doi:10.1017/ajil.2022.81

Alternatives to Adjudication in International Law: A Case Study of the Ombudsperson to the ISIL and Al-Qaida Sanctions Regime of the UN Security Council

*By Andrej Lang**

Abstract

The "temporary golden age" of international courts is likely over. States seeking to provide oversight mechanisms and individual remedies at the international level are likely to opt for less intrusive and more flexible alternatives to adjudication. This Article analyzes the phenomenon of international complaint mechanisms through a detailed case study of the Ombudsperson to the ISIL and Al-Qaida sanctions regime. The analysis reveals an in-built tension between principle and pragmatism: the Ombudsperson's institutional design falls short of the requirements that are essential for adjudication, but it nevertheless proves to be a surprisingly effective remedy for persons wrongfully listed. The Article makes the case for the establishment of such bodies, despite some of their inherent shortcomings.

I. Introduction

It is a bedrock assumption of many international legal scholars that courts are institutionally best suited to protect the international rule of law and human rights, and that quasi- and non-judicial alternatives are less desirable—if not insufficient or even harmful.[1] The end of the Cold War sparked a stunning proliferation of international courts (ICs), but today the

* I am grateful to José E. Alvarez, Hannah Birkenkötter, Gráinne de Búrca, Stefanie Egidy, Susan Emmenegger, Mattias Kumm, Cristina Lloyd, Karin Loevy, Juha Rainne, Yuanyuan Ren, Mariana Velasco Rivera, Rafael Lima Sakr, Rebecca Sutton, Giacomo Tagiuri, and J.H.H. Weiler for their insightful comments, and to the students at the Global and Comparative Public Law Colloquium at NYU School of Law for their outstanding reaction papers. I am especially indebted to Julian Leonhard for his excellent research assistance. Warm thanks are due to Markus Berger, Emilia Kanera, and Robin Westphal for helping with the footnote revisions.

[1] For a similar assessment, see José E. Alvarez, *Mythic Courts* (iCourts Working Paper Series No. 2014, 2020), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685739; Laura Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 New Eng. L. Rev. 1059, 1059–60 (2002). A manifestation of this court-centric viewpoint is the debate about the establishment of a World Court of Human Rights. *See*, *e.g.*, Manfred Nowak, *It's Time for a World Court of Human Rights*, *in* New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures 17, 21 (M. Cherif Bassiouni & William A. Schabas eds., 2011) (depicting the "non-legally binding" decisions by "quasi-judicial bodies" as a "weaknesses" of the UN treaty body system that is contrasted with a more desirable "world court").

appetite of states for establishing international judiciaries has largely disappeared,[2] and backlash against ICs has become a recurring concern.[3] The tectonic shift in the geopolitical context, with the American empire and the rule of the West fading and a multipolar world order with China as a new superpower emerging, has likely ended the "temporary golden age" of ICs.[4] At least, the current zeitgeist renders the establishment of new ICs increasingly unlikely as states grow more wary of losses of control that independent courts typically induce.[5] Tom Ginsburg even predicts that with the rise of authoritarian regimes, "we should expect international law to increasingly take on the character of that demanded by authoritarians"[6]—which likely means less "third-party dispute resolution mechanisms in the form of a court."[7]

At the same time, global governance still creates multiple accountability and human rights lacunas that require oversight or even an effective remedy. States seeking to provide oversight mechanisms and individual remedies at the international level are likely to opt for less intrusive and more flexible quasi- or non-judicial review mechanisms because "[s]uch 'softer' forms of dispute resolution . . . reflect more accurately the political contours of the current international system."[8] Today, there already are numerous alternatives to international adjudication that were designed to increase the level of control exercised by member state-principals over their reviewer-agents.[9] One of the most important manifestations of this phenomenon are what I call international complaint mechanisms (ICMs) such as the World Bank's Inspection Panel (WBIP) and Compliance Advisor/Ombudsman (CAO), the ILO's Committee on Freedom of Association (CFA), the Aarhus Convention Compliance Committee (ACCC), the UN treaty bodies, and the former ombudspersons of the UN transitional authorities in Kosovo and East Timor.[10]

I use a three-part working definition of these bodies: First, an ICM is an (ordinarily subsidiary) organ of an international organization (IO), composed of independent experts vested

[2] In the timeframe from 1993 until 2009, twenty-seven new international judicial bodies were established, seventeen alone since 2000. Since 2010 only one IC has been established, the Court of the Eurasian Economic Community, which was subsequently replaced by the Court of the Eurasian Economic Union. *Cf.* Cesare P.R. Romano, Karen J. Alter & Yuval Shany, *Annex 1: International Judicial Bodies: Recapitulation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 899 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2013).

[3] *See, e.g.*, Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197 (2018); Erik Voeten, *Populism and Backlashes Against International Courts*, 18 PERSP. POL. 407 (2020); Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019).

[4] Wayne Sandholtz, *A New Age of International Courts*, 51 I TULSA L. REV. 471, 485 (2016); *but see* Karen Alter, *The High Water Mark of International Judicialization?* 23 (iCourts Working Paper Series No. 250, 2021), *at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3857526.

[5] *See* Karen Alter, *Critical Junctures and the Future of International Courts in a Post-Liberal World Order*, *in* THE FUTURE OF INTERNATIONAL COURTS: REGIONAL, INSTITUTIONAL AND PROCEDURAL CHALLENGES 33 (Avidan Kent, Nikos Skoutaris & Jamie Trinidad eds., 2019).

[6] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221, 231 (2020).

[7] *Id.* at 238.

[8] *See* Duncan French & Richard Kirkham, *Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?*, 7 N.Z. Y.B. INT'L L. 179, 205–06 (2009).

[9] *Id.* at 205; Laurence R. Helfer, Karen J. Alter & Maria F. Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AJIL 1, 41 (2009).

[10] For a useful overview, see Mara Tignino, *Quasi-Judicial Bodies*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 242 (Catherine Brölmann & Yannick Radi eds., 2016); Cesare Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISP. SETTLEMENT 241, 254–61 (2011).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

with compulsory jurisdiction who conduct legal review to assess compliance with international norms. Second, an ICM serves as triadic dispute resolver between individuals, communities, and/or NGOs adversely affected by alleged non-compliance on one side and the responsible state or IO on the other side. In this triad, the former are entitled to unidirectionally file complaints against the latter before the ICM. Third, the mandate of the ICM is institutionally highly constrained, reflecting the founding member states' intention to guard themselves against unintended role expansions. The lack of binding decision-making powers—a feature that is shared by all IMCs—best encapsulates these constraints,[11] entitling the scrutinized states and IOs to adopt or reject the reports and recommendations submitted by ICMs at their will.[12] Nevertheless, private persons and entities have to date lodged more than ten thousand complaints with various ICMs and have often received substantial relief.[13]

The growth of ICMs raises important normative issues that are embedded in a broader debate about the just design of global institutions.[14] That debate reflects public international law's built in tension between realist pragmatism and principled aspirations, between apology and utopia.[15] Is it normatively acceptable to establish more flexible and less intrusive complaint mechanisms given the power structures of the international legal system? Do they promote the international rule of law or are they a lamentable degradation of traditional judicial forms of adjudication? To what extent are and can they be structured to ensure meaningful oversight of states and IOs and to protect the rights of affected individuals and communities?

The Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee (OP) is one of the most controversial and remarkable ICMs.[16] It was grudgingly established by the UN Security Council (S.C.) in 2009 in response to the *Kadi* judgment of the Court of Justice of the European Union (CJEU) to save the ISIL and Al Qaeda sanctions regime established in 1999 by S.C. Resolution 1267 (1267-sanctions regime), thereby empowering a single individual, the acting OP, to review the listing decisions of arguably the most powerful international institution. Yet the OP faces serious institutional constraints: it is neither institutionally independent nor does it have the power to render binding decisions. This raises the questions whether this kind of mechanism could become a blueprint for global governance in a more turbulent world order or whether it only constitutes a fig leaf that purports to legitimate the S.C.'s sanctions regime. How we evaluate the success or failures of the high-profile OP in terms of protecting due process rights and providing accountability may have important ramifications for the design of future global institutions.

The literature about the OP reflects the broader debate about ICMs. It is characterized by a stark controversy between proponents and critics of the OP mechanism. While both agree that legal protection for listed persons should be provided by an independent oversight

[11] Tignino, *supra* note 10, at 253.

[12] Romano, *supra* note 10, at 253.

[13] Kelebogile Zvobgo & Benjamin A. T. Graham, *The World Bank as an Enforcer of Human Rights*, 19 J. HUM. RTS. 425, 425 (2020).

[14] *See* Thomas Pogge, *Concluding Remarks*, *in* SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD 407, 415 (Jeremy Farrall & Kim Rubenstein eds., 2009).

[15] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

[16] For a similar classification, see Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449, 452 (2019); DEVIKA HOVELL, THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING 27 (2016).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

body, they hold contrasting views on whether the OP is institutionally sufficient to provide such review. Proponents see the OP model as providing court-equivalent legal protection that is the best institutional solution for the highly political context of the S.C.[17] Instead of fixating on courts as the universal ideal model, this view argues that context-appropriate institutional models should be developed beyond the state and that the OP model should be consolidated and expanded.[18] Conversely, critics insist that only a judicial body can guarantee sufficient legal protection for the listed persons,[19] and that the OP constitutes a fig-leaf that contributes to stabilizing the sanctions regime—a global security exception incompatible with the rule of law.[20]

Both of them overlook the tension between principle and pragmatism that is inherent in the OP's nature as an alternative to adjudication—a tension that international legal scholars will likely increasingly have to grapple with in a possibly more authoritarian and less judicialized international law. Before engaging in principled and abstract debates about the merits and demerits of the OP mechanism—and of other ICMs for that matter—we need to better understand and evaluate how these bodies operate in practice, their institutional features, procedures and decision-making techniques, and what prospects and limitations they have in providing an effective remedy for individuals and private organizations harmed by states or IOs. Although ICMs are an important phenomenon in international dispute settlement, we still lack a clear understanding of these issues.[21]

This Article seeks to contribute to the global debate about alternatives to adjudication by providing a detailed case study of the OP. Most analyses of the OP focus on the period shortly after its establishment and on the flawed institutional design set out in the legal texts of the S.C. resolutions. Today, however, there is a significant body of practice from the first decade of its existence, allowing for a systematic, nuanced, and empirically grounded evaluation of the OP.

To do so, the analysis proceeds in three steps. Part II puts the OP into the broader context of UN targeted sanctions, providing a brief overview of the 1267-sanctions regime and explaining its serious accountability and human rights deficits that call for independent review. It further dives into the diplomatic history of making the Resolutions 1904 and 1989 that established and transformed the Office of the OP to better understand the motivations and political compromises that resulted in the creation of the OP mechanism.

[17] HOVELL, *supra* note 16, at 27; Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1 (2016); Armin Cuyvers, *"Give Me One Good Reason": The Unified Standard of Review for Sanctions After* Kadi II, 51 COMMON MKT. L. REV. 1759, 1786 (2014); SUE E. ECKERT & THOMAS J. BIERSTEKER, DUE PROCESS AND TARGETED SANCTIONS: AN UPDATE OF THE "WATSON REPORT" 24 (2012); William Bartholomew, *A Due Process Balancing Act: The United States' Influence on the U.N. al-Qaeda Sanctions Regime*, 59 N.Y. L. SCH. L. REV. 737 (2014); Kimberly Prost, *The Office of the Ombudsperson: A Case for Fair Process*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 181 (Jeremy Farrall & Hilary Charlesworth eds., 2016).

[18] HOVELL, *supra* note 16, at 3–4, 23; Larissa J. van den Herik, *Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes*, 19 J. CONFLICT & SECURITY L. 427, 447–49 (2014); José E. Alvarez, *International Organisations and the Rule of Law*, 14 N.Z. J. PUB. & INT'L L. 3, 43 (2016).

[19] Ben Emmerson (Special Rapporteur), Second Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, para. 23, UN Doc. A/67/396 (Sept. 26, 2012).

[20] GAVIN SULLIVAN, THE LAW OF THE LIST: UN COUNTERTERRORISM SANCTIONS AND THE POLITICS OF GLOBAL SECURITY LAW 249 (2020).

[21] Zvobgo & Graham, *supra* note 13, at 425–26.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

Part III explores the institutional design and the practice of the OP mechanism. It demonstrates the shortcomings of the OP mechanism: the informality of the process that makes it less fair, the non-binding nature of the recommendations that allows the permanent members of the S.C. to block every disliked delisting recommendation, and the lack of institutionalized independence that potentially compromises the OP's ability to render impartial decisions. Despite these institutional inadequacies, Part III documents that the OP is surprisingly effective. Although the S.C. and its Sanctions Committee are legally entitled to override the OP's delisting recommendations, they have never actually done so. The OP has capably countered the constraints concerning independence and procedural fairness with professional integrity and innovative lawmaking. In sum, the case study about the OP illustrates how an ICM that was designed and assumed to be "soft" was transformed into a moderately robust international review mechanism that advances regard for the international rule of law even in the institutionally difficult and highly politicized S.C. environment.

Part IV assesses whether and when the institutional model of the OP merits replication in other contexts, cautiously drawing two broader lessons for other ICMs. First, it argues that ICMs have the institutional capacity to incrementally improve over time to better fulfill their normative mission as complaint mechanisms based on their influential role as triadic dispute resolver and the transnational character of its dispute settlement if officeholders engage in legally and politically skillful institution-building. Second, it suggests that heightened procedural requirements for overriding recommendations of ICMs may constitute a promising option beyond the binarity between bindingness and non-bindingness.

The Article concludes with the argument that there is value in establishing even weak independent review bodies, despite serious and likely persistent limitations, because institutional dynamics have the potential to compensate for many shortcomings built into the body at its creation. Instead of pitting legally binding ICs and non-binding ICMs against each other, the emphasis should be on building islands of independent legal review (whether judicial or extrajudicial) in the turbulent sea of international relations.

II. Context and Genesis

International legal scholarship lacks an empirically grounded understanding of the practice of ICMs generally and the OP specifically. This Article provides a case study about the OP to fill that gap.[22] It relies upon a variety of sources beyond legal texts to examine the OP and its institutional environment, including publicly available documents, small-scale statistical measures, and semi-structured qualitative expert interviews with key actors, including all former ombudspersons, their staff, attorneys representing petitioners in the OP process, members of the monitoring team of the 1267-sanctions regime, and diplomats who were sitting in the Sanctions Committee and participated in the drafting of the pertinent S.C. resolutions.[23]

[22] For a useful analysis of the meaning utility of a case study, see John Gerring, *What Is a Case Study and What Is It Good for?*, 98 Am. Pol. Sci. Rev. 341 (2004).

[23] Overall, ten interviews were conducted between October 2020 and April 2021. All interviews were recorded and transcribed. One request to interview a former petitioner and listed person was denied. The contact information of other former listed person could not be found despite significant searches and investigations. It warrants acknowledgment that qualitative expert interviews pose the risk of personal bias from both interview participants. While expert interviewees may tend—intentionally or unintentionally—to misrepresent information, for example, by portraying themselves in a good light, interviewers may display a lack of critical distance and reflection

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

This Part begins the case study by outlining the broader institutional context in which the OP operates and the international political process that led to its creation.

A. In Need of Independent Review: A Sketch of the 1267-Sanctions Regime

The OP forms part of the UN sanctions regime. To maintain or restore international peace and security, the S.C. is authorized under Articles 39 and 41 in Chapter 7 of the UN Charter to impose economic sanctions on states and individuals that are legally binding on all UN member states. On the basis of these far-reaching Chapter 7 powers, the S.C. has established thirty different sanctions regimes since 1966, fourteen of which are currently still in force, each administered by a separate UN sanctions committee.[24] The most elaborate and controversial is the 1267-sanctions regime, a counterterrorism instrument against Al Qaeda (and later also ISIL) created in response to 9/11, which is virtually unlimited in time, geographical reach, and number of persons who may be designated.[25]

The 1267-sanctions regime reflects a tectonic shift in the sanction practice—away from comprehensive trade sanctions against states toward targeted sanctions against individuals. At first glance, this new direction appears both gentler and more effective, as innocent populations are spared from potentially disastrous humanitarian consequences and instead the responsible leaders are sanctioned. However, the switch to targeted sanctions against amorphous and geographically dispersed terrorist organizations created a new dilemma.[26]

The regime establishes a novel form of international security law through which the S.C. effectively exercises international public power over individuals.[27] The S.C. itself targets individuals by placing them on the so-called Consolidated List. It does so via its subsidiary body, the 1267 Committee, thereby eliminating to a significant extent the state as a mediator between international law and its citizens—and eliminating with the state its infrastructure of parliament and courts that controls the executive and protects individuals. The S.C. justifies this broad authority with questionable reliance on the right to preventive self-defense against the diffuse enemy of terrorism, which can strike at any time to threaten international security.[28] The

concerning the interviewees and their own personal and ideological predispositions. I have attempted to address these concerns by cross-checking all interviews with each other and with publicly available sources of information, and by critically reflecting my own personal and professional background and possible motives of interviewees to misrepresent information.

[24] These are, in chronological order, the sanctions regimes concerning: (1) Somalia pursuant to Resolutions 751 (1992) and 1907 (2009); (2) ISIL (Da'esh) and Al-Qaida pursuant to Resolutions 1267 (1999) and 1989 (2011); (3) Iraq pursuant to Resolution 1518 (2003); (4) Democratic Republic of Congo pursuant to Resolution 1533 (2004); (5) Sudan pursuant to Resolution 1591 (2005); (6) Lebanon pursuant to Resolution 1595 (2005); (7) North Korea pursuant to Resolution 1718 (2006); (8) Libya pursuant to Resolution 1970 (2011); (9) Afghanistan pursuant to Resolution 1988 (2011); (10) Guinea-Bissau pursuant to Resolution 2048 (2012); (11) Central African Republic pursuant to Resolution 2127 (2013); (12) Yemen pursuant to Resolution 2140 (2014); (13) South Sudan pursuant to Resolution 2206 (2015); and (14) Mali pursuant to Resolution 2374 (2017).

[25] Lisa Ginsborg, *The United Nations Security Council's Counter-terrorism ISIL (Da'esh) and Al-Qaida Sanctions Regime*, *in* Research Handbook on International Law and Terrorism 551 (Ben Saul ed., 2d ed. 2020).

[26] *See* Monika Heupel, *UN Sanctions Policy and the Protection of Due Process Rights: Making Use of Global Legal Pluralism*, *in* Protecting the Individual from International Authority: Human Rights in International Organizations 86 (Monika Heupel & Michael Zürn eds., 2017) (speaking of a "Pyrrhic victory").

[27] Monika Heupel & Michael Zürn, *Human Rights Protection in International Organizations: An Introduction*, *in* Protecting the Individual from International Authority, *supra* note 26, at 14.

[28] Critical Jan Kiitrich, *Can Self-Defense Serve as an Appropriate Tool Against International Terrorism?*, 61 Me. L. Rev. 133 (2009).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

sanctions are thus preventive, not punitive; the relevant question is therefore not whether someone is guilty, but whether someone poses a threat.[29] The sanctions interfere with the targeted individuals' human rights to property, freedom of movement, personality, and family, and severely affect their daily lives.[30] Sanctioned individuals have all their assets frozen, including bank accounts used to pay rent and receive salaries, and bans on travel and on acquiring weapons are also imposed.[31]

The S.C. initially showed little sensitivity for the serious accountability and human rights vacuum it had created.[32] In its original form, the 1267-sanctions regime lacked even rudimentary procedural safeguards, drawing metaphorical comparisons with Kafka's literary account *The Trial*.[33] Listed individuals were neither informed or heard in advance, nor were they told the reasons for listing. Their sole legal remedies were diplomatic protection, later trivially expanded through the creation of the Focal Point, which was largely limited to facilitating communication between listed persons and the reviewing states.[34] Nevertheless, numerous U.S. nominations were—even if some of them contained only very little identifying information[35]—mostly just rubber-stamped by the sanctions committee in the aftermath of 9/11.[36]

The S.C. has improved the listing regime through incremental steps in response to widespread criticism,[37] but descriptions of the listing process in legal literature today still tend to paint a caricature of the 1267-sanctions regime based on its original form. In current Committee practice, however, the number of clearly false listings has gradually declined, if not disappeared altogether.[38] The listing process has become a long, arduous, and

[29] *See*, explicitly, SC Res. 1989, pmbl. Rec. 14 (2011).

[30] Her Majesty's Treasury v. Ahmed and Others, Judgment of 27 January 2010, [2010] UKSC 2, para. 60 (Lord Hope) (UK) [hereinafter UK Supreme Court, *Ahmed*] (characterizing listed persons as "effectively prisoners of the state").

[31] SC Res. 1989, *supra* note 29, paras. (1)(a)–(c).

[32] Emmerson, *supra* note 19, para. 15; SULLIVAN, *supra* note 20, at 245.

[33] *See* Abdelrazik v. Canada (Minister of Foreign Affairs), 2009 FC 580, Federal Court of Ottawa, para. 53 (June 4, 2009) (Can.).

[34] *See* Heupel, *supra* note 26, at 90 (characterizing the focal point as "a mail box").

[35] In U.S. counterterrorism circles, the recurring problem of a thin identifying information base, which at times included only a name and a location, was referred to as the "'Muhammad from Peshawar'-problem." *See* Interview with former U.S. diplomat working at the U.S. Mission to the United Nations on matters relating to the UN 1267-sanctions regime, via Webex, at 8:251–56; 9:257–63 (Mar. 26, 2021) (transcript on file with author) [hereinafter Interview with U.S. Diplomat].

[36] *See* Interview with the former UN 1267 Ombudsperson, Daniel Kipfer Fasciati, via Webex, at 3:76–77; 8:230–33; 9:256–61 (Nov. 10, 2020) (transcript on file with author) (all citations translated by author) [hereinafter Interview with Kipfer]; Interview with former member of the UN 1267-Ombudsperson's office staff, via Webex, at 13:440–43 (Jan. 11, 2021) (transcript on file with author) [hereinafter Interview with OP's Staff Member]. See in the literature: RON SUSKIND, THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE AND THE EDUCATION OF PAUL O'NEILL 193 (2004) (citing former U.S. Treasury General Counsel David Aufhauser: "It was almost comical . . . . We just listed out as many of the usual suspects as we could and said Let's go freeze some of their assets."); Ginsborg, *supra* note 25, at 553 (noting that the 1267-sanctions list was almost identical in content to the sanctions list of the U.S. Office of Foreign Assets Control in the first years after September 11, 2001).

[37] For an overview: Ginsborg, *supra* note 25, at 556–57.

[38] *See* Interview with Kipfer, *supra* note 36, at 18:569–72; Interview with OP's Staff Member, *supra* note 36, at 13:438–44; Interview with former member of the UN 1267-Monitoring Team, via Webex at 14:418–19 (Mar. 23, 2021) (transcript on file with author) (all citations translated by author) [hereinafter Interview with Monitoring Team Member].

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

information-intensive process for the designating state,[39] and listing designations are commonly withdrawn as a result.[40] The S.C. requires member states to take all possible measures to notify listed individuals and entities,[41] to make available a publicly available Narrative Summary of Reasons for the Listing,[42] and a more detailed Statement of the Case.[43] In addition, Resolution 1822 (2008) has established an annual review that requires the review of all listings at least every three years—even if just to remove deceased or falsely identified persons from the List.[44]

The basic governance vacuum inescapably remains: The 1267-Sanctions Committee, staffed by diplomats from the fifteen-member S.C., is an intergovernmental and power-political forum that is institutionally unsuited to designate individuals (with serious human rights implications), let alone to adjudicate their delisting applications. The listing process is highly political.[45] Any state, including a non-member, can nominate an individual it believes is "associated" with Al Qaeda or ISIL for listing, without providing evidence or intelligence underlying the nomination. There are virtually no deliberations about listing designations at the usually non-public meetings of the Committee,[46] and listings are approved through a no-objection procedure.[47] As a result, the Sanctions Committee does not review designations as a collective body, even though—or perhaps because—states typically have little incentives to diplomatically snub another state by explicitly rejecting a listing nomination simply to protect from sanctions an Islamist terrorist suspect that the other state believes poses a terrorist threat. This combination of the culture of secrecy in the sanctions committee, the absence of collective deliberation, and the political nature of its sanctions decisions makes the listing process structurally prone to error and abuse.[48]

There may be some valid reasons for giving a highly political and diplomatic, almost apotheosized intergovernmental institution like the S.C. the mandate to maintain international peace and security,[49] but its Sanctions Committee is institutionally ill-suited to individualized administrative action causing serious human rights infringements. The listing process itself suggests that the S.C. does not conform to the rule of law-principles that we should use to

[39] Interview with Monitoring Team Member, *supra* note 38, at 19:613–14.

[40] *Id.*, 23:737–38.

[41] *See* SC Res. 1822, para. 17 (2008).

[42] *Id.*, para. 13.

[43] SC Res. 1904, para. 11 (2009).

[44] Interview with Monitoring Team Member, *supra* note 38, at 11:313–30; *see also* Ginsborg, *supra* note 25, at 563.

[45] *See* SULLIVAN, *supra* note 20, at 234 (citing a former chairman of the Sanctions Committee: "At the end of the day, it's a political decision based on a political process."); DANIEL KIPFER, REMARKS BY THE OMBUDSPERSON AT THE HIGH-LEVEL PANEL DISCUSSION ON THE OCCASION OF THE 10TH ANNIVERSARY OF THE OFFICE OF THE OMBUDSPERSON 6 (Dec. 17, 2019), *at* un.org/securitycouncil/sites/www.un.org.securitycouncil/files/remarks_10th_anniversary_0.pdf.

[46] *See* Interview with two former U.S. diplomats working at the U.S. Mission to the United Nations on matters relating to the UN 1267-sanctions regime, via Webex, at 20:628–21:631 (Apr. 9, 2021) (transcript on file with author) [hereinafter Interview with U.S. Diplomats]. However, confidential bilateral discussions between individual states on listings regularly occur. *See* Emmerson, *supra* note 19, para. 26.

[47] The Sanctions Committee decides on listing nominations by consensus, but no explicit approval is required. *See* Emmerson, *supra* note 19, para. 26.

[48] Critical SULLIVAN, *supra* note 20, at 5; Emmerson, *supra* note 19, para. 26.

[49] Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOB. GOV. 39, 45 (2008).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

evaluate its work as an international institution that exercises international public power against individuals.[50]

B. Creating the Ombudsperson: Insights into the Negotiation History

It is not surprising against this background that the practices of the 1267-sanctions regime raised widespread criticism. It is, perhaps, more surprising that this criticism triggered serious reflection inside the S.C.—an institution perceived by its member states, especially the five permanent members (P-5), as sovereign and empowered to take any measure they deem necessary to ensure peace and international security[51]—about how to make the sanctions regime more just.

The greatest weakness of the 1267-sanctions regime was arguably the disregard for listed persons' right to be heard and right to effective review by an independent institution.[52] The institutional solution to this problem was the creation of the OP—an independent review body tasked with examining, upon receipt of a delisting petition, whether the listed petitioner is associated with Al Qaeda or ISIL, conducting its own investigations and making a recommendation to the 1267-Sanctions Committee on whether the petition should be granted or denied.

Put in perspective, its establishment through Resolution 1904 and the strengthening of this mechanism through Resolution 1989 is one of the most astonishing institutional developments in the S.C. context and in the field of ICMs. This Part explores the genesis of the OP. Based on accounts of diplomats who were involved in the drafting of those resolutions, it provides insights into the negotiation history of Resolution 1904 (A.) and Resolution 1989 (B.), suggesting that the establishment and strengthening of the OP mechanism constituted an unlikely reform conducted under exceptional circumstances.[53]

1. The Making of Resolution 1904 (2009)

The P-5 of the S.C. did not agree to establish the OP on the courage of their convictions but instead because of outside pressure and because of specific conditions that cannot be easily reproduced. The S.C. was then—unlike today—still capable of meaningful compromise and action. The early days of the Obama presidency in the United States created a political window for international institution-building.

The P-5 encountered heavy criticism for the 1267-sanctions regime from various actors. Within the UN framework, state leaders at the 2005 World Summit called on the S.C. to ensure a fair and clear process,[54] and, in 2006, then-UN Secretary-General Kofi Annan

[50] Ginsborg, *supra* note 25, at 552; KIPFER, *supra* note 45, at 6.

[51] Katalin Tünde Huber & Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: A Paradigm Shift?*, DÉCIMO ANIVERSARIO ANU. MEX. DE DERECHO INT'L 107, 135 (2012) (characterizing the S.C.'s traditional hermetic self-comprehension as being "the master of its own decisions").

[52] *Id.* at 118.

[53] One caveat of the account set forth in this Article is that—despite efforts made in this direction—it is not based on qualitative interviews with representatives of all or most members of the S.C., but—in addition to publicly available resources—only on interviews with U.S. and German diplomats, thus displaying a Western-centric perspective. In addition, two former diplomats from Mexico and Austria who were involved in the policymaking process resulting in Resolution 1904 provide valuable insights into the negotiation history. *See id.* at 140. However, their account is incomplete because it does not give information on the negotiations between the five permanent member states even though they were the key actors in the process.

[54] GA Res. 60/1 on the 2005 World Summit Outcome, para. 109 (2005).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

urged the S.C. to provide listed individuals the right to be heard and the right to review by an effective, independent, and impartial review mechanism.[55] The UN human rights machinery, from the high commissioner for human rights to the Human Rights Council and beyond, unanimously condemned the S.C.'s sanctions regime.[56]

Some member states advocated for reform through the Group of Like-Minded States[57] that put forward various proposals for the establishment of an independent monitoring body, ranging from the expansion of the Focal Point, to the creation of a Special Advocate with access to intelligence, to a panel of experts.[58] One of these proposals, originally put forward by Denmark, was the establishment of an ombudsperson,[59] seeking to transplant the Scandinavian ombuds tradition to the international plane.

The most important impetus for reform came from the CJEU's *Kadi* judgment[60] that annulled the EU regulation incorporating the applicable S.C. resolutions into EU law for violating EU fundamental rights.[61] As a result, EU member states were legally prevented from implementing the UN sanctions, sparking fears that Al Qaeda money would be diverted through Europe in order to avoid the sanctions thereby creating an EU-wide "hole in the sanctions net."[62] The S.C. acted out of concern about the lack of legitimacy and effectiveness of the sanctions regime.[63]

The establishment of the OP was an extraordinary diplomatic achievement. After all, it was surprising that the P-5 would accept an independent oversight body interfering with how they ran the 1267-sanctions regime. Although non-permanent S.C. members such as Austria and Mexico, as well as the Group of Like-Minded States, played a significant role in the

[55] The letter by Secretary-General Kofi Annan dated June 15, 2006 has not been published but is referred to in the Security Council debate on June 22, 2006. *See* SC, 5474th Mtg., at 5, UN Doc. S/PV.5474 (June 22, 2006). *See* Grant Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L L. 673, 736 (2011).

[56] For further details, see HOVELL, *supra* note 16, at 9–10.

[57] The group of like-minded states on targeted sanctions for fair and clear procedures for a more effective UN sanctions system was set up in 2008. Today, it comprises Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Ireland, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland. For an overview of the activities of the like-minded states in the context of the making of Resolution 1904, see Tünde Huber & Rodiles, *supra* note 51, at 121–25.

[58] *Id.* at 122.

[59] Letter Dated 28 September 2009 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council 2.10.2009, para. 46, UN Doc. S/2009/502 (Oct. 2, 2009).

[60] See for this assessment: Gavin Sullivan & Marieke de Goede, *Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise*, 26 LEIDEN J. INT'L L. 833, 841 (2013) (noting that "the Ombudsperson would never have been created were it not for the European Court's decision in *Kadi*"); SULLIVAN, *supra* note 20, at 169 (citing a diplomatic dispatch of September 4, 2009 by then-U.S. ambassador to the United Nations Susan Rice stating: "Bold action is needed to salvage the UN1267 al-Qaeda/Taliban targeted sanctions regime [and stop it from being] seriously undermined by criticisms—and adverse European court rulings . . . ."); Heupel, *supra* note 26, at 87 (classifying the establishment of the OP as "*judicial institution-building*"); KIPFER, *supra* note 45, at 2.

[61] Kadi v. Council, Joined Cases C-402/05P, C-415/05P, ECLI:EU:C:2008:461 (Sept. 3, 2008).

[62] Peter Wittig, *Making UN Sanctions Work: Germany's Chairmanship of the Al-Qaida/Taliban Sanctions Committee of the UN Security Council*, 55 GER. Y.B. INT'L L. 561, 564 (2012); Emmerson, *supra* note 19, para. 23.

[63] HOVELL, *supra* note 16, at 164; SULLIVAN, *supra* note 20, at 183.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

diplomatic negotiation,[64] the framework and central rules were negotiated in typical S.C. fashion in a small circle among the P-5, with the decision-making dynamics remaining largely obscure to outsiders.[65]

Among the P-5, the United Kingdom and France were the strongest advocates for the OP mechanism. Because they were bound by the CJEU's *Kadi* ruling, the two states hoped that its establishment would dispel the CJEU's objections and resolve the norm conflict between the UN Charter and EU law.[66] The UK in particular was a key player in this process because its own domestic version of the *Kadi* case, the *Ahmed* proceedings, was then pending before the British Supreme Court, and it had the ear of the United States based on their "special relationship."[67]

By contrast, all three non-European P-5s, China, Russia, and the United States, initially took the stance that *Kadi* was a European problem that the Europeans should deal with themselves, though the United States understood that bringing an independent court in line in a liberal constitutional system may not be as simple.[68] An additional source of institutional reluctance shared between the United States and Russia was the potential effects of the OP mechanism on the S.C.'s primacy. In their view, the Council is an inherently political body that should not be held accountable to a quasi-judicial body.[69]

As the lead country in counterterrorism,[70] as the central force behind the establishment of the 1267-sanctions regime, and as the country that designated the most individuals on the Consolidated List, the United States was arguably the key player in the establishment of the OP. Resolution 1904 ultimately passed because the United States supported it, assumed the role of key negotiator, and submitted an ambitious and influential draft resolution.[71] However, U.S. support was not a given.[72] While the Bush administration likely would not have agreed to its establishment,[73] there was serious skepticism even within the Obama administration.[74]

Underlying the internal U.S. decision-making process was an interdepartmental conflict between two of the most powerful departments of the U.S. government, the U.S. Department of State and the U.S. Department of Treasury.[75] The former viewed the establishment of the OP as a means to end the legitimacy crisis of the 1267-sanctions regime, accommodate European partners, and realize President Obama's credo of a "false . . . choice

[64] Tünde Huber & Rodiles, *supra* note 51, at 141.

[65] Interview with U.S. Diplomats, *supra* note 46, at 6:187–91.

[66] *See* Interview with the former UN 1267 Ombudsperson, Kimberly Prost, via Webex, at 1:21–24 (Mar. 31, 2021) (transcript on file with author) [hereinafter Interview with Prost].

[67] Interview with U.S. Diplomat, *supra* note 35, at 14:439–51.

[68] *Id.*, 3:74–80; 13:420–23.

[69] *Id.*, 2:48–55; 15:467–68.

[70] Interview with U.S. Diplomats, *supra* note 46, at 1:19–24; Tünde Huber & Rodiles, *supra* note 51, at 127.

[71] *Id.* at 127.

[72] Interview with U.S. Diplomats, *supra* note 46, at 24:728–33 ("It's not hard to imagine a world where the United States just said, 'No,' they said, 'Sorry,' or not even going to take a tiny step down this path. . . . My view is that the United States could have said that, even the Obama administration. That is very possible that could have been the U.S. position.").

[73] *See* Interview with U.S. Diplomat, *supra* note 35, at 4:120.

[74] *Id.*, 1:26–27.

[75] *Id.*, 7:195–97, 8:225–28; Interview with Prost, *supra* note 66, at 2:45–55; 2:36–38.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

between . . . safety and . . . ideals."[76] By contrast, the U.S. Department of Treasury, a key actor in U.S. sanctions policy due to its financial dimension ("asset freeze"),[77] opposed this reform for several reasons. First, Treasury was confident that U.S. entries on the Consolidated List were correct because they were based on extensive intelligence and on the domestic listing process conducted by the U.S. Office of Foreign Assets Control (OFAC), which was subject to domestic judicial review.[78] Second, Treasury resented the additional workload that the OP process was expected to create.[79] Third, it did not believe that "anything short of full independent judicial review" would "be sufficient to appeal to European courts."[80] Ultimately, the State Department prevailed.

The OP mechanism created by Resolution 1904 represents a delicate compromise between the opposing camps. It was designed to meaningfully provide listed persons with the right to be heard and the right to effective review requested by Kofi Annan.[81] It was agreed that addressing these issues required the creation of "a neutral mediator-like position"[82] and a process in which the independent reviewer would provide the listed persons with reasons and listen to their side of the story. Against this background, the U.S. State Department drafted Annex II of Resolution 1904 from scratch, envisioning a process that met minimum requirements of due process, without putting an undue burden on the member states.[83] The biggest concession for the skeptics of the OP was agreeing to a "paradigm shift" for the S.C.,[84] empowering a single individual to review, second-guess, and potentially alter its listings.[85]

However, the powers of the OP under Resolution 1904 were carefully limited. The P-5 agreed that the OP would have only the power to make observations on delisting requests. Anything more would have lost the Chinese and Russian vote and would have created internal problems for the U.S. government.[86] Resolution 1904 was finally adopted unanimously on December 17, 2009. In diplomatic circles, the establishment of the OP was considered a "sensation" that went far beyond what members of the Group of Like-Minded States had imagined.[87]

However, the P-5's hope that the establishment of the OP would alone quell critics of the sanctions regime was not fulfilled. As U.S. diplomats described, "before 1904 even had a chance to breathe, the drumbeat of European litigation did not slow down"[88] and "from the earliest days, there was pressure to move in the direction of something more

[76] Barack Obama, President Barack Obama's Inaugural Address (Jan. 20, 2009), *at* https://obamawhitehouse.archives.gov/blog/2009/01/21/president-Barack-obamas-inaugural-address.

[77] Interview with U.S. Diplomat, *supra* note 35, at 7:196–97.

[78] *Id.*,1:30–31, 2:33–46; Interview with U.S. Diplomats, *supra* note 46, at 18:558–61.

[79] Interview with U.S. Diplomat, *supra* note 35, at 2:59–70.

[80] *Id.*, 5:129–33.

[81] Interview with Prost, *supra* note 66, at 1:8–16.

[82] Interview with U.S. Diplomats, *supra* note 46, at 3:67–69.

[83] *Id.*, 4:106–10.

[84] Tünde Huber & Rodiles, *supra* note 51.

[85] Interview with U.S. Diplomats, *supra* note 46, at 3:89–92, 22:679–85.

[86] *Id.*, 4:112–14.

[87] Interview with former German diplomat working at the German Mission to the United Nations on matters relating to the UN 1267-sanctions regime, via Webex, at 17:434 (Apr. 30, 2021) (transcript on file with author) (all citations translated by author) [hereinafter Interview with German Diplomat].

[88] *Id.*, 5:129–30.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

binding."[89] About a month after the enactment of Resolution 1904, the UK Supreme Court in *Ahmed* dismissed the new OP mechanism noting that "[w]hile these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy."[90] Even worse, the European General Court (EGC) in *Kadi II* found the OP to fall short "of an effective judicial procedure for review of decisions of the Sanctions Committee."[91]

At the same time, the newly appointed OP Kimberly Prost pushed ahead. In her first two years in office, she submitted twenty comprehensive reports to the sanctions committee, seventeen of which proposed delisting, including some of the most controversial cases in the history of the OP.[92] For the United States, this was a surprising development as they had "a degree of confidence in the names that we had on the list that these were the right people and there was enough information," and expected that "any delisting recommendation that would come from the Ombudsperson would be a very rare occasion."[93] As a result, the P-5 faced the worst of both worlds: continued court challenges and a legitimacy crisis, along with interference with their sanctions practices by the new OP.

2. *The Making of Resolution 1989 (2011)*

Negotiations for Resolution 1989 took place in the spring of 2011. The developments since the adoption of Resolution 1904 had arguably hardened the stances and reinforced the views of the opposing camps. On one side, the EU members in the S.C., the UK, France, Germany, and Portugal, as well as the Group of Like-Minded States, intensified their push for strengthening the OP in order to address the concerns raised by the EGC in *Kadi II*—particularly because the appeal of the case was pending before the CJEU.[94] The United States was concerned about the legitimacy crisis of the 1267-regime.

On the other side, Russia and China were soured by the continued court challenges mounted against the 1267-regime despite the establishment of the OP. They questioned whether they should continue to help strengthen an accountability mechanism that was fundamentally at odds with their own preferences, without any guarantee that this further effort would end the regime's legitimacy crisis.[95] Moreover, the working atmosphere between Russia and the three Western members of the P-5 had deteriorated due to the disagreement about the no-fly zone over Libya that had been established in March 2011 despite Russia's concerns.[96]

Still, that the mechanism had already been established made it easier in the negotiations "to convince people to take a few additional steps."[97] The bottom line for the negotiators was that

[89] Interview with U.S. Diplomat, *supra* note 35, at 15:477.

[90] UK Supreme Court, *Ahmed*, *supra* note 30, para. 78.

[91] Kadi v. European Commission, T-85/09, ECLI:EU:T:2010:418, para. 128 (Sept. 30, 2010).

[92] This includes all completed cases from July 2010 until July 2012. In the three other cases, one petition was denied, one withdrawn, and one amended.

[93] Interview with U.S. Diplomat, *supra* note 35, at 9:264–67.

[94] Interview with U.S. Diplomats, *supra* note 46, at 5:134–35.

[95] At one point during the negotiations on Resolution 1989, the Chinese deputy ambassador reportedly asked his British and French colleagues "[o]kay, let's say we could agree to all of this . . . can you just make this problem with the judges go away?" Interview with U.S. Diplomats, *supra* note 46, at 24:745–47.

[96] Interview with Prost, *supra* note 66, at 3:67–70.

[97] Interview with U.S. Diplomat, *supra* note 35, at 15:479.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

the objections articulated by the EGC had to be addressed in a meaningful way. Because granting the Ombudsperson binding decision-making authority over the S.C. "was absolutely not acceptable,"[98] a compromise emerged to upgrade the OP's decisions from observation to recommendation and, more importantly, to making the recommendation more difficult to overturn. Instead of requiring unanimity in the sanctions committee when adopting a delisting recommendation (consensus), overruling a recommendation would now require a unanimous resolution (reverse consensus). The CJEU upheld the decision of the EGC despite the improvements under Resolution 1989, causing frustration among member state diplomats,[99] but the reforms succeeded in substantially mitigating the legal challenges posed by litigation before European courts.[100]

Russia only agreed to this compromise in return for a concession: the bifurcation of the Al Qaeda and Taliban sanctions regime. A "central motivation"[101] for the bifurcation was that Russia, which had designated most of the Taliban names to the 1267-list, was not willing to accept that its designations would be subject to the strengthened OP process.[102] The bifurcation thus had the ramification that due process for listed persons associated with Al Qaeda improved substantially, while those associated with the Taliban lost access to the OP.[103]

III. Institutional Design and Practice

The establishment of ICMs is an institutional design choice that involves delicate tradeoffs. They are, as the genesis of the OP illustrates, frequently created in response to intense criticism for IOs or states for the lack of accountability and human rights deficiencies, yet their creation also involves contentious negotiations and resistance from some states.[104] Establishing softer, less intrusive, and thus more adaptable independent review mechanisms, often results from a carefully crafted compromise that promises to stabilize the concerned international institution or regime by accommodating calls for more accountability, participation, and better protection of human rights and the environment, while avoiding the role

[98] *Id.*, 13:396–7; *see also* Interview with U.S. Diplomats, *supra* note 46, at 4:111–12 ("[T]he furthest we could go is just give the ombudsperson the ability to issue a recommendation.").

[99] *See* James Cockayne, Rebecca Brubaker & Nadeshda Jayakody, Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness Through Fair and Clear Procedures 16 (2018).

[100] *See* Al-Dulimi et al. v. Switzerland, App. No. 5809/08, para. 66 (Eur. Ct. Hum. Rts. June 21, 2016) (concur., Pinto de Albuquerque, J.) (finding that "[t]he Office of the Ombudsperson is not an insignificant development, which shows that incremental changes in the system are possible"). The EU Courts have dismissed the most recent challenges by listed persons. *See* Al-Bashir Mohammed Al-Faqih et al. v. European Commission, C-19/16 P, ECLI:EU:C:2017:466 (June 15, 2017); Mohammed Al-Ghabra v. European Commission, T-248/13, ECLI:EU:T:2016:72 (Dec. 13, 2016); Al-Faqih et al. v. European Commission, T-134/11, ECLI:EU:T:2015:812 (Oct. 28, 2015). In *Al-Ghabra*, the Court criticized the listed person for failing to petition the OP, hinting at a possible reverse *exhaustion of local remedies*-rule regarding the OP as a requirement to bring an annulment action before the EU courts. *See id.*, paras. 178–79.

[101] Interview with U.S. Diplomats, *supra* note 46, at 12:376.

[102] *Id.*, 12:349–76.

[103] *Id.*, 13:387–91 ("I remember having a conversation with her [Kimberly Prost] right after we adopted or on the evening before we were about to adopt these resolutions. . . . At first, she was livid that we were separating out the Taliban names from the Al-Qaeda names, but then once she found out all the additional provisions of 1989, I think she understood and was quite pleased with where we had ultimately landed.").

[104] See for the Aarhus Compliance Committee: Gor Samvel, *Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice*, 9 Transnat'l Envtl. L. 211, 215 (2020); for the Kosovo Ombudsperson Institution: French & Kirkham, *supra* note 8, at 199.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

expansions typically associated with ICs[105] and thereby maintaining the favorable prevailing power structures.[106]

The contradictory purposes that ICMs serve lead to normative questions about how we should evaluate their performance. This evaluation should not be based on instrumental member state preferences to keep them in check but on how they perform measured against the procedural and substantive principles that they are claimed to promote. ICMs are often defended as: (1) providing attainable access even for marginalized petitioners and an expedient process; (2) bringing states and individuals together in a fair process on the international plane; (3) offering some measure of independence; and (4) providing meaningful remedies for aggrieved private persons and organizations negatively affected by states and international institutions. Given that the normative debates concerning ICMs are oriented around these four metrics, we should also evaluate the performance of ICMs on this basis.

Reasonable doubts persist about whether ICMs can deliver on these promises. How we normatively evaluate ICMs should therefore also depend—in addition to these four criteria—on their capacity to overcome at least some of their institutional constraints to better fulfill their normative missions even if this does not conform to state preferences. In other words, it hinges on the institutional dynamics that ICMs do or do not set in motion.

This Part evaluates the OP based on these criteria of effective remedy, procedural fairness, independence, broad access and expedient process, and capacity to overcome institutional constraints through quantitative and qualitative evaluation of the existing institutional arrangements and practices. The analysis shows that the institutional constraints imposed on the OP are troubling on paper. Its delisting recommendations are not binding, it does not review the legality of the S.C. original listing decisions, its process is characterized by a high degree of informality that works mostly to the petitioner's disadvantage, it lacks institutional independence, and most listed persons have never filed a petition with the OP. If we ended our analysis here, the OP would seem like a poor and inadequate complaint mechanism.

The practice of the acting OPs tells a different story, however. It suggests that the office-holders, Kimberly Prost (July 2010–July 2015), Catherine Marchi-Uhel (July 2015–Aug. 2017), Daniel Kipfer Fasciati (July 2018–Dec. 2021), and Richard Malanjum (Feb. 2022–present), have, through politically shrewd institution-building, exploited the break-in-points in the legal framework set forth by the applicable resolutions. They have turned the OP into a surprisingly effective review body with very high delisting and compliance rates that provides impartial review and basic procedural rights to listed persons.

A. Remedy

ICMs are established to offer meaningful remedies,[107] but critics contend that mere findings and recommendations will have little impact on non-compliant states and IOs.[108] This

[105] Helfer, Alter & Guerzovich, *supra* note 9, at 41 (claiming that "[i]nternational judges . . . are professionally predisposed 'to depart from their limited roles in order to expand their own and their courts' authorities'")

[106] See for this claim regarding the OP: SULLIVAN, *supra* note 20, at 227–28.

[107] See regarding the WBIP and the CAO: Lynn M. G. Ta & Benjamin A. T. Graham, *Can Quasi-judicial Bodies at the World Bank Provide Justice in Human Rights Cases*?, 50 GEO. J. INT'L L. 113, 122–27 (2018).

[108] Similar, Samvel, *supra* note 104, at 212. For a version of this criticism regarding the OP, see Emmerson, *supra* note 19, para. 35; SULLIVAN, *supra* note 20, at 223–24.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

argument is persuasive in theory, but in the practice of the OP the reverse consensus rule introduced by Resolution 1989 has ensured very high delisting and acceptance rates. In addition, critics argue that the remedies of ICMs are unduly limited to promoting future compliance instead of repairing past wrongdoing.[109] Although the remedy offered by the OP excludes review of original listing decisions, this section demonstrates that *de novo* review, the standard of review responsible for this exclusion, was pivotal in establishing an outcome-oriented model of individual justice that succeeded in getting dozens of petitioners off the List through a procedurally efficient and substantively focused no-nonsense approach.

1. *Non-bindingness and Reverse Consensus*

The OP lacks binding decision-making powers. It concludes every pending delisting petition with a "comprehensive report" that is strikingly similar to a court judgment.[110] The report outlines the standard of review, presents in detail the facts of the case, and sets forth a legal assessment as to whether there is sufficient information to provide a reasonable and credible basis for an association with Al Qaeda or ISIL.[111] The 1267-Sanctions Committee decides to follow or reject the recommendation. The OP decision is therefore best understood as an intermediate procedural step in a global administrative process.

However, the legal effect of these recommendations was significantly strengthened by the reverse consensus rule that the S.C. grudgingly introduced via Resolution 1989. According to paragraph 23 of the Resolution, recommendations to delist a person from the Consolidated List can be overruled in two ways with starkly different voting requirements. First, the Sanctions Committee can overrule the recommendation by consensus. Second, the Chair of the Sanctions Committee shall, on the request of a single Committee member, refer the matter to the S.C., which will decide on the basis of its ordinary voting rules laid down in UN Charter Article 27(3) "the question of *whether to delist*."[112] In other words, the question put before the Council for a vote would not be "whether the name should be on the list, but whether the name should be removed from the list."[113] This careful wording ensures that each permanent member retains its veto power to block any disliked delisting recommendation.

a. *Findings: High Delisting and Acceptance Rates*

In practice, no recommendation has ever been overruled even though the OP recommends delisting in most cases, and even though some P-5 members perceive "sanctions as a tool to 'help get the bad guys,' and due process [rights and procedural fairness] as 'getting in the way.'"[114] The OP has recommended delisting in sixty-three out of eighty-six individual petitions in completed cases, or 73.3 percent, and in six out of six entity petitions, or

[109] Yvonne Wong & Benoit Mayer, *The World Bank's Inspection Panel: A Tool for Accountability*, 6 WORLD BANK LEGAL REV. 495, 514 (2015).
[110] Interview with Kipfer, *supra* note 36, at 10:312–13.
[111] *Id.*, 11:346–12:385.
[112] Emphasis added.
[113] Interview with U.S. Diplomats, *supra* note 46, at 10:301–02.
[114] COCKAYNE, BRUBAKER & JAYAKODY, *supra* note 99, at 20.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

100 percent.[115] Member states' representatives believe that "the vast majority of these names were truly names of individuals who deserve to remain on the list."[116] Although the member states were opposed to vesting the OP with binding decision-making powers and retained fire-alarm controls, the Sanctions Committee has yet to overrule a recommendation or refer the matter to the S.C. in a single case.

b. Interpretations: Inducing Compliance by Accommodating State Preferences?

Of course, high acceptance rates of recommendations do not by themselves demonstrate that the OP provides an effective remedy. George Downs, David Rocke, and Peter Barsoom have shown, for example, that high compliance rates with international treaties arise if a treaty with shallow commitments does not require "states to depart from what they would have done *in its absence*."[117] High compliance rates may also be achieved through a high degree of deference to states.[118]

It is doubtful, however, that these general objections explain the interplay between the OP and the states sitting in the S.C., because it is unlikely that the Sanctions Committee would have delisted the petitioners *in the absence* of the OP's recommendations. The Committee kept the petitioner on the List *until* the recommendation and delisted the petitioner *after* the recommendation. It was the OP that made the difference.[119] Deference also does not seem to explain the high compliance rate for the OP's decision. It recommended delisting in almost three-fourths of all cases even though member states maintain that most listed persons should remain listed, suggesting that the recommendations do not defer to the views of the states, but instead frequently go against state preferences.

c. Explanations: Compliance Through Persuasion?

The high compliance rate might be explained through the persuasiveness of the OP's recommendations and the reputational costs of override, as advocates of the OP model argue.[120] The OP's reports are comprehensive legal documents, ranging between twenty and fifty pages with careful analysis of the facts and systematic legal reasoning that have been praised by diplomats for their thorough legal analysis, yet it is doubtful that the OP persuades most member states that the persons whose delisting it recommended are not associated with Al Qaeda or

[115] Overall, the OP has received one hundred petitions from individuals of which nine are currently pending, one was withdrawn and four were rendered moot before the completion of the OP process. In addition, the OP has received seven petitions from entities. However, in one case the OP only recommended the removal of an aka, and not the delisting of the entity. All data presented in this article were up to date as of September 1, 2022.

[116] Interview with U.S. Diplomats, *supra* note 46, at 19:592–93.

[117] George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996) (emphasis added).

[118] Alexandra Huneeus, *Compliance with Judgments and Decisions*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, *supra* note 2, at 453 (summarizing research on ICs demonstrating that highly deferential and less independent ICs may generate higher compliance than less deferential and more independent ICs because the former may be more likely to issue ruling acceptable to states, while the latter may face more compliance problems for unpopular decisions).

[119] See already for a similar argument concerning court judgments: *id.* at 437, 441. One caveat merits mention. As noted above, the Sanctions Committee removed the petitioners from the sanctions list before the conclusion of the ombudsperson proceedings in four cases. It appears that in those cases, it was not the recommendation itself but likely the prospect of a delisting recommendation that led the Sanctions Committee to delist.

[120] Hovell, *supra* note 16, at 26.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

ISIL. Most, if not all, designating states continue to insist that the petitioner belongs on the List. State representatives are likely to put more trust in the findings of their intelligence agencies than in decision of the OP who frequently only sees a fragment of the existing intelligence on a terrorist suspect.

But states also have good reasons to accept the OP's delisting recommendations even though they are not persuaded. Most importantly, overriding the delisting recommendations of an independent legal expert who precisely was assigned with making this determination may appear illegitimate. Especially for low-level supporters of Al Qaeda or ISIL confronting the OP and paying the ensuing political cost may not be worth it.[121] Finally, the OFAC Sanctions List of the U.S. government, with its sweeping extraterritorial effect, provides additional assurances that even persons delisted from the UN Sanctions List can still be effectively targeted with the national List.

A look into the practice of the Sanctions Committee suggests that the reverse consensus rule is an important constraint on states' ability to reject the OP's delisting recommendation. Although the Sanctions Committee accepts the recommendations without any objection in most cases,[122] two or three member states routinely vote against delisting recommendations.[123] The fact that some committee members object to the recommendations some of the time suggests that if the consensus rule of Resolution 1904 had not been substituted with the reverse consensus-rule of Resolution 1989, several delisting recommendations would likely have been overridden. Although legal expertise and reputational cost are significant factors, the design of the voting procedure and the high requirements for an override imposed by the reverse consensus rule appear to be more important.

Two cases that—due to the strict confidentiality requirements of the OP process—have received little attention in legal scholarship illustrate this point. In the case concerning Saudi citizen Saad al-Faqih, a former professor of medicine and outspoken critic of the Saudi government, the Sanctions Committee came very close to overturning the delisting recommendation—twelve of fifteen committee members voted to maintain the listing, only narrowly failing to meet the unanimity requirement.[124] In no other case did the Sanctions Committee ever come nearly as close to overruling the OP.[125] The case has been described by participants as "the watershed case"[126] and "the test case for the credibility of the ombudsprocess."[127]

The Saudi government had made it a high diplomatic priority to keep al-Faqih on the List, calling and exerting pressure on the "very highest level" of government in the process,[128] even

[121] Francesco Giumelli & Filippo Costa Buranelli, *When States and Individuals Meet: The UN Ombudsperson as a "Contact Point" Between International and World Society*, 34 INT'L REL. 46, 53 (2020).

[122] SULLIVAN, *supra* note 20, at 231.

[123] Interview with the former UN 1267 Ombudsperson, Catherine Marchi-Uhel, via Webex, at 21:638 (Nov. 23, 2020) (transcript on file with author) [hereinafter Interview with Marchi-Uhel]; Interview with Kipfer, *supra* note 36, at 20:634–35.

[124] Interview with OP's Staff Member, *supra* note 36, at 9:298–300; ECKERT & BIERSTEKER, *supra* note 17, at 18, 20; *Saudi Dissident Faqih Removed From UN Sanctions List*, BBC (July 3, 2012), *at* bbc.co.uk/news/world-middle-east-18688045.

[125] Interview with U.S. Diplomats, *supra* note 46, at 17:507–08.

[126] Interview with Prost, *supra* note 66, at 12:367.

[127] Interview with German Diplomat, *supra* note 87, at 7:149–152.

[128] *Id.*, 8:172.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

calling the British prime minister and the German foreign minister, amongst others, only about this case.[129]

In the end, Saudi Arabia managed to persuade twelve members, including all of the P-5, to support its campaign. Many of the members were persuaded not because they believed that al-Faqih truly belonged on the List, but only because they saw the diplomatic rationale in not alienating an important ally or state. Ultimately, however, Germany, South Africa, and Guatemala voted in favor of upholding the delisting recommendation even though this stand was not a given throughout the entire process.[130]

The example of the Committee's decision-making process in the *al-Faqih* case demonstrates the importance of the reverse consensus rule. States represented in the S.C. do not form a homogeneous community of interests. They have very different interests regarding the OP mechanism. Some states such as the Group of Like-Minded States regard a robust OP institution as essential, but others reject it as an encroachment on the Council's authority.[131] Against this political background, it appears almost impossible to create a consensus in the Sanctions Committee for overruling a recommendation—at least one S.C. member will prioritize protecting the integrity of the OP process and therefore vote against override. Put differently, the reverse consensus rule transforms the recommendations into quasi-binding decisions in the framework of the Sanctions Committee, triggering a procedurally almost insurmountable voting requirement, especially in times of a deeply divided membership.

However, the twelve member states that had voted to overturn the al-Faqih recommendation still had a second legal avenue readily available—referring the matter to the S.C. where either a majority of nine members or the veto of a single permanent member would have sufficed. So why did those member states choose not to pursue this path? First, the Council may have better uses of its time than maintaining the listing of a single individual especially considering how difficult it generally is to put an issue on the S.C.'s agenda.[132] Second, the referral of delisting cases to the Council has been described, at least by supporters of the OP mechanism, as a "nuclear option," because it would disavow the authority of the Sanctions Committee.[133] The member states that pursued this path were reportedly "talked down" from referral by U.S. State Department officials, which "saw the bigger picture and [knew that] it would have blown the whole process up."[134] Notwithstanding strong disagreement with the OP, the P-5 ultimately concluded that retaining Mr. al-Faqih on the List was not important enough to risk damaging the credibility of the mechanism, not least because the

[129] *Id.*, 9:198–99; *see also* Interview with U.S. Diplomats, *supra* note 46, at 16:501–02. In another episode, the Saudi ambassador reportedly barked at the Guatemalan ambassador Gert Rosenthal at a break during a Security Council session: "If you don't vote against the delisting, we'll break off diplomatic relations," with Rosenthal, responding: "May I point out to you, Mr. Ambassador, that Guatemala and Saudi Arabia have no diplomatic relations at all." *See* Interview with German Diplomat, *supra* note 87, at 8:180–87.

[130] Germany for example, which chaired the Sanctions Committee in 2011–2012, internally took the position that it would only support the delisting recommendation if it was not the only member state to do so, for voting as the singular outcast against the entire committee in the role as Chair would have required, in Germany's view, to resign from the Chair, which it considered a cost too high. Interview with German Diplomat, *supra* note 87, at 7:145–49.

[131] Interview with OP's Staff Member, *supra* note 36, at 23:851–53.

[132] Interview with U.S. Diplomats, *supra* note 46, at 16:492–500.

[133] *See* Wittig, *supra* note 62, at 564; Interview with Prost, *supra* note 66, at 12:379–80; *see* also Giumelli & Costa Buranelli, *supra* note 121, at 59–60.

[134] Interview with Prost, *supra* note 66, at 12:380–83.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

sword of Damocles of the pending *Kadi II* litigation was still hanging over the S.C. at that time.[135]

The decision-making process in the *al-Faqih* case demonstrates two things: First, member states are apparently less concerned about overturning the OP's recommendation by unanimity vote in the Sanctions Committee than by the ordinary voting procedures in the S.C. even though Resolution 1989 legalizes both pathways. Meeting the high threshold of unanimity seems, in the view of the member states, to legitimate overturning the recommendation, while referral to the Council is perceived more akin to power politics despite its legality. Second, the combination of the resource costs caused by putting issues on the S.C.'s tight agenda and the legitimacy costs for overturning delisting recommendations provide a robust safeguard against override despite the recommendations' non-bindingness. However, the 1989-procedure also provides no guarantee for deviations from the Council's current practice in the event of changing circumstances, illustrating the fragility of the OP process. For illustration, consider this hypothetical: If Saudi Arabia did have P-5-status, it surely would have overturned the recommendation, and if ever a case came up in the Sanctions Committee that was as important to a real P-5 as the *al-Faqih* case was to Saudi Arabia, it would likely use its veto power—that is why they insisted on its presence in the first place.

Legal override of delisting recommendation is not the only avenue for member states to keep persons on the List as the *Ali Ahmed Nur Jim'ale* case concerning a Somali businessman who allegedly financed Al Shabaab, a regional offshoot from Al Qaeda, shows. Although this case was marked by strong disagreement between the OP and some member states, the Sanctions Committee formally followed the recommendation by delisting Jim'ale from the 1267-Consolidated List, but instantly placed him on the Somalia and Eritrea Sanctions List (today only Somalia) for the same purported conduct that the OP had deemed insufficient for continued listing.[136] U.S. diplomats have characterized this treatment as "our clever little way of getting around a very tricky problem."[137] Although they have justified the relisting arguing that Jim'ale should have been placed on the Somalia sanctions list in the first place,[138] this approach violates rule of law-principles and exposes the double standards between the 1267-sanctions regime (with an OP mechanism) and the other sanctions regimes (without an OP mechanism).[139]

d. Conclusions: Beyond the Binarity Between Bindingness and Non-bindingness

Safety valves by states are a common way of counteracting principal-agent dynamics and the associated risk that judicial or non-judicial agents exceed the limits of the authority delegated by the state principal.[140] In the negotiations to Resolution 1989, the safety-valve of paragraph 23 was one of the "most heavily negotiated paragraphs of the entire text."[141] Especially for the United States and Russia, retaining this fire-alarm control proved to be

[135] Interview with U.S. Diplomats, *supra* note 46, at 16:496–98.
[136] Cockayne, Brubaker & Jayakody, *supra* note 99, at 19–20.
[137] Interview with U.S. Diplomats, *supra* note 46, at 17:521–22.
[138] *Id.*, 17–18:538.
[139] Interview with Prost, *supra* note 66, at 13:392–99.
[140] Hovell, *supra* note 16, at 26.
[141] Interview with U.S. Diplomats, *supra* note 46, at 12:351–53.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

conditio sine qua non for agreeing to the resolution.[142] They could not bring themselves to agree to a mechanism that would "upset or cheapen the power of the veto."[143] For the United States, the thought that they could have voluntarily stripped themselves of veto power for delistings and then "someone [could] recommend[] removing Osama bin Laden from the list,"[144] was simply unacceptable. In addition, safety valves have a symbolic dimension. They underline that the principal—and not the agent—has the final say and does not subject itself to the agent's decision. Against this background, the art of the compromise consisted in strengthening the recommendatory powers without relinquishing veto power and the right to overrule the OP.

The practice of compliance with the recommendations indicates that fire-alarm controls may only have limited practical significance. As shown above, the recommendations were accepted by the Sanctions Committee in all cases (except for *Jim'ale*) despite the high rate of delisting recommendations. The *al-Faqih* case illustrates the resilience of procedural safeguards falling short of bindingness against override despite high political pressure in the diplomatic arena. The *Jim'ale* case indicates that even legal bindingness does not immunize OP delisting decisions against political override because member states have other means such as re-listing at their disposal. The OP hence serves as an example of how to create meaningful decision-making power that fall within a continuum between the binary poles of bindingness and non-bindingness.

2. De Novo *Review and Disregard of Original Listing Decisions*

The central legal standard for listing and delisting decisions is whether a person or entity is associated with Al Qaeda or ISIL.[145] This narrow and vague criterion provides the OP with little guidance but broad discretion. The politically savvy Kimberly Prost used this latitude to craft a standard of review tailored to navigate the minefield of S.C. politics that has shaped the Office and is meticulously followed by her successors. The OP evaluates delisting petitions *de novo* and looks only at the present. In other words, it does not review the legality of the original listing decision, but only whether there is a sufficient basis to continue listing.[146] This exclusive focus on the present benefits the designating state because it offers a face-saving procedure for false recommendations with no pressure to justify the original listing recommendation.[147] From the OP perspective, this approach avoids numerous minefields that would arise in a formal legal review of the S.C.'s listings. It creates a serious justice gap for the petitioner, however, because a listing is never established as unlawful, precluding recognition of wrongdoing, let alone reparations or damages.

De novo review is a clever legal innovation carefully tailored to the legal situation of listed petitioners, most of whom claim to have disassociated themselves from Al Qaeda or ISIL since their original listing. It ties in with the preventive and non-criminal classification of sanctions

[142] *Id.*, 12:374–76.
[143] *Id.*, 10:297–98.
[144] *Id.*, 11:321–24.
[145] SC Res. 1904, *supra* note 43, para. 2.
[146] Kimberly Prost, *A Reflection on Innovations in the Security Council: The International Tribunals, Counterterrorism, and the Office of the Ombudsperson*, 46 CASE W. RES. J. INT'L L. 465, 474 (2014).
[147] SULLIVAN, *supra* note 20, at 227, 230.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

set forth in the relevant Resolutions and takes the S.C. at its word. If the nature of sanctions is preventive, its existence can only be justified by a persistent threat. But if a person no longer poses a terrorist danger, there is no reason to continue imposing anti-danger sanctions. From the perspective of the petitioners, the advantage of *de novo* reviews lies in the fact that new information may be presented, and the OP's review is not limited by the S.C.'s prerogative to assess the original listing decision.[148] The delisting decision does not hinge on the past, making burdensome and likely fruitless investigations into the S.C.'s decision making superfluous.[149]

A critical feature of *de novo* review is that it disentangles the concern of providing an effective legal remedy to listed persons from the concern of holding the S.C. accountable for its original listing decisions. The OP succeeds in getting listed persons off the list without providing a meaningful accountability forum against the Council, making it easier for member states to accept its interventions. Critics assert that the purpose of *de novo* review is to accommodate the prevailing power structures within the sanctions regime, thereby legitimizing an otherwise illegitimate sanctions regime.[150] Although Prost sacrificed comprehensive legal review of human rights infringements by abstaining from review of the S.C. original listing decisions, there is much to suggest that she understood the S.C. would never have accepted review of the original listing decisions. All OPs are firmly convinced that review of original listing decisions would be politically unenforceable.[151]

B. Procedural Fairness and Informality

ICMs bring together states and individuals in a joint procedure under international law—an arena that historically has been dominated by states. While proponents laud ICMs precisely for this feature, critics chide their processes as inadequate.[152] This begs the question what role the individual has in the process, and whether the process design lives up to promises of procedural fairness and due process.[153]

The OP process is the product of the legal imagination of a few actors: U.S. lawyers and diplomats received substantial leeway from the other permanent members to invent a process with "no playbook on how to set any of this up,"[154] but also the creative practice and advocacy of the acting OPs. The process has two phases:[155] through "Information Gathering" the OP

[148] Kimberly Prost & Elizabeth Wilmshurst, *UN Sanctions, Human Rights and the Ombudsperson*, Summary of an International Law Discussion Group meeting with Kimberly Prost, at 5 (May 17, 2013), *at* https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/170513summary.pdf.

[149] Interview with Prost, *supra* note 66, at 8:245–50; 9:282–86.

[150] SULLIVAN, *supra* note 20, at 227–28.

[151] Interview with Kipfer, *supra* note 36, at 8:234–35 ("Making the original listing decision judicially reviewable is a no-go politically.") (translation by author); SULLIVAN, *supra* note 20, at 228 (citing Kimberly Prost: "I would not have been in the job long if I had attempted to start reviewing [the initial listing decisions].").

[152] Ta & Graham, *supra* note 107, at 130.

[153] Similar, Tignino, *supra* note 10, at 251.

[154] Interview with U.S. Diplomats, *supra* note 46, at 4:106–07. Annex II of Resolution 1904 was predominantly drafted by lawyers in the Office of the Legal Adviser in the U.S. State Department and in the U.S. Mission to the United Nations.

[155] The procedure is prescribed in detail in Annex II of Resolution 1904 (2009), *supra* note 43. Officially, there is a third phase named "Committee Discussion and Decision" in which the ombudsperson submits and explains the comprehensive report to the Sanctions Committee.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

gathers the information relevant to the individual case from the states, from the monitoring team of the Sanctions Committee, and through independent research; through "Dialogue," the listed person has notice and a meeting with the OP who presents the case against him and who hears the listed persons version of the relevant facts. Both phases are informal processes which accommodate the member states by protecting their control over classified and other information. Although the power asymmetries between states and listed persons remain stark, the OP has managed to alleviate some of the most negative effects through creative procedural practices.

1. Information Gathering

One of the greatest challenges for the OP is to gather the information necessary to make an informed decision on a delisting petition.[156] The factual support for listing process is often thin, especially for listings that are predominantly based on undisclosed intelligence sources.[157] Although the monitoring team provides the OP with all its collected information on a listed person or entity,[158] this information regularly contains the official listing dossier only.[159]

The most valuable source of information in the delisting process are states.[160] Classified information based on intelligence is key in the Sanctions Committee, yet only states typically have this type of information. However, they are often unwilling to provide relevant information to protect their intelligence—a matter of vital importance in the field of counterterrorism in a multilateral context.[161] Resolution 1989 does not require them to do so; it merely asks member states "to provide all relevant information to the Ombudsperson, including providing any relevant confidential information, *where appropriate*."[162] OPs cannot legally order, let alone compel, the provision of evidence in the fact-finding process. They ultimately rely upon the goodwill and cooperation of states.[163] As a result, states may reject requests for information or retreat to futile diplomatic phrases for justifying why they believe that a listing should be maintained.[164] They also may withhold exculpatory information,[165] and provide misleading information[166]—all without any consequences. They do not have to engage in a

[156] Second Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989 (2011), para. 26, UN Doc. S/2011/447 (July 21, 2011).

[157] Prost & Wilmshurst, *supra* note 148, at 5. By contrast, some listings are based on domestic criminal court judgments, which are typically well-documented and describe the facts of the case in a detailed manner. *See* Seventeenth Report of the Office of the Ombudsperson, Submitted Pursuant to Security Council Resolution 2368 (2017), para. 34, UN Doc. S/2019/621 (Aug. 1, 2019).

[158] Interview with Monitoring Team member, *supra* note 38, at 6:155–65.

[159] Interview with Kipfer, *supra* note 36, at 12:370–73.

[160] Interview with OP's Staff Member, *supra* note 36, at 17:601–02, 612–13.

[161] SULLIVAN, *supra* note 20, at 230–31; Hovell, *supra* note 16, at 27.

[162] *See* SC Res. 1989, *supra* note 29, para. 25 (emphasis added).

[163] *See* Kipfer, Comment at Online Panel "A Decade of Review: The UN's Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee," 36:13–36:43 (June 15, 2020), *at* youtube.com/watch?v=4V4AuckG-OU.

[164] KIPFER, *supra* note 45, at 6–7; Seventeenth Ombudsperson Report, *supra* note 157, para. 33; Eighteenth Report of the Office of the Ombudsperson Submitted Pursuant to Security Council Resolution 2368 (2017), para. 31, UN Doc. S/2020/106 (Feb. 7, 2020); Sixteenth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2368 (2017), para. 29, UN Doc. S/2019/112 (Feb. 6, 2019).

[165] Emmerson, *supra* note 19, para. 45.

[166] Interview with Kipfer, *supra* note 36, at 24:768–81.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

constructive process role and a rational legal discourse with the OP, and they regularly choose not to. This lack of cooperation by many states and the central role of intelligence in the OP process creates fairness dilemmas for the petitioner that the OP has primarily sought to address in three ways.

a. Assuming an Investigative Role

The OP meets this challenge in part by playing an active, investigative role in obtaining both incriminating and exculpatory information.[167] It assumes, in some ways, the procedural roles of attorney and prosecutor.[168] The OP writes official letters to member states requesting case-relevant information, meets with diplomats and security officials from member states to emphasize the importance of a request, to build trusting relationships, and to explain delisting recommendations to designating states in private meetings while listening to their objections,[169] concludes agreements on access to classified information,[170] and undertakes independent research on social networks.[171] Although advocates of ombudspersons praise this information-gathering process as an institutional strength of the mechanism,[172] they overlook that fact-finding and trust-building activities are weak mechanisms as compared to the legal power to order the production of evidence.[173]

b. Requiring Updated Information to Maintain Listing

Second, the OP leverages *de novo* review to create strong incentives for member states that wish to maintain a listing to provide sufficient information even if they are legally not obliged to do so.[174] *De novo* review puts pressure on the member states to continuously update the justification for the listing in the present. In the absence of sufficient information, it can bring about the delisting of a listed person considering the OP's strong recommendation power, benefitting the petitioner even if he fails to provide new information. When member states assert, as some still do, that because "[w]e do not have updated information, therefore the grounds for the listing remain,"[175] they entirely miss this point. The crux of *de novo* review is precisely that the grounds for the listing disappear if states fail to justify the listing in the present.

c. Admissibility of Intelligence

Third, the unreliability of classified information raises the issue of admissibility. The OP has implemented a compromise between the concerns of the member states and the

[167] Interview with Marchi-Uhel, *supra* note 123, at 27:820–21.

[168] Interview with Kipfer, *supra* note 36, at 37:1115–17; Interview with Marchi-Uhel, *supra* note 123, at 28:849–59.

[169] Interview with OP's Staff Member, *supra* note 36, at 19:697–712.

[170] The OP has concluded such agreements with twenty-one states. *See* Office of the Ombudsperson, Access to Classified Information, *at* www.un.org/securitycouncil/ombudsperson/classified_information.

[171] Prost & Wilmshurst, *supra* note 148, at 5.

[172] Hovell, *supra* note 16, at 28.

[173] Interview with Marchi-Uhel, *supra* note 123, at 27:808–10 ("The courts can compel the production of information . . . the Ombudsperson can compel no one.").

[174] Interview with Prost, *supra* note 66, at 15:469–74; Interview with Marchi-Uhel, *supra* note 123, at 27:808–17.

[175] Interview with Kipfer, *supra* note 36, at 7:201–02.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

petitioners. With no formal rules of evidence for the OP process, Prost deliberately invented a highly flexible and permissive evidentiary standard that avoids *a priori* excluding intelligence information as evidence from the outset.[176] The evidentiary standard requires the OP to assess "whether there is sufficient information to provide a reasonable and credible basis for the listing."[177] Although this wording reiterates that mere suspicion or an unproven allegation is not sufficient to uphold a listing,[178] the approach provides the Office with a high degree of flexibility[179] and accommodates member states' sensibilities with respect to the admissibility of intelligence. An evidentiary approach that disqualified classified information might have called into question the OP's institutional viability.[180]

Instead, the OP lumps all available information together to assess whether the listing should be revoked or upheld. Unrestricted "truth"-finding enjoys priority over strict rules on the admission of evidence. This approach is a concession to member states, which value the accuracy of the sanctions list higher than procedural fairness for the listed person.[181] The latter must rely on the OP's professional sensitivity to properly assess the inherently unreliable sources of evidence. But the OP has alleviated the risks for petitioners arising out of the broad admissibility of intelligence by creating another informal procedural rule that caught some member states off guard. She made it clear early on that allegations without provision of the underlying information are not considered in the process, ending any illusion for member states that they could keep a person on the List simply by asserting "don't worry, we got info on this guy."[182]

2. *Dialogue*

The information collected serves as the basis for the "dialogue" with the petitioner.[183] For many listed persons, the dialogue is the only human encounter with a representative of the sanctions regime in the entire listing and delisting process—creating an element of humanity in an otherwise depersonalized sanctions regime.[184] The dialogue involves an intensive face-to-face meeting between the OP and the petitioner that lasts between several hours and two days, and is typically also attended by the OP's legal officer, the petitioner's attorney, and a

[176] *See* HOVELL, *supra* note 16, at 150 (citing Kimberly Prost candidly admitting: "I made it up!"); Interview with U.S. Diplomats, *supra* note 46, at 6:160–61 (noting that Prost "filled in a lot of the blanks in the mandate"); SULLIVAN, *supra* note 20, at 226–27 (citing Kimberly Prost recalling that when she began the position, the Security Council "didn't give me any of that procedural stuff to fill in").

[177] Office of the Ombudsperson, Approach and Standard, *at* un.org/securitycouncil/ombudsperson/approach-and-standard.

[178] *Id.*

[179] SULLIVAN, *supra* note 20, at 235–36 (citing Kimberly Prost: "It gives me, quite frankly, freedom and the flexibility").

[180] *Id.* at 235 (citing Kimberly Prost: "I wanted to make sure that it was a standard that was realistic and practical for the states that were responsible for a number of listings").

[181] *See* Interview with OP's staff Member, *supra* note 38, at 23:875–76 ("Kim's response was, 'This is not a court of law, so we're not applying the standard of the court of law.'"); Interview with Kipfer, *supra* note 36, at 8:238–40 ("If you take that as a baseline what is done today in the listing sanctions regime, any judicial review would result in repeal.") (translation by author).

[182] Interview with Prost, *supra* note 66, at 3:86–101.

[183] Prost & Wilmshurst, *supra* note 148, at 6.

[184] *Id.*

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

translator.[185] Here, the petitioner learns the core of the listing reasons, is questioned about and can respond to incriminating information.[186] While the OPs believe that they convey the essence of the listing rationale to petitioners in sufficient detail,[187] the petitioners' attorneys have expressed more skepticism.[188]

The dialogue is informal and conversational.[189] It lacks most formal rules of procedure, including many features of criminal proceedings. The petitioner, for example, is not an accused who is innocent until proven guilty and faces the risk that a refusal to testify will be used as incriminating evidence against him.[190] He must instead convince the OP that he is not associated with Al Qaeda or ISIL to be taken off the list.[191] Incriminating intelligence information is only verbally described by the OP to the petitioner and his lawyer.[192]

The process puts the petitioner in a vulnerable position. A petitioner must defend himself in part against detailed allegations, such as fifteen-year-old telephone conversations, without ever seeing the basis of the allegation, such as the transcript of the telephone conversation. From his perspective, the dialogue is more like an interrogation than a relaxed conversation.[193] As important as dialogue is for procedural fairness in the OP process, it does not create equality of arms in the asymmetrical sanctions regime. While the entire process leaves much to be desired in terms of procedural fairness, what mitigates some of the resulting concerns is the high rate of delisting recommendations. The outcome suggests that petitioners get a fair hearing despite procedural flaws.

C. Independence and Personal Integrity

Independence is a critical institutional feature of ICMs because both their credibility and their ability to hold states and IOs accountable depends upon it.[194] It is also essential to the OP's mandate as review body tasked with ensuring due process and reviewing individual complaints.[195] Yet the institutional arrangements designed to ensure the independence of ICMs attract criticism.[196] The Office of the OP is not, by any means, institutionally

[185] Interview with OP's staff member, *supra* note 36, at 21:764–66; Interview with attorney who has represented listed persons in the OP process, via Zoom, at 13:383–86 (Dec. 11, 2020; Jan. 11, 2021) (transcript on file with author) [hereinafter Interview with Attorney].

[186] Prost & Wilmshurst, *supra* note 148, at 6.

[187] *See, e.g.*, Eighth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161 (2014), para. 34, UN Doc. S/2014/553 (July 31, 2014).

[188] Emmerson, *supra* note 19, para. 43.

[189] Interview with OP's Staff Member, *supra* note 36, at 15:530–36; Interview with Prost, *supra* note 66, at 14:443–48.

[190] Interview with Kipfer, *supra* note 36, at 15:452–58.

[191] *See* SC Res. 1989, *supra* note 29, para. 23.

[192] Interview with Attorney, *supra* note 185, at 10:308–11:320.

[193] *Id.*, 10:307–09 ("Calling it a dialogue makes it sound nicer than it was. It was an eight-hour-long interrogation using and drawing from material which wasn't disclosed to us. It was very difficult.").

[194] See regarding the WBIP, the CAO, and regional accountability and inspection mechanisms: Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L 403, 466 (2005).

[195] Twelfth Report of the Office of the Ombudsperson, Submitted Pursuant to Security Council Resolution 2253 (2015), para. 33, UN Doc. S/2016/671 (Aug. 1, 2016).

[196] See, e.g., regarding the WBIP: Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 207 (2005).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

independent,[197] failing to meet even basic internationally established standards of independence.[198]

The term of office is not fixed for a sufficient and reliable period, the security of tenure is not guaranteed, and the OP has no legally guaranteed self-governing autonomy. Its mandate must be continually renewed by resolution and was, until very recently, limited to eighteen months,[199] providing the S.C. with the regular opportunity to remove the institution simply by choosing not to pass a new resolution—all it takes, in other words, is the veto of one permanent member.[200] The lack of institutional independence and the self-imposed need to regularly renew the mandate means that the OP is a fragile institutional arrangement.

The officeholder is employed by the United Nations as an external consultant.[201] The OP is part of the general performance evaluation system of the UN Secretariat[202] and requires approval of all work-related expenses and travel. The consultancy contracts are surprisingly short-term, ranging from one to twelve months,[203] without any legal guarantee of renewal. They include no health insurance, no pension, and no sick leave[204] but entitle the officeholder to terminate the contract with two weeks' notice. This contractual framework and the OP's institutional design as a small single-leader institution resulted in the Office being vacant for almost a year between August 2017 and July 2018 following Marchi-Uhel's resignation—a period during which no decisions on delisting applications could be made.[205] While the selection process for the OP remains opaque, it appears that the UN Secretariat typically proposes several qualified candidates selected from applicants to a public job posting, and requests the member states in the Sanctions Committee, in practice especially the P-5, to unanimously agree on one of them.[206] The long vacancy period suggests that the selection process has become more controversial among the P-5.[207] The Office's staff are formally employees of the Department of Political and Peacebuilding Affairs, which serves as the S.C.'s international secretariat.[208] In other words, the OP's staff is hierarchically integrated into and reports to the very institution whose listing decisions the OP is supposed to monitor as an independent reviewer.

[197] The OP reports have repeatedly criticized the current arrangement and called for institutional independence. *See* Twenty-First Report of the Office of the Ombudsperson Submitted Pursuant to Security Council Resolution 2368 (2017), para. 41, UN Doc. S/2021/676 (July 23, 2021); Eighteenth Ombudsperson Report, *supra* note 164, para. 34; Sixteenth Ombudsperson Report, *supra* note 164, paras. 33–39; Twelfth Ombudsperson Report, *supra* note 195, paras. 33–45.

[198] Critical, Interview with Kipfer, *supra* note 36, at 27:860–62; Emmerson, *supra* note 19, para. 36. For a brief comparative overview of international standards concerning the independence of ombudspersons: LINDA C. REIF, OMBUDS INSTITUTIONS, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 179–83, 748–54 (2d ed. 2020).

[199] *But see* SC Res. 2610, para. 63 (2021), extending the mandate by thirty months.

[200] Critical, Emmerson, *supra* note 19, para. 36

[201] Sixteenth Ombudsperson Report, *supra* note 164, para. 33.

[202] Twelfth Ombudsperson Report, *supra* note 195, para. 36.

[203] Interview with Kipfer, *supra* note 36, at 27:849–51.

[204] *Id.*, 27:840.

[205] Sixteenth Ombudsperson Report, *supra* note 164, paras. 24–25.

[206] Interview with Kipfer, *supra* note 36, at 2:31–61.

[207] Interview with Marchi-Uhel, *supra* note 123, at 1:25–27; *see* also Giumelli & Costa Buranelli, *supra* note 121, at 60.

[208] Twenty-First Ombudsperson Report, *supra* note 197, para. 44.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

While the contractual arrangement is almost paradoxically provincial for a world organization, the rigid and inflexible bureaucratic culture of the United Nations is only one reason for the lack of institutional independence. It appears that some member states in the S.C. are determined to "keep the position as weak as possible."[209] A brief window of opportunity for institutionalizing the Office of Ombudsperson ultimately failed because it was reportedly blocked by key P-5 members.[210] In any case, the UN Secretariat justifies its lack of action in this matter with its lack of political authority without express S.C. mandate and the predictable resistance from the UN budget committee, which is controlled by the member states.[211] The findings on independence, or the lack thereof, indicate that the lack of entrenched expectations about the specific configuration of institutional design features of ICMs such as the guarantee of independence facilitate increasing the level of control exerted by states over an ICM.

The lack of institutional independence has been countered by the personal integrity and professional diligence of the OPs. All former OPs have, not surprisingly given their prior professional background as criminal judges, approached delisting petitions with the self-conception of a judge.[212] They view targeted sanctions as a legitimate international legal instrument so long as due process is provided. They were just as determined to provide listed persons with due process as they were worried about recommending the delisting of an actual terrorist. Their professional skills in conducting rigorous interrogations and assessing the credibility of criminal defendants reassured member states. Moreover, there are no reported cases of delisted persons re-engaging in terrorist activities yet[213]—which could otherwise undermine the acceptance by states of the OP mechanism.

While the common judicial background has shaped the Office of the OP, it was not a given from the outset. The United States had initially preferred "someone who comes from a government counter-terrorism agency, and someone who understands counter-terrorism and understands how intelligence works and how we identify these people."[214] However, EU states wanted a candidate with a judicial background, and they ultimately prevailed.[215] This choice proved critical for the institutional trajectory of the OP. Although an adequate guarantee of independence requires more than reliance upon personal integrity, the latter can offset shortcomings in the former. The analysis in this section suggests that the success and failure of independence and the specific institutional arrangements designed to protect independence will not necessarily correlate neatly.[216] Independence can be realized, albeit delicately, without proper institutional arrangements.

[209] Interview with Kipfer, *supra* note 36, at 26:816–21; Interview with Marchi-Uhel, *supra* note 123, at 21:618.

[210] Colum Lynch, *How a Dream Job Became a Bureaucratic Nightmare for a Top U.N. Lawyer*, FOR. POL'Y (July 27, 2021), *at* https://foreignpolicy.com/2021/07/27/un-terrorism-lawyer-resigning-ombudsperson-bureaucracy. For more details, see Twelfth Ombudsperson Report, *supra* note 195, paras. 39–41.

[211] Lynch, *supra* note 210.

[212] Interview with Prost, *supra* note 66, at 7:212–13; Interview with Kipfer, *supra* note 36, at 6:180; in this direction, *see* Interview with Marchi-Uhel, *supra* note 123, at 15:438 ("independent reviewer").

[213] COCKAYNE, BRUBAKER & JAYAKODY, *supra* note 99, at 20.

[214] Interview with U.S. Diplomats, *supra* note 46, at 6:164–67.

[215] *Id.*, 7:214–16 (noting that the EU member states wanted "a judge . . . to show that even if this isn't an actual judicial process, this is about as close as the S.C. can get to creating this quasi-judicial process").

[216] Christoph Möllers, *Individuelle Legitimation: Wie rechtfertigen sich Gerichte?*, 40 LEVIATHAN 1, 3 (2012).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

D. Accessibility and Expeditiousness of the Process

One justification for establishing an ombudsperson institution is the ease of access and the expeditiousness of the proceedings. The OP seems to live up to its promise: it is credited for being "far more accessible than courts,"[217] and Annex II of Resolution 1904 sets short deadlines for the OP process.[218] Procedural efficiency is paramount. This Section shows that the informality of the process allows the OP to support listed persons in filing petitions and to conduct a swift and efficient process.[219] But it also demonstrates based on available data that only a modest number of listed petitioners and entities actually initiate proceedings, pointing to structural limitations of the OP in addressing the due process vacuum created by the 1267-sanctions regime.

1. Ease of Access

Although the OP is only entitled to act upon receiving a petition,[220] it compensates for this petition requirement with a low threshold for admissibility of petitions. A short e-mail from petitioners identifying themselves and briefly explaining the reason for the petition is sufficient to establish the OP's competence.[221] Even if the information contained in the first e-mail is inadequate, the OP and the legal officer will make proactive efforts to rectify the situation.[222] As a result, first-time petitions do not fail due to the admissibility requirements.[223] Those who seek access to the OP receive it.

To date, 99 of all 432 listed individuals, or 23 percent, have initiated OP proceedings.[224] The number for entities is even lower (29 out of 168 listed entities, or 17.3 percent). In addition, 114 individuals were delisted by the Sanctions Committee without completing the OP process as part of the annual triennial review established by Resolution 1822 (2008), thus removing the grounds for a successful petition. As a result, roughly half of all listed individuals did not petition the OP even though they are still listed.[225]

[217] Hovell, *supra* note 16, at 144.

[218] The information-gathering phase and the dialogue phase are both attributed a two-month period, each with an extension possibility for up to two additional months.

[219] Hovell, *supra* note 16, at 24.

[220] *See* SC Res. 1904, *supra* note 43, Annex II ("the Office of the Ombudsperson shall be authorized to carry out the following tasks upon receipt of a delisting request . . .").

[221] Office of the Ombudsperson, For Future Petitioners, *at* un.org/securitycouncil/ombudsperson/application. *See also* Interview with Prost, *supra* note 66, at 9:260–63.

[222] *Id.*, 14:443–45; Interview with OP's Staff Member, *supra* note 36, at 7:205–10, 7:226–30, 8:242–46; Interview with Marchi-Uhel, *supra* note 123, at 13:386–95.

[223] Interview with OP's Staff Member, *supra* note 36, at 8:247–51. The admissibility requirements are stricter for repeat request cases in which the OP requires "new information." *See id.*, 8:239–41; Notes for Future Petitioners, *supra* note 221.

[224] This data assumes that only one petitioner filed a second petition that was deemed admissible by the OP and has led to two separate entries in the case statistics. This assumption cannot be verified based on the publicly available statistics because the identity of petitioners whose petition was denied is not revealed. I was informed, however, that such a successful repeat request, in fact, occurred on one occasion. It is possible that more such cases exist. Based on my conversations with the former OP, it seems fair to assume that there have only been very few, if any, admissible repeat request.

[225] The exact number cannot be determined based on publicly available information because the identity of petitioners whose delisting request was denied is concealed and it therefore remains uncertain how many of those petitioners were delisted by the Sanctions Committee without a delisting recommendation by the OP.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

Another serious legal protection issue is that petitioners, on average, did not initiate delisting proceedings until 9.1 years after they were placed on the Consolidated List. Twenty-eight individuals and twenty entities have been on the List for more than twenty years. Even if one replaces the actual listing date with the start date of the operation of the OP, when a meaningful legal remedy existed, it still took individual petitioners 4.9 years on average to file a delisting request. In part, this can be explained by cases in which the petitioners did not disassociate themselves from Al Qaeda or ISIL until sometime after the listing, so the delisting reason occurred later. Other probable reasons include: (1) lack of knowledge of being subject to sanctions and of the existence of the OP; (2) lack of prospects of success of an OP procedure; (3) lack of legitimacy of the procedure from the perspective of the listed persons; and (4) the risks involved for members of Al Qaeda or ISIL of revealing their identity and address.[226] If one considers the OP as a solution to the due process vacuum for listed persons caused by the 1267-sanctions regime, then it encounters structural limitations in that it only conducts review for a fraction of the listed persons and entities.

2. *Expeditious Process*

Once a petition is filed, the review process is conducted expeditiously. Figure 1 shows the duration of all proceedings to date, distinguishing the core OP process and the process in the 1267-Sanctions Committee after the OP's recommendation. On average, it takes only 7.4 months from receipt of the petition to the recommendation.[227] After completion of the Comprehensive Report, which is ultimately decisive for the outcome of the proceedings given the OP's strong recommendation power, another three months pass on average before a petitioner is delisted. This leads to a total of just 10.6 months between the start of the OP process and the decision of the Sanctions Committee. From the perspective of petitioners who typically have already been on the Consolidated List for several years prior to initiating the proceedings, such a speedy and pragmatic process arguably best serves their interests.

E. Possibilities and Limits of Institution-Building

This Section tracks the institutional incrementalism of the OP mechanism to better understand its capacity to overcome institutional constraints. It also explores the impact of the OP on the List based on empirical data before finally addressing the criticism that the OP had the counterproductive effect of stabilizing the regime.

[226] *Cf.* Interview with attorney, *supra* note 185, at 7:200–01; Interview with Monitoring Team member, *supra* note 38, at 15:455–75.

[227] Cases 79 and 80, which took substantially longer than the other cases, are no exception to this rule. The delay was caused by the vacancy of the post between August 2017 and July 2018, indicating that the lack of institutional consolidation of the Office has caused significant human costs with persons being required to endure the impairments of the List longer than necessary. Critically, Sixteenth Ombudsperson Report, *supra* note 164, paras. 24–25. During the vacancy period, only two delisting petitions, Cases 80 and 81, were filed due to the absence of an OP authorized to decide. In Case 80 in which the petitioner was removed from the Consolidated List, the proceedings were delayed by seven and a half months due to the vacancy. The proceedings concerning Case 79 were interrupted by the vacancy, resulting in a duration of just under two years (Start date: Mar. 27, 2017; Committee Decision date: Feb. 20, 2019). *Cf. see* Office of the Ombudsperson, Status of Cases, *at* un.org/securitycouncil/sc/ombudsperson/status-of-cases.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

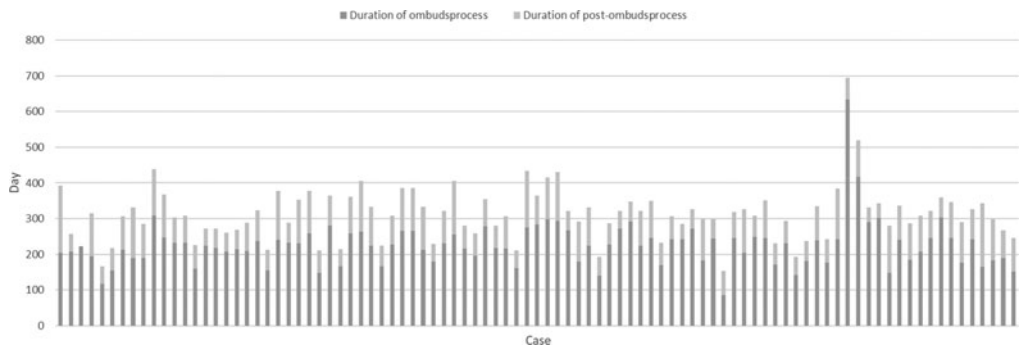


FIGURE 1. Duration of OP Process

Sources: Own calculations based on information provided by Office of the Ombudsperson, Status of Cases, *at* un.org/securitycouncil/sc/ombudsperson/status-of-cases.

1. *Mode of Institutional Incrementalism*

The evolution of the OP mechanism is an example of institutional incrementalism.[228] The mechanism today is substantially more robust and better protects the due process rights of listed persons than the version enacted by Resolution 1904. It was improved through small and incremental steps over time. To name only a few examples: At its inception, the applicable consensus-rule gave every single S.C. member state the power to veto OP "observations." Today, the reverse consensus rule provides the elevated "recommendations" robust protection from political override. Moreover, the petitioner was initially not informed about the identity of designating states, impairing his right to defend himself against allegations behind the listing. For the first 80 cases, only every other petitioner was assisted by legal counsel,[229] but since then until December 2021 all nineteen cases reviewed except one featured legal representation.[230] Favoring factors for this institutional incrementalism likely are the small-scale nature, ease of implementation and reversibility of the reform proposals, the disinterest of some member states in such procedural niceties, the OP's status as an expert, and the existence of allies, such as other UN institutions, some member states, NGOs, or academia.

The process of incremental improvement—the opportunities it provides and its structural limitations—is best illustrated by the transparency of the OP decisions. At the outset, the process was treated so confidentially that the goal of generating procedural fairness was almost reduced to absurdity: the so-called reasons letter submitted to the petitioner initially did not give the reasons for the recommendation that he either remain listed or was removed from the list.[231] But since 2017, the OP—and not the Sanctions Committee anymore—is responsible,

[228] This mode of institutional development is prototypical for the United Nations more generally. *See* Tünde Huber & Rodiles, *supra* note 51, at 116.

[229] Update of the Office of the Ombudsperson Pursuant to Security Council Resolution 2368 (2017) in Lieu of a Biannual Report (2018), para. 9, UN Doc. S/2018/120 (2018).

[230] Eighth Ombudsperson Report, *supra* note 187, para. 34; Twenty-Second Report of the Ombudsperson to the Security Council Pursuant to Security Council Resolution 2368 (2017), para. 10, UN Doc. S/2021/1062 (Dec. 16, 2021).

[231] For more details, see SULLIVAN, *supra* note 20, at 228–31.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

albeit subject to oversight by the Sanctions Committee, for preparing a summary of the confidential report written by the OP which explains the outcome, including the reasons, and makes the decision comprehensible for the petitioner.[232] In most recent practice, the OP has moved to sending the petitioner redacted versions of the recommendation, rather than writing a summary, without objections from the Sanctions Committee.[233]

This incremental institution-building has its limits, though. Although the small reform steps have substantially improved the process, more sweeping proposals have rarely, if ever, gained much traction. The OP's comprehensive reports are not disclosed to the public (not even in a redacted form), severely impairing public accountability of the sanctions regime and keeping the OP from entering a legal discourse with the public and legal scholars on fundamental procedural principles.[234] The Office is still not institutionally independent, despite repeated advocacy by the OP and the Group of Like-Minded States, the legality of original listing decisions of the Sanctions Committee are still not subject to review, and the OP is only entitled to review listings upon the request of a petitioner, and not *ex officio* as most ombudspersons around the globe.

Most importantly, the OP mechanism has never been extended beyond the 1267-regime, referring persons listed in other sanctions regimes as remedy to the utterly insufficient Focal Point mechanism.[235] The S.C. appears to submit itself to an independent reviewer such as the OP only as absolutely necessary to avert a legitimacy crisis—and not one step further.[236] The *Kadi* litigation only created immediate and sustained pressure with respect to the 1267-sanctions regime, and not the other regimes. Although an extension to all sanctions regimes, including those directed against "rogue states" such as North Korea or Iran, would arguably overwhelm the OP institutionally,[237] there are good reasons to extend the mechanism to regimes with a substantial number of non-state actors, especially the African sanctions regimes concerning the Democratic Republic of Congo, the Central African Republic, South Sudan, and Sudan.[238]

[232] Interview with Kipfer, *supra* note 36, at 10:296–305; *see* also SC Res. 2368, Annex II, para. 17 (2017); Fourteenth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2368 (2017), para. 26, UN Doc. S/2017/685 (Aug. 7, 2017).

[233] Twenty-Second Ombudsperson Report, *supra* note 230, para. 74.

[234] *See* Interview with Prost, *supra* note 66, at 15:450–55 ("I would have much preferred if all my opinions, maybe taking out, redacting some information, could have been made public because there's also some very interesting legal issues that you have to address. . . . I think the biggest weakness [of the ombudsperson process is] that there's just no transparency."). On the importance of publicizing the comprehensive reports, see also Hovell, *supra* note 16, at 27.

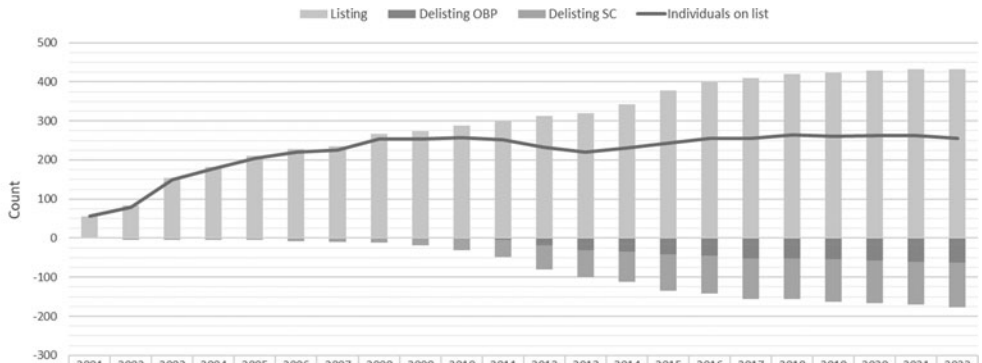
[235] For an instructive comparison between the OP and the Focal Point, see Giumelli & Costa Buranelli, *supra* note 121, at 58–59.

[236] *See* Kimberly Prost, *Remarks*, 109 ASIL PROC. 281, 282 (2015) (noting that "politically there is significant opposition to any further enhancement of the mechanism or its extension beyond the Al Qaeda sanctions regime").

[237] It would transport explosive international conflicts into the OP's fragile legal framework. *Cf.* Interview with U.S. Diplomats, *supra* note 35, at 6:174–76 (suggesting that the prospect "that a North Korean general responsible for ballistic missiles would have an independent right of review and could potentially be delisted or his delisting could be facilitated through a process like this" would be a political impossibility).

[238] For a recent proposal in the same vein, see the detailed report by THOMAS BIERSTEKER, LARISSA VAN DEN HERIK & REBECCA BRUBAKER, ENHANCING DUE PROCESS IN UN SECURITY COUNCIL TARGETED SANCTIONS REGIMES (2021).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Delisting SC	0	-4	-4	-5	-5	-8	-9	-12	-19	-31	-43	-61	-70	-76	-93	-97	-103	-103	-109	-109	-110	-114
Delisting OBP	0	0	0	0	0	0	0	0	0	0	-5	-19	-30	-35	-42	-45	-52	-52	-54	-57	-60	-63
Listing	56	83	154	182	210	228	235	266	273	288	299	312	320	342	378	398	410	420	424	428	432	432
Individuals on list	56	79	150	177	205	220	226	254	254	257	251	232	220	231	243	256	255	265	261	262	262	255

FIGURE 2. Listings and Delistings Per Year

Sources: Own calculations based on information provided by Office of the Ombudsperson, Status of Cases, *at* https://www.un.org/securitycouncil/sc/ombudsperson/status-of-cases, and by UN Security Council, Consolidated List, *at* https://www.un.org/securitycouncil/sanctions/information.

2. *Limited Impact on the Sanctions Regime*

The OP had an immediate, yet limited impact on the 1267-sanctions regime. Figure 2 shows the OP's delisting activities and relates them to the listing and delisting activities of the 1267-Sanctions Committee regarding individuals over time. It counts the added listings and delistings each year, distinguishing between delistings based on OP recommendations and those without OP input. In addition, the Figure indicates—in the form of the vertical line—the total number of persons on the List in any given year.

Figure 2 shows that in the period from 2001 to 2008, the size of the Consolidated List grew steadily and significantly: A large number of persons were listed (avg. 33.5 persons per year, a total of 266 persons), while hardly anyone was removed from the list (1.5 per year, a total of twelve persons). In the period from July 2010 when the OP commenced her functions until September 1, 2022, the number of listings decreased significantly (average 11.9 persons per year, a total of 166 persons), while persons were delisted to a significant extent (average 11.8 persons per year, a total of 165 persons), essentially keeping the number of listings and delistings—and hence the size of the List—in balance since 2010.

The establishment of the mechanism thus correlates in time with a more restrictive listing practice and a more extensive delisting practice even beyond the OP procedure. It is not clear, however, whether and to what extent the OP caused this change. Since 2010, the OP has concluded a total of 91 delisting proceedings with a decision, while 105 proceedings have been initiated.[239] As a result, a total of 63 out of 432 listed individuals and 28 out of 168 listed entities were delisted through the OP procedure from the Consolidated List, which currently

[239] Of the fourteen unresolved cases, nine cases are still pending, in four other cases the Sanctions Committee removed the petitioners from the sanctions list before the conclusion of the Ombudsperson proceedings, and in one case the petitioner withdrew his petition after the Ombudsperson submitted her report to the Sanctions Committee.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

still contains 255 individuals and 88 entities. At the same time, 114 individuals were delisted by the Sanctions Committee without completing the OP process, most as part of the annual triennial review under Resolution 1822. In other words, the OP was only responsible for 35.6 percent of all individual delistings, while 64.4 percent of all delisted individual were removed from the List by the Sanctions Committee acting alone.

The prospect of OP review may have encouraged the Sanctions Committee to consider more carefully whether a person truly belongs on the List or whether a person should be removed from the List through the 1822 procedure.[240] However, this interpretation that attributes an effect of the OP on the listing and delisting practices of the Sanctions Committee even in cases not litigated before the OP likely understates the distinctive role of the Sanctions Committee practices.[241] It disregards that member states do not actually engage in substantive review of listings under the 1822 procedure, leaving limited opportunities for implementing anticipatory effects in their delisting process. Moreover, the confidentiality of the proceedings makes it unlikely that delisting recommendations cause meaningful reputational costs for designating states that would inhibit listing designations. It seems more plausible to assume that the OP's impact on the size of the List is largely limited to reviewed cases. Considering that only 22.9 percent of all listed individuals and only 16.7 percent of all listed entities have petitioned the OP, most of them only many years after they were placed on the List, its impact on the 1267-sanctions regime appears to be substantial but limited. The OP is only capable of partially alleviating the structural vacuum created by the S.C.'s targeted sanctions—if only because it is not involved in the listing process and can only act upon receiving a petition. It still remains much easier to be placed on the List than to be removed from it.[242]

3. Stabilizing the Sanctions Regime?

Critics make the valid point that the OP may have the counterproductive effect of stabilizing the dubious 1267-sanctions regime by restoring and strengthening its authority. They suggest in a nutshell that the legitimacy crisis and domestic judicial contestations experienced by the sanctions regime before the establishment of the OP were so grave and existential that they likely would have led to the demise of the entire sanctions regime had the mechanism not been established.[243]

Interviews with diplomats working on the 1267-sanctions regime tend to confirm a modest version of that view. In 2009, U.S. diplomats were deeply concerned about the viability of the sanctions regime and felt that its "legitimacy had been eroded."[244] They credit the establishment of the OP with "relieving a degree of the pressure from the courts in Europe" and "restor[ing] legitimacy to a very important sanctions tool."[245] And as a matter of fact, judicial contestations of the regime have significantly diminished after the reform enacted through Resolution 1989. Although these diplomatic accounts indicate that the regime was in serious

[240] For this proposition, see Interview with OP's staff member, *supra* note 36, at 12:434–13:437.
[241] Interview with Monitoring Team Member, *supra* note 38, at 24:771–75.
[242] SULLIVAN, *supra* note 20, at 232.
[243] *Cf. id.* at 223, 232.
[244] Interview with U.S. Diplomats, *supra* note 46, at 21:639–41.
[245] *Id.*, 19:566–69.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

trouble in 2009 prior to the establishment, the question remains whether in the counterfactual scenario that the OP had never been created, the S.C. truly would have been forced to abandon, or at least to significantly alter the regime, or whether the prevailing power structures rather would have enabled its continuation. The latter scenario seems more likely for the following reasons: On the one hand, targeted sanctions have become a central tool of international security politics that allows especially the P-5, by virtue of their status as permanent members, to exert substantial pressure on rogue states or other non-state actors—an asset that they would need to be very hard pressed to relinquish. On the other hand, the S.C.'s political and legal accountability is weak and, accordingly, the pressure to change established practices is low, especially for the P-5. Although the OP clearly had a stabilizing effect on the 1267-sanctions regime, the fact that the thirteen other UN sanctions regimes currently operating lack any meaningful review mechanism raises doubts as to whether the 1267-regime truly would have become politically untenable without the OP.

F. Conclusions to the Case Study

The case study about the OP has brought into focus both sides of the coin, its surprising impact as well as its structural limitations. On one side, the close analysis of its practice has led to a counterintuitive finding: It illustrates how politically skillful and persistent incremental institution-building can succeed in carving out a due process niche in the institutionally difficult and highly politicized S.C. environment, providing listed persons with at least basic features of a fair delisting procedure and an effective means of legal protection. Many of the OP's institutional constraints have not affected the process as negatively as critics had suggested.

The OP has managed to establish an outcome-oriented model of individual justice that has proven to be successful in getting many petitioners off the List in a swift and focused process. Critics tend to disparage the OP's achievements simply because they do not correspond to certain institutional design features of courts. However, it is not clear how a sanctions court, apart from its political unrealizability for the foreseeable future,[246] would fare in the highly sensitive field of security politics in the challenging institutional framework of the S.C., how much backlash it would draw, and whether the delisting rate would necessarily increase under a court.

On the other side, many of the merits claimed by proponents of the OP model are, in part, little more than inferior compensatory mechanisms for a lack of legal authority. The informality of the OP process creates fairness dilemmas and leaves petitioners vulnerable. The recommendatory nature of the OP's decision, despite the reverse consensus rule in the Sanctions Committee, ensures that each permanent S.C. member is legally entitled to block every disliked delisting recommendation with its veto power. Viewed from the broader perspective of the politics of UN sanctions, the OP ultimately remains a lone fighter for due process in the asymmetrical power structures of the sanctions regime, with effective but limited capacities to alleviate the legitimacy and human rights vacuum created by the regime. As a result, the OP also has not remedied most of the human harm caused by the sanctions regime: while the preventive sanctions severely impair the daily lives of listed persons, only every fifth listed

[246] *Cf.* Interview with Kipfer, *supra* note 36, at 23:715–16 ("The Security Council will never accept a court above itself. You can just forget about it. From that point of view, it is an academic question.") (translation by author). *See also* Prost, *supra* note 146, at 474.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

person or entity petitions the OP to review the listing and they are listed for years before they do so.

IV. Possible Lessons for Other International Complaint Mechanisms

Drawing broader lessons for ICMs in global governance is difficult because of the distinctive legal, institutional, and political contexts of ICMs.[247] The OP is the specific institutional solution for the particular S.C. context. Other ICMs such as the UN treaty bodies—to name only the most obvious example—broadly expound various legal principles, the OP inquiry is reduced to a simple, factually driven question: association with Al Qaeda or ISIL. It is a potential blueprint only for other UN sanctions regimes with a substantial number of non-state actors, and possibly for unspecified international regimes in which political bodies of IOs specifically designate private persons or organizations to impose adverse actions on them.

But despite its distinctiveness, the OP faces challenges shared by other ICMs: facilitating broad access to complainants, ensuring procedural fairness despite the gaping power asymmetries between individuals and states or IOs, maintaining independence despite shortcomings in the specific institutional arrangements designed to protect independence, providing an effective remedy to complainants despite the non-bindingness of the decisions, and navigating the inevitable tension between pragmatism and principle by accommodating the sensibilities of member states and IOs, while, at the same time, exploiting the break-in-points in the legal framework to overcome the tight institutional constraints in order to better accomplish their normative mission. All ICMs grapple with these tensions in one way or another, to a greater or lesser extent, suggesting that broader lessons for institutional design may be possible.

This Part follows up on two critical challenges experienced by the OP and relates them to other ICMs. First, it briefly sketches the institutional dynamics of the OP and discusses literature on other ICMs that suggests—at least on a basic level—similar institutional patterns. It subsequently offers two possible explanations for these institutional dynamics: the influential social role of the ICM wielded in its capacity as triadic dispute resolver and the transnational character of its dispute settlement. The second Section takes the impressive acceptance rate of OP recommendations as a starting point and investigates the acceptance and compliance rates of other ICMs. Because the reverse consensus rule might be an important driver of the OP's high acceptance rate, it surveys whether and under what conditions heightened procedural requirements for overriding recommendations may present an option worth considering for other ICMs.

A. Dynamic Evolution Despite Institutional Constraints

Part III explained that the institutional limitations of ICMs may create shortcomings in terms of independence, procedural power imbalances between individuals and states or international institutions, and the legal capacity of political bodies to disregard the (non-binding) decisions of their independent reviewers. On the one hand, the institutional evolution of the OP suggests that ICMs have realistic prospects to improve over time, at least if the office-holders engage in shrewd institution-building and are supported by influential member states,

[247] French & Kirkham, *supra* note 8, at 205.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

international institutions, and civil society stakeholders.[248] The institution-building after the establishment of the OP mechanism that skillfully combined statecraft and legal craft, understanding that ICMs must defend the normative principles they embody without disregarding core member state interests, teaches valuable lessons also for other contexts.

On the other hand, the case study also indicates that states achieve some of the hoped-for effects in terms of cabining the independent tendencies of ICMs. Although the many small reform steps have substantially improved the delisting process, more sweeping proposals, such as the extension of the OP's mandate to some of the other sanctions regimes, have not gained much traction.[249] One restraining factor is likely the absence of inherited norms and expectations of modus operandi for ICMs,[250] which facilitates transplanting them into pre-existing institutional arrangements without upsetting prevailing power structures. In the S.C. context, for example, cornerstones such as broad political discretion in international security matters, the exclusion of member state accountability for original listing decisions, and the admissibility of intelligence information while—or despite—guaranteeing their confidentiality were not challenged by the OP.[251] Hence, the evolution of the OP is not only indicative of the potential but also of the limits of institutional dynamics.

The institutional trajectory of the OP seems to mirror experiences with other ICMs. None of the ICMs broadly considered in this Article encountered an institutional transformation that defied the cabining expectations of its founding states and IOs. But none of them remained entirely confined to all constraints originally imposed upon them either. As a result of subsequent reforms enacted by their creators and their own imaginative practices, they have incrementally improved over time, even if only modestly in some instances, to better fulfill their mission as complaint mechanisms. In the literature on quasi-judicial bodies, ICM's are accordingly depicted as "capable, and even innovative, procedural rule-makers,"[252] which have developed "new practices that nonetheless fall within the formal limits of their powers."[253]

What facilitates their institutional dynamics? I suggest two possible, mutually complementary factors. First, independent dispute resolvers in triadic governance structures wield, as Alec Stone Sweet and Martin Shapiro have outlined, an influential social role.[254] By virtue of being the triadic entity, they develop authority over the normative structure that governs the relationship between the disputing parties and unfold institutional dynamics by reorienting the normative discourse around themselves. ICMs, which should be understood to constitute triadic dispute resolvers, benefit from this role in at least two ways.

[248] On the cooperation between the OP and the Group of Like-Minded States, see Kimberly Prost, *The Office of the Ombudsperson and the Elected Members of the Security Council*, *in* ELECTED MEMBERS OF THE SECURITY COUNCIL: LAME DUCKS OR KEY PLAYERS? 237 (Nico Schrijver & Niels Blokker eds., 2019).

[249] COCKAYNE, BRUBAKER & JAYAKODY, *supra* note 99, at 4 (seeing no realistic prospects for such an extension).

[250] On this point, Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 209 (2006). Specifically concerning the 1267-sanctions regime: Hovell, *supra* note 16, at 25–26.

[251] *Id.* at 29; HOVELL, *supra* note 16, at 166–67.

[252] Tignino, *supra* note 10, at 246.

[253] *Id.* at 242.

[254] *See* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 56–72 (2002).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

On one hand, they turn into authoritative, though not final, interpreters of what the normative framework requires—the OP concerning principles of procedural fairness and the evidence and level of intensity of association with Al Qaeda or ISIL, the WBIP and the CAO concerning the social and environmental standards of the World Bank, and the CAAA concerning public access and participation rights in environmental matters. To be clear, their authority is weaker than that of courts, which are the focus of Shapiro and Stone Sweet's analysis.

On the other hand, the ICM is arguably the actor most concerned, most occupied, and most knowledgeable about the dispute settlement system it represents. The political and bureaucratic leadership of states and IOs have limited attention resources, especially after the establishment of an ICM, and they often pay little attention to the nitty-gritty details of the review process. These institutional attention asymmetries put the ICM in a favorable position to create procedural innovations and successfully push for small, incremental reform steps as the final Section of Part III illustrated regarding the OP.

Second, liberal IR theory on the judicialization of international politics has established that transnational dispute resolution—as opposed to interstate dispute resolution—increases the potential for institutional dynamics to unfold by allowing for complaints by individuals.[255] Private actor access helps ICs to generate a mutually reinforcing "virtuous circle" of steady activity, heightened authority, and growing autonomy from the preferences of states.[256] These claims about the institutional dynamics of transnational dispute settlement seem to apply to ICMs.[257] While the latter do not have the same "potential for setting in motion a distinctive dynamic built on precedent,"[258] their ability to receive individual complaints is arguably a game changer for them too.[259]

A look into their caseloads reveals that they have received a meaningful number of complaints or communications since their inception: As of September 1, 2022, the CFA 3,427 since 1950,[260] the Kosovo Ombudsperson Institution (KOI) 1,857 between November 2000 and June 2005,[261] the CAO 213 since 1999,[262] the AAAC 194 since 2004,[263] the WBIP 159 since 1994,[264] and the OP 105 since 2010.[265] The UN treaty bodies that have registered most individual communications are: the Human Rights Committee with 3,727

[255] Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Org. 457 (2000); Karen J. Alter, The New Terrain of International Law: Courts, Politics, Rights 7–8, 81–85 (2014); Andrew Moravcsik, *Liberal Theories of International Law*, *in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 102–06 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

[256] Keohane, Moravcsik & Slaughter, *supra* note 255 at 482–83.

[257] *Cf. id.*

[258] *Id.* at 479. A striking example is the confidentiality of the OP's comprehensive reports.

[259] Zvobgo & Graham, *supra* note 13, at 429.

[260] International Labour Organization, *Freedom of Association Cases*, *at* ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20060:0::NO.

[261] The total number of complaints combines the official numbers provided in the annual reports from 2000–2005. *Cf.* Ombudsperson Institution in Kosovo, *Annual Reports*, *at* oik-rks.org/en/reports/annual-reports/page/2.

[262] Office of the Compliance Advisor Ombudsman, *Section CAO Data*, *at* www.cao-ombudsman.org.

[263] United Nations Economic Commission for Europe, *Communications from the Public*, *at* unece.org/env/pp/cc/communications-from-the-public.

[264] The World Bank Inspection Panel, *Panel Cases*, *at* https://www.inspectionpanel.org/panel-cases.

[265] Office of the Ombudsperson, *Status of Cases*, *at* un.org/securitycouncil/sc/ombudsperson/status-of-cases.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

since 1977,[266] the Committee against Torture with 1,126 since 1988,[267] the Committee on Economic, Social and Cultural Rights with 230 since 2013,[268] the Committee on the Rights of the Child with 175 since 2014,[269] and the Committee on Elimination of Discrimination Against Women with 161 since 2003.[270] This unceasing stream of complaints brings several benefits to ICMs: it increases their authority and invites more complaints, it mobilizes interested petitioners and stakeholders with different agendas than the states, and it creates credible needs to properly address the procedural and institutional issues posed by the complaints.[271] In other words, it creates more institutional leverage to expand the quasi-judicial role in order to effectively fulfill the demands of the mandate assigned to them.

B. Effectiveness Despite Non-bindingness

Non-bindingness is a defining feature of ICMs. It is also the basis for their portrayal as toothless and ineffective.[272] Critics assume that mere findings and recommendations will have little impact on non-compliant states and IOs.[273] The OP case study suggests, however, that it is effective. Although the OP recommends delisting in 73.3 percent of all cases, that recommendation has been accepted in all but one case.[274] The high acceptance rate of the OP's unpopular delisting decision is likely attributable to the reverse consensus rule, buttressed by the reputational costs of override. It is less clear that the persuasiveness of the recommendations significantly contributes to compliance by the Sanctions Committee.

This raises two questions for other ICMs: can they duplicate the success of the OP and do procedural safeguards for ICM recommendations offer a desirable institutional feature beyond the OP? Although the correlation between effectiveness and compliance is complicated,[275] a look into the extent to which states and IOs comply with ICM recommendations and plaintiffs obtain a remedy resulting from ICM cases may serve as a useful starting point for this inquiry.

Other ICMs have lower, but still substantial, acceptance and compliance rates. One study on the WBIP and the CAO shows that plaintiffs obtain some form of remedy in roughly half

[266] Human Rights Committee, Report of the Human Rights Committee. 129th, 130th & 131st Sess., para. 21, UN Doc. A/76/40 (2021).

[267] Committee Against Torture, Report of the Committee Against Torture. 71st, 72nd & 73rd Sess., at III, UN Doc. A/77/44 (2022).

[268] Committee on Economic, Social and Cultural Rights, Report of the Committee on Economic, Social and Cultural Rights. 69th & 70th Sess., para. 81, UN Doc. E/2022/22-E/C.12/2021/3 (2022).

[269] Committee on the Rights of the Child, *Table of Pending Cases Before the Committee on the Rights of the Child*, *at* ohchr.org/sites/default/files/Documents/HRBodies/CRC/TablePendingCases.pdf (as of Feb. 23, 2022).

[270] Committee on the Elimination of Discrimination Against Women, *Individual Communications*, Section Recent Complaints, Subsection Table of Pending Cases, *at* ohchr.org/en/treaty-bodies/cedaw/individual-communications (as of Oct. 27, 2020).

[271] *Cf.* Keohane, Moravcsik & Slaughter, *supra* note 255, at 488.

[272] For this assessment with respect to the WBIP and the CAO, see Ta & Graham, *supra* note 107, at 130.

[273] Similar, Samvel, *supra* note 104, at 212.

[274] This one case is the Jim'ale case discussed above. In one other case, a person was delisted upon the OP's recommendation and relisted shortly thereafter but with the OP's consent because new information was presented that had not been available during the OP process. *See* UN Press Release, Security Council Al-Qaida Sanctions Committee Action Regarding Jaber Abdallah Jaber Ahmad Al-Jalahmah (Jan. 3, 2014), *at* https://www.un.org/press/en/2014/sc11241.doc.htm. *See* also Interview with Prost, *supra* note 66, at 13:400–05.

[275] Ta & Graham, *supra* note 107, at 123.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

of WBIP and two-thirds of CAO cases, 40 percent of which result in the more intrusive remedies of plaintiff compensation, project alteration, or project termination.[276] Based on their quantitative findings, they suggest that "quasi-judicial accountability mechanisms of this type can be an effective mechanism by which human rights can be enforced."[277] A study of the ACCC based on a small sample of nineteen non-compliance cases (out of eighty-seven submitted communications) concludes that the Convention's governing body, the Meeting of the Parties (MoP), has adopted the Committee's recommendations in seventeen out of nineteen cases (89.5 percent) and that the member states deemed to be incompliant have recorded some degree of implementation in only eight out of seventeen (41 percent) of the analyzed cases.[278]

The data suggests two cautious observations. First, ICMs are not toothless and have at least modest institutional impact—an assessment that resonates with the findings of the case study about the OP. The remedies proposed in their recommendations, including the delisting of terrorist suspects, the termination of development finance projects, and the enactment of legislation creating broad public participation rights in environmental affairs, can be demanding for states and international institutions, and require them to take actions they likely would not have taken absent those recommendations. In other words, ICMs seem to elicit meaningful compliance despite their non-bindingness at least some of the time. This suggests that the binarity between bindingness and non-bindingness tends to be overstated and that non-binding, but independent triadic dispute resolvers create other compliance-inducing effects than legal obedience such as normative pressure and reputational costs.[279]

Second, the robustness of the OP's recommendations conferred by the reverse consensus rule on one hand, and the lack of similar procedural safeguards for the recommendations of other ICPs on the other hand, may contribute to the comparatively high acceptance and compliance rates of the OP. Recommendations that trigger heightened procedural requirements for override may constitute a promising mechanism in other global governance settings. The WTO has also shifted from a consensus rule to a reverse consensus rule, a move that is seen as transforming dispute settlement away from a diplomatic mode and into "a fully-fledged legal dispute settlement system."[280] It has made the adoption of panel and Appellate Body (AB) reports by the Dispute Settlement Body, which is composed of representatives of all WTO members, effectively automatic. Some scholars have argued that this arrangement has resulted in a troublesome "loss of institutional checks and balances" against judicial activism.[281] Whether the introduction of the reverse consensus rule ultimately led to over-legalization

[276] *Id.* Another study on the same institutions arrives at similar but slightly lower compliance rates, documenting at least one positive outcome in 50% of all complaints. Zvobgo & Graham, *supra* note 13, at 427.

[277] Ta & Graham, *supra* note 107, at 141.

[278] Samvel, *supra* note 104, at 213 (relying upon communications by the public decided by the Committee in the period between 2004–13).

[279] Similar, Christina Verones, *Mechanisms for Reviewing Compliance with International Environmental Law Open to Private Parties*, *in* RULE OF LAW FOR NATURE: NEW DIMENSIONS AND IDEAS IN ENVIRONMENTAL LAW 275, 279 (Christina Voigt ed., 2013). See also with respect to the ILO Committee on Freedom of Association, Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AJIL 90 (2008).

[280] Thomas Cottier, *Preparing for Structural Reform in the WTO*, 10 J. INT'L ECON. L. 497 (2007).

[281] Wenwei Guan, *Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17 J. INT'L ECON. L. 77, 102 (2014).

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

and caused the recent political backlash against the AB, is beyond the scope of this discussion.[282] At the same time, it is important to beware that consensus and reverse consensus do not necessarily constitute either-or options for designing decision-making procedures, but rather the outer poles of a continuum of voting requirements for adopting or overriding non-binding recommendations that also may include majority or qualified majority voting.

Heightened procedural override requirements are only a feasible option for ICMs whose recommendations are subject to adoption by governing member state bodies. This includes the dispute settlement systems of the World Bank and the Aarhus Convention, which require approval by the responsible Board in the case of the WBIP and the CAO, and the MoP in the case of the ACCC.[283]

In the case of the ACCC, however, the following consideration speaks against their use. The MoP has, in the sample set used in Samvel's study, endorsed almost 90 percent of the ACCC's non-compliance recommendations even though it follows a long-standing practice of deciding by consensus. While this high adoption rate despite the formally unfavorable consensus rule calls for explanations, it clearly does not create a pressing need to lower the adoption requirements. A possible explanation is that the costs of adopting the recommendations of the ACCC are negligible because adoption does not change the legal status of the recommendations. They remain, even after the MoP's endorsement, non-binding. The ritualized practice of endorsement ensures that recommendations are not suppressed by the MoP but submitted to the non-compliant states, and, moreover, come with the added authority of having received the member states' endorsement.

There is an important structural difference between the legal arrangements of two distinctive types of ICMs that further facilitates the endorsement practice of the MoP. In the case of ICMs that review the actions of IOs such as the OP, the WBIP, and the CAO, the reviewed international institutions such as the UN Security Council and the World Bank have simultaneously been vested with the power to impair human rights and to remove human rights impairment. Simply put: They can list and delist a person or finance and terminate a harm-inflicting project. As a result, adoption and implementation rates coincide because the member state body that adopts the recommendation of the responsible IMC is also responsible and empowered to implement the recommendation. It makes little sense to adopt a recommendation only to refuse to implement it shortly thereafter. Thus, a person will automatically be delisted in the case of the 1267-sanctions regime if the Sanctions Committee does not override the delisting recommendation within a 60-day period.[284]

By contrast, ICMs that monitor state compliance with treaty obligations, such as the CAAA, the UN treaty bodies, and the CFA, review cases of alleged non-compliance not by their own IO, but by single states. This difference has important ramifications: adoption and implementation rates differ because both are administered by completely different

[282] For more reflection, see Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297 (2019); Jeffrey Kucik & Sergio Puig, *Do International Dispute Bodies Overreach? Reassessing World Trade Organization Dispute Ruling*, 66 INT'L STUD. Q. 66 (2022), *at* https://doi.org/10.1093/isq/sqac074. For a case study on how over-legalization may lead to backlash in a different setting, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

[283] It excludes the UN treaty bodies whose "views" do not require adoption by some member state body.

[284] *See* SC Res. 1989, *supra* note 29, para. 23.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

polities—the former by the governing member state body, the latter by the domestic legal and political process of the non-compliant state. This added difficulty of bringing single states to implement ICM recommendations despite unfavorable domestic circumstances may help to explain the lower implementation rates in the case of the CAAA.[285] If this conjecture is true, it suggests that better protecting the recommendations against override by the MoP may neither increase their authority nor increase compliance.

In the context of the WBIP and the CAO, the idea of heightened procedural requirements to deviate from ICM findings or recommendations may be more deserving of consideration. In these institutional settings, the Board decides by a majority vote and approval rates are much lower than for the CAAA, potentially offering room for increasing approval rates by raising override requirements. For example, a qualified majority requirement to override CAO recommendations may address the criticism that the IFC tends to structurally ignore these recommendations.[286] On the other hand, it would have to be taken into account that such a rule could significantly hamper the CAO's role as mediator and crafter of create remedies.[287] The WBIP, by contrast, performs its role more akin to an adjudicator, which renders facile override of its findings more troublesome. But, of course, the first step would be to empower the panel to make recommendations before thinking about how to bolster them.

V. Conclusion and Future Directions of Research

The introduction asked whether, and to what extent, it is desirable to establish ICMs despite their institutional limitations. ICMs are criticized time and again as merely legitimating unjust global governance structures, masking that states have little interest in sweeping reforms that restrict their room for action more meaningfully.[288] At a minimum, however, ICMs bring some measure of accountability to global governance by providing independent legal review. They provide access, give voice, and provide some relief to some of the world's most vulnerable persons and communities[289]—the OP affords these protections to Islamic terrorist suspects listed by powerful states to freeze their assets and ban their travel, the World Bank's WBIP and CAO provides them to Indigenous communities adversely affected by large-scale finance projects, and the UN treaty bodies give them to neglected groups such as persons with disabilities, children, and racial minorities harmed by their home state. The reluctance of the UN and its member states to extend the institutional model of the OP to other sanctions regimes and that of the KOI to other UN transitional administrations or peacekeeping operations suggest that these two ICMs are effective—why resist extending them if they serve merely as a fig-leaf to legitimate state preferences?[290]

[285] *Cf.* Samvel, *supra* note 104, at 213.

[286] Mara Tignino, *Human Rights Standards in International Finance and Development*: *The Challenges Ahead*, *in* The Practice of Independent Accountability Mechanisms (IAMs). Towards Good Governance in Development Finance 105 (Owen McIntyre & Suresh Nanwani eds., 2020).

[287] *See* Tignino, *supra* note 10, at 246; Ta & Graham, *supra* note 107, at 120–21.

[288] Sullivan, *supra* note 20, at 227–28.

[289] Zvobgo & Graham, *supra* note 13, at 444.

[290] Cf., regarding the KOI: Gisela Hirschmann, *UN Peacekeeping and the Protection of Due Process Rights: Learning How to Protect the Rights of Detainees*, *in* Protecting the Individual from International Authority, *supra* note 26, at 186, 190 (observing that the KOI "did not become general policy to be replicated in other missions" although it "was regarded as a role model in the context of peace operations").

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

It should not be forgotten that the presence of "contact points" on the international plane that bring together individuals and states or international institutions in a joint procedure that provides the former with an accountability mechanism against the latter is still much more the exception than the rule.[291] Or, to put it more prosaically, they still "remain islands in the sea of international relations."[292] Most individuals still do not have any remedy under international law. Instead of pitting legally binding ICs and non-binding ICMs against each other, the emphasis should be on building "pockets of accountability"[293] whatever their class origin. If the international rule of law may be built incrementally through "islands of effective . . . adjudication" that are subsequently extended, institution by institution and issue-area by issue-area, to larger archipelagoes,[294] nothing speaks against extending this line of reasoning to ICMs.

The example of the OP shows that there is value in establishing even weak ICMs that are only the second- or third-best solutions given the potential of institutions to incrementally expand over time. Even a complaint mechanism that is weak on paper can be a valuable contribution. The stark due process discrepancy between the 1267-sanctions regime with the OP and the other sanctions regimes without a comparable mechanism illustrates this point. We may be better off to create extrajudicial complaint mechanisms on the international plane than to do nothing at all.

But while there is a normative case for ICMs, we still need to understand better how ICMs perform as international accountability and compliance mechanisms for aggrieved individuals and communities.[295] Much more empirical research remains to be done. It appears, for example, that most ICMs set forth generous accessibility requirements, yet they receive few complaints. On average, the AAAC receives less than eleven complaints per year, the OP less than nine, and the WBIP less than six. Is this an indicator for the weakness of these bodies from the perception of harmed persons who choose not to lodge complaints, do informal hurdles such as lack of capacity or awareness substantially inhibit access, or are the numbers more impressive than it seems given the confined circle of potential petitioners? In any case, complaints are the lifeblood of ICMs, and scholars of these bodies therefore need to gain a better understanding of what drives access and how to best structure access rules, or whether to grant ICM's ex-officio powers as a complement.

A critical issue for ICMs is whether—and to what extent—the non-bindingness of their decisions affects their authority and compliance with their recommendations, or possibly opens new channels of communication with states and IOs, and what effect the design of voting procedures in governing bodies adopting or rejecting the recommendations may, or may not, have on compliance. Moreover, the institutional trajectory of other ICMs from their creation until today merits exploration, especially how they managed to overcome some of the institutional constraints imposed upon them, which trade-offs they made in the process, and which factors were likely determinative for the institutional dynamics they unfolded or failed to unfold.

[291] For this conceptualization, see Giumelli & Costa Buranelli, *supra* note 121.

[292] Christian J. Tams, *International Law and Dispute Settlement: New Problems and Techniques/The Law of Treaties Beyond the Vienna Convention*, 54 GER. Y.B. INT'L L. 794, 795 (2011) (referring to courts and tribunals).

[293] Ta & Graham, *supra* note 107, at 131.

[294] Helfer, Alter & Guerzovich, *supra* note 9, at 5, 45.

[295] Zvobgo & Graham, *supra* note 13, at 425–26.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press

Future research should compare ICMs by examining their similarities and differences. While there is extensive literature on each particular ICM, typically written by specialists in the specific branch of international law, those insights are not situated in the larger context of the work that other ICMs do. International law scholarship on ICMs largely mirrors the fragmentation of international law generally.

Comparative research on ICMs may help to identify good practices for access, procedural fairness, and independence that could, in the long run, generate inherited norms and expectations of modus operandi for ICMs. If international law does become more authoritarian, as Ginsburg speculates,[296] we should reflect about how to turn the fragile institutional arrangements of ICMs more resilient to authoritarian conversion.

[296] Ginsburg, *supra* note 6.

https://doi.org/10.1017/ajil.2022.81 Published online by Cambridge University Press