that it demonstrates the importance of studying practice for the critique of international law. In order to notice the shifts that take place, like a scientist analysing the movement of tectonic plates, one needs to zoom in and look at the application of the law in what Sullivan refers to as its ‘sites’ and to analyse its workings in these concrete settings. This does not necessarily make for easy reading: Sullivan’s analysis is very technical; he critiques the List through a micro, or ‘granular’, analysis of how it works, focusing on each site where it is operationalized. In his words:

global security law and governance regimes might just as well be critiqued by better understanding the complexities of how they work. That is, by ethnographically remapping the particular techniques, spatiotemporal moves, legal knowledges and practices through which these legal ensembles achieve their effects – in short, by delving more deeply into the dynamics of nascent global legal governance arrangements, rather than flying away from them, as some have suggested. (at 303)

Unsurprisingly, not all of us are in a position to carry out such an assessment or are used to the process of ‘ethnographic remapping’ that Sullivan offers. As this is so, his monograph takes time to digest. But it is time worth investing; moving beyond the List, Sullivan’s study illustrates the insights that ‘micro-assessments’ can provide. After all, the movement of tectonic plates has a (sometimes drastic) impact on the earth’s surface. Sullivan offers an account of how preventive global security practices shape international law, and he shows that targeted sanctions against individuals are adopted with very little insight into how these sanctions actually work and how effective they are. In spite of this, policy-makers frequently see them as the right thing to do. In recent years, national governments and the EU have adopted their own listing procedures in response to human rights violations; the USA and Canada have adopted the Global Magnitsky Act³, while the EU implemented the Global Human Rights Act.⁴ These lists operate in a different manner to the List in that they do not target individuals preventively but are reactions to prior behaviour and presumably aim to prevent further misconduct. At the same time, just as with the List, they are adopted on the basis of little insight on how they actually influence unwanted behaviour and whether they function as a preventive mechanism.

³ In the USA: Global Magnitsky Human Rights Accountability [23 December 2016] Act 22 U.S.C. 2656, Public Law 114-238; In Canada: Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) [18 October 2017] S.C. 2017, c. 21.

⁴ Council Decision Concerning Restrictive Measures against Serious Human Rights Violations and Abuses (7 December 2020) OJ L 410I/13; Council Regulation Concerning Restrictive Measures against Serious Human Rights Violations and Abuses (7 December 2020) OJ L 410I/1.

In studying a particular prominent preventive mechanism in detail, Sullivan provides insights on how global security techniques create and shape our world and how the law adjusts to them. Perhaps because such processes can appear boring and are technical, we do not pay attention to them, leaving room for this shaping of law to occur largely unnoticed. Or perhaps we do not consider it the role of the lawyer to inquire how practice shapes law. Nonetheless, whether or not we choose to pay attention to such practices, they shape and mould our world in crucial ways. It seems to the present author that the moulding that Sullivan brings to our attention is one that we should be wary of and that we should be alert to how global security practices subtly shape legal principles and judicial processes. All this has an impact on our understanding as international lawyers: Sullivan encourages lawyers to ask critical questions about seemingly technical matters and perhaps even dare to be an advocate, lest we unwittingly support and legitimize novel forms of collateral damage. Given their expertise, lawyers are uniquely placed to understand how law is (ideally) designed to work and to raise critical questions when transformations occur. Besides, one should not forget that academia has been highly influential in nudging the UNSC to shift towards targeted sanctions and in taking human rights issues seriously. Clearly, however, in the UNSC listing procedure, the hard work of human rights law is not done.

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Hadi Azari. ***La demande reconventionnelle devant la Cour internationale de Justice***. Paris: L'Harmattan, 2018. Pp. 462. €45. ISBN: 9782343135571.

In a field already densely populated (including, more recently, by the monumental *Max Planck Encyclopedia of International Procedural Law*¹), monographic works on the law governing the activity of the International Court of Justice (ICJ) belong to a genre that knows no crisis. Be it ad hoc judges or parties' non-appearance, preliminary exceptions or third party intervention, few powers of the ICJ and few aspects concerning its composition or its procedure have not been subjected to a careful dissection and evaluation in book-length form. While the main ingredients of these evaluations tend to be the same – a thorough examination of the rules governing a particular issue and of the practice relating to it, a contextual analysis of the role of the ICJ and of the dynamics guiding its activity and a comparison with other international tribunals – the focus can be different. Indeed, the genre has its variations, three of which stand out. Some books concentrate on the rules, providing a complete and systematically organized overview of the law and practice governing a particular issue. In other monographs, studies of the law governing a particular issue provide the backdrop to the analysis, but the authors' main interest lies in the underlying concepts and