

POLICING THE POLICE: SECURITY COUNCIL  
MONITORING OF STATES' SANCTIONS  
IMPLEMENTATION OBLIGATIONS

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*U.N. Sanctions are devised internationally but imposed locally. The legal obligations in the Security Council's sanctions resolutions are directed at recalcitrant state and non-state actors, but apply to all U.N. member states, requiring them to individually take domestic measures against sanctions targets. Sanctions obligations are not only voluminous and difficult to translate into domestic law, but they may also not be fully effective unless states apply them universally. In order to address the unique supervisory challenges this system presents, the Council established sanctions committees and expert panels in most sanctions regimes to manage and monitor implementation by states. This article critically evaluates the role of these institutions—in particular, the expert panels—and the normative paradigm in which they operate. To this end it has both practical and academic objectives. It identifies governance problems and offers some suggestions for reform in relation to three aspects of the sanctions system: (1) the independence and impartiality of panels; (2) the quantity and quality of information on implementation provided to the Council; and (3) the factual and legal decision-making standards panels adopt in relation to states'*

*compliance. This article also considers the role and identity of panels from comparative and theoretical perspectives. Through this analysis, this article crafts a clear conceptual picture of a sometimes incoherent institution, from which to build a more sophisticated debate about sanctions governance.*

## I. INTRODUCTION

Sitting between “war and words,”<sup>1</sup> targeted economic sanctions have become the default foreign policy tool for bringing recalcitrant state and non-state actors into line with international norms. The United Nations (U.N.) Security Council (Council) uses multilateral sanctions to confront the most pressing threats on the global agenda, from constraining a nuclear Iran and North Korea (DPRK) to containing the Islamic State in Iraq and the Levant (Da’esh) (ISIL). Despite their popularity on the international stage, states face considerable difficulty implementing sanctions domestically. Sanctions against the DPRK, for instance, present compliance problems for China, whose shipping companies sell oil to the regime.<sup>2</sup> South Korea faced another set of challenges, when it became apparent that its plan to give smartphones to DPRK athletes at the 2018 Winter Olympics would breach a luxury goods export ban.<sup>3</sup>

Although the international community often conceptualizes poor sanctions implementation as a domestic regulatory problem, it also presents a broader challenge to the global governance of the sanctions system. Whereas states directly implement sanctions under their domestic laws, they adopt those laws in order to meet international legal obligations imposed by the Council. The Council not only generates international sanctions law, but it is also responsible for supervising states’

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1. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 109, U.N. Doc. A/59/2005 (Mar. 21, 2005).

2. See Charles Clover, *Chinese Ships Accused of Breaking Sanctions on North Korea*, FIN. TIMES (Dec. 27, 2017), <https://www.ft.com/content/21a0407e-eadd-11e7-bd17-521324c81e23> (detailing that “Chinese vessels are secretly trading oil products with North Korea in violation of UN sanctions.”).

3. Choe Sang-Hun, *A Korean Olympic Dilemma: Do Hockey Sticks Violate U.N. Sanctions?*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/world/asia/north-korea-olympics-sanctions.html>.

implementation of and compliance with that law.<sup>4</sup> The Council polices the police in order to ensure sanctions engage their targets.

In itself, the Council's role is not unique. Academics recognize that "one of the key functions of international organizations is to supervise compliance" with its laws by its members.<sup>5</sup> However, several features of the international sanctions regime make monitoring particularly difficult. Sanctions obligations are voluminous and difficult to translate into domestic law. Yet, despite these significant burdens, they may not be fully effective unless states implement them universally. Sanctions measures are designed to operate as a global web, denying access to proscribed benefits for all sanctions targets across all jurisdictions. Any gaps, allowing access to markets to buy arms or protect assets, can substantially undermine, or even render ineffectual, the sanctions regime.

In order to supervise sanctions implementation, the Council establishes both sanctions committees (committees) and expert panels (panels) as part of almost all of its sanctions regimes. Committees comprise representatives of each Council member and are responsible for managing lists of sanctions targets and other operational matters. Panels, a more recent innovation, are tasked by the Council with monitoring, investigating, and reporting back on the implementation of, and compliance with, sanctions.<sup>6</sup> Panels have been described as the Council's "eyes and ears on the ground"<sup>7</sup> and are heralded as a "valuable contribution to the effort to detect and correct violations and to the overall goal of enhancing compliance."<sup>8</sup>

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4. See PHILIPPE SANDS Q.C. & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 320 (6th ed. 2009) (discussing the role of international organizations as regime supervisors).

5. Niels Blokker & Sam Muller, *Towards More Effective Supervision by International Organizations: A General Introduction*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 1, 1 (Niels Blokker & Sam Muller eds., 1994).

6. See *infra* Part II Section D (outlining the organization of committees and panels).

7. Permanent Representatives of Austl., Fin., Ger., Greece and Swed., *Compendium of the High-Level Review of United Nations Sanctions*, at 36, U.N. Doc. A/69/941-S/2015/432 (June 12, 2015) [hereinafter *High-Level Review*].

8. Rep. of the Informal Working Group of the Security Council on General Issues of Sanctions, transmitted by Letter Dated 18 December 2006 from

Nevertheless, despite the fact that panels are the only means of knowing whether the U.N.'s main peace and security tool is implemented globally, legal scholars give little serious attention to their work.<sup>9</sup>

This article aims to rectify the gap in the scholarship by critically evaluating the role of expert panels in sanctions monitoring. To this end, it has both practical and academic objectives. It identifies governance problems in three aspects of the sanctions system: (1) the independence and impartiality of panels; (2) the quantity and quality of information on implementation panels receive from states; and (3) the factual and legal decision-making standards panels adopt. It evaluates the role of law in causing these problems and considers how institutional or normative reforms might provide solutions. In doing so, the article constructively engages with the limited commentary on sanctions administration reform, arguing against suggestions for the centralization of sanctions monitoring, and in favor of normative coherence across sanctions regimes through clear and consistent standards and rules.

The article also contributes to the international legal community's understanding of sanctions monitoring by evaluating the panels in a theoretical and comparative dimension. In this vein, it draws on compliance theory and considers if and how panels contribute to the resolution of the collective action problem of global sanctions implementation. It also tests the panels' approaches against practices of other international monitoring bodies. These devices not only situate the work of expert panels in the wider world of global governance law and theory, but also help build a common identity for panels. The Council has instituted panels in an *ad hoc* and reactive manner, and the absence of normative consistency in their form and function underlies and perpetuates the panel

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the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions Addressed to the President of the Security Council, ¶ 8, U.N. Doc. S/2006/997 (Dec. 22, 2006) [hereinafter Informal Working Group Rep.].

9. Significant attention has been paid to due process concerns associated with the decisions of the Council to list an individual or entity as a sanctions target. *E.g.*, DEVIKA HOVELL, THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING 1–6 (2016). However, scholarship is lacking on the process of implementing sanctions once listing decisions have been made.

system's governance problems. An overarching goal of this article is crafting a clear conceptual picture of an inconsistent institution, so as to lay a platform for a more sophisticated debate about sanctions governance in future scholarship and practice.

The article unfolds in three parts. Part II explains the character of economic sanctions and the problems associated with their implementation domestically. It examines why this issue presents a global governance challenge and the normative and structural solutions the Council deploys in response. Part III tests the Council's solutions by examining the practice of panels across three different sanctions regimes: ISIL/Al-Qaida, DPRK, and Sudan. It identifies problems in the relationships between committees and panels, the means and methods through which panels gather information on implementation, and the manner in which panels assess state compliance with sanctions obligations. This part relies, to some extent, on interviews the author conducted with former and current U.N. officials and state diplomats to gain insight into less transparent aspects of the monitoring process, particularly the privately held committee meetings. Finally, Part IV critically examines the role played by law in creating, and potentially rectifying, selected problems identified in Part III.

## II. SANCTIONS SUPERVISION: CHALLENGES AND RESPONSES

Targeted economic sanctions generate complex interactions between international and domestic law, which present unique governance challenges for the Council. This part considers the legal character of international sanctions obligations and the supervisory mechanisms created by the Council to oversee their implementation. It formulates the legal and institutional benchmarks for assessing the performance of panels in Parts III and IV.

### A. *Sanctions in the U.N. System*

The global community traditionally viewed sanctions as unilateral acts of private justice taken by one state to ensure compliance with the obligations owed to it by another.<sup>10</sup> How-

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10. Alain Pellet & Alina Miron, *Sanctions*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 6, <http://opil.ouplaw.com/view/10.1093/law:epil/97801>

ever, with the gradual centralization of enforcement mechanisms in international organizations (IOs) over the course of the twentieth century, international lawyers increasingly use the term when describing measures taken on a collective basis; including measures adopted by the Council under Chapter VII of the U.N. Charter (Charter).<sup>11</sup> Sanctions can take a variety of forms, ranging from economic and diplomatic measures to military enforcement.<sup>12</sup> This article discusses economic sanctions—a device employed by the Council over the course of the last half-century, which has become one of its key peace and security instruments during the past three decades.

During the Cold War, the Council limited its use of economic sanctions to two instances: Southern Rhodesia in 1966<sup>13</sup> and South Africa in 1977.<sup>14</sup> The approach changed after 1990, starting with the imposition of comprehensive sanctions against Iraq after its invasion of Kuwait.<sup>15</sup> Since that time, sanctions have become one of the most commonly used devices in the Council's Chapter VII toolbox; there are currently fourteen separate active sanctions regimes.<sup>16</sup> These operate alongside a range of other sanctions imposed by states unilaterally or through regional organizations.<sup>17</sup>

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99231690/law-9780199231690-e984?rskey=WFYE29&result=1&prd=EPIL  
(last updated Aug. 2013).

11. See, e.g., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. OF INT'L L. COMMISSION art. 22, ¶ 3 (2001) [hereinafter *I.L.C. Commentary*] (explaining that “[t]he term ‘sanctions’ has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term ‘measures’, not ‘sanctions’.”); Vera Gowlland-Debbas, *The Security Council and Issues of Responsibility Under International Law*, 353 RECUEIL DES COURS 185, 225–41 (2011).

12. U.N. Charter arts. 41–42.

13. S.C. Res. 232 (Dec. 16, 1966).

14. S.C. Res. 418 (Nov. 4, 1977).

15. S.C. Res. 661 (Aug. 6, 1990).

16. See *infra* Figure 1.

17. See, e.g., *Sanctions Programs and Country Information*, U.S. DEP'T TREASURY [www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx](http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx) (last visited Mar. 27, 2019) (listing the unilateral sanctions of the United States); EUROPEAN COMM'N, RESTRICTIVE MEASURES (SANCTIONS) IN FORCE (Aug. 4, 2017), [https://eas.europa.eu/sites/eas/files/restrictive\\_measures-2017-08-04.pdf](https://eas.europa.eu/sites/eas/files/restrictive_measures-2017-08-04.pdf) (listing the unilateral sanctions of the European Union).

Over the course of the past three decades, the scope of sanctions changed considerably. Measures against Iraq in 1990 were comprehensive in that they prevented states from importing or exporting all commodities and products.<sup>18</sup> The Security Council employed similar comprehensive sanctions against the former Yugoslavia and Haiti.<sup>19</sup> Today sanctions are more targeted. They are limited to certain areas of a state's economy, to types of political conduct, or to specific individuals and entities designated on sanctions lists.<sup>20</sup> The devastating humanitarian impact of the Iraq sanctions was the primary motivation for the shift to targeted sanctions.<sup>21</sup> Those sanctions not only resulted in shortages of medicine and other humanitarian supplies, but also prevented the rebuilding of key infrastructure destroyed during the conflict.<sup>22</sup> The Council developed targeted sanctions to avoid or reduce such harm to civilian populations while simultaneously influencing more directly those responsible for wrongdoing.<sup>23</sup>

Targeted sanctions imposed against individuals or entities commonly include travel bans and asset freezes.<sup>24</sup> Committees maintain lists recording targets, which are then disseminated to states.<sup>25</sup> Sectoral sanctions may encompass arms embargoes, commodity bans, or financial sector restrictions.<sup>26</sup> This article

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18. S.C. Res. 661, *supra* note 15, ¶ 3 (imposing the relevant sanctions); Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MOD. L. REV. 153, 159–60 (1992) (discussing the sanctions framework more generally). R

19. *See* S.C. Res. 757 (May 30, 1992) (sanctions against the former Yugoslavia); S.C. Res. 841 (June 16, 1993) (sanctions against Haiti).

20. *See generally* LORAINIE SIEVERS & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 520 (4th ed. 2014) (discussing the development of these targeted sanctions).

21. SIMON CHESTERMAN, IAN JOHNSTONE & DAVID M. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS* 376 (2d ed. 2016).

22. *Id.*

23. SIEVERS & DAWS, *supra* note 20, at 520. R

24. George A. Lopez & David Cortright, *Targeted Sanctions, Counterterrorism, and Strategic Peacebuilding*, in *STRATEGIES OF PEACE: TRANSFORMING CONFLICT IN A VIOLENT WORLD* 169, 172 (Daniel Philpott & Gerard F. Powers eds., 2010).

25. *See United Nations Security Council Consolidated List*, U.N. Security Council <https://www.un.org/securitycouncil/content/un-sc-consolidated-list> (last visited Apr. 8, 2019).

26. *See* Thomas J. Biersteker, Marcos Tourinho & Sue E. Eckert, *Thinking about United Nations Targeted Sanctions*, in *TARGETED SANCTIONS: THE IMPACTS*



limits its focus to three of the main economic sanctions measures adopted by the Council, namely travel bans, asset freezes, and arms embargoes.<sup>27</sup>

The ability to finely calibrate sanctions and to use them in combination with diplomatic or other tools, means that the Council employs sanctions for a greater range of purposes.<sup>28</sup> No longer are they designed only on a “pain-gain” understanding, where actors change their behavior to avoid the economic sting of sanctions.<sup>29</sup> They also constrain the capacity of the target to achieve its objectives, such as through an arms embargo, or to stigmatize the target in the eyes of the international community and dissuade others from behaving in a like manner.<sup>30</sup>

### B. *The Law of Sanctions*

The Security Council imposes economic sanctions under Article 41 of the Charter, which provides for the adoption of measures not involving the use of armed force.<sup>31</sup> Sanctions resolutions address states, requiring that they take measures to implement sanctions within their jurisdiction against specified individuals, entities, or sectors. This entails taking appropriate steps to ensure that domestic legal subjects enforce sanctions against those targets. As sanctions measures are adopted under

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AND EFFECTIVENESS OF UNITED NATIONS ACTION 11, 13 (Thomas J. Biersteker et al. eds., 2016) (discussing different types of sanctions measures and their scope of application).

27. Arms embargoes are the most common type of targeted sanction, used in 88% of regimes. Asset freezes and travel bans come next, deployed in 75% of cases. GRADUATE INST. GENEVA, UN TARGETED SANCTIONS: QUANTITATIVE DATABASE (2014) [hereinafter TS QUANTITATIVE DATABASE].

28. See generally Francesco Giumelli, *The Purposes of Targeted Sanctions*, in TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION, *supra* note 26, at 38, 39–40 (discussing the different purposes of sanctions, including coercion, constraint and signal/stigmatization).

29. *Id.* at 39.

30. *Id.* at 39–40; Simon Chesterman & Béatrice Pouligny, *Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations*, 9 GLOBAL GOVERNANCE 503, 504–5 (2003).

31. This follows a positive determination made under Article 39. Sometimes the Council does not explicitly refer to Article 41 in its resolutions, instead relying on Chapter VII generally. Nevertheless, Article 41 is commonly accepted as the source of its sanctioning powers. Nico Krisch, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1305, 1312–19 (Bruno Simma et al. eds., 3rd ed. 2012).

Chapter VII, they are legally binding on states and a failure to comply constitutes a violation of the Charter.<sup>32</sup>

To date, scholars have given little attention to the precise character of sanctions obligations. There are slight differences in the way that the Council frames the obligations to implement arms embargoes, travel bans, and assets freezes.<sup>33</sup> However, they are all preventative obligations—preventing a particular activity, entry or transit, weapons transactions, or the movement of frozen assets.<sup>34</sup> They require that the state take the necessary measures in its legal system to prevent public or private actors engaging in these activities.<sup>35</sup> However, the success of domestic measures often depends on whether private actors behave in accordance with the framework imposed by the state. In these circumstances, the international legal obligation attaches to the conduct of the state and not to the end result.<sup>36</sup> States will avoid international responsibility if they act with due diligence to prevent the proscribed conduct, notwithstanding whether the proscribed conduct eventuates.<sup>37</sup>

In determining whether states meet due diligence obligations, the International Court of Justice looks both to the content of the primary rule and the relevant circumstances of the state, including its resources.<sup>38</sup> Yet while adequate perform-

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32. U.N. Charter arts. 2(5), 25, 48, 103; *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep. 151, 163 (July 20). It remains the subject of debate whether the Council can bind non-U.N. member states. ROSALYN HIGGINS ET AL., *OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS* 993 (2017).

33. *Compare, e.g.*, S.C. Res. 1267, ¶ 4(b) (Oct. 15, 1999), *with* S.C. Res. 1718, ¶ 8(d) (Oct. 14, 2006) (imposing asset freezes with different requirements).

34. *See infra* Part III Section A (outlining examples of several sanction regimes in the form of case studies).

35. *Id.*

36. *See I.L.C. Commentary, supra* note 11, art. 14 cmt. 14 (detailing the obligation of prevention requiring states to take steps to prevent the occurrence of a given event).

37. *See* Application of Convention on Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26) (applying the due diligence framework to states' obligations with respect to the crime of genocide).

38. *See* Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 157 (June 27) (suggesting different types of due diligence obligations for Nicaragua and the United States in light of their respective resources).

ance of a due diligence obligation may be case specific, it appears that states must always reach a minimum threshold of conduct. States must not only pass the appropriate laws proscribing the conduct, they must also adopt “a certain level of vigilance in their enforcement.”<sup>39</sup> In some instances, it might be clear when the standard has not been reached. This might occur when the final application of a sanction rests with a state official and that official fails in performing their responsibility. However, in cases involving private actors, complying with the due diligence obligation will depend on the appropriate level of diligence a state should have exercised in relation to those actors in the circumstances, and this may be difficult to assess.

C. *Sanctions Implementation: Domestic Law Challenges*

The system of U.N. sanctions creates a unique legal predicament in which the burdens of non-compliance with international norms are placed not at the door of the transgressor, but with the community of states. With each sanctions regime arises a new set of obligations, binding on all states, that generates a “chain reaction of complex legal interactions, between international law and domestic law, between public and private law, between public authorities and private actors.”<sup>40</sup> States face implementation challenges not only in translating measures into domestic law, but also in disseminating information to relevant stakeholders for action; supervising compliance; investigating and prosecuting violations; and enforcing penalties against sanctions evaders.<sup>41</sup> The manner in which governments interpret the requirements and implement them in their domestic context may vary considerably. During this stage of implementation, legislators and policymakers must interpret measures drafted by the Council in general terms, confronting the “challenge of rational design by a highly politicized body.”<sup>42</sup>

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39. *Pulp Mills on River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶ 197 (Apr. 20).

40. Jeremy Farrall & Kim Rubenstein, *Introduction: Filling or Falling Between the Cracks? Law's Potential*, in *SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD* 1, 2 (Jeremy Farrall & Kim Rubenstein eds., 2009).

41. Biersteker, Tourinho & Eckert, *supra* note 26, at 16.

42. *Id.* at 15.

States have widely implemented some sanctions measures. Scholars estimate that over seventy five percent of all states implemented the trade embargo against Iraq.<sup>43</sup> Nevertheless, stories of failure have plagued the U.N. sanctions regime from the beginning. For instance, South Africa ignored sanctions against Rhodesia from 1971 to 1977, and it took the Netherlands five years to pass implementing legislation prohibiting payments to regime leaders in Rhodesia.<sup>44</sup> More recently, states have accused China, Russia, Myanmar, and others of trading with the DPRK in breach of their sanctions obligations.<sup>45</sup>

D. *Sanctions Implementation: Challenges in International Supervision*

International organizations are responsible for setting standards and overseeing their implementation.<sup>46</sup> Over time, this supervisory function has become one of their most important roles.<sup>47</sup> This is especially true of the Council, which both sets sanctions obligations and assumes responsibility for supervising them. The Council requires information from states to understand the extent of successful implementation.<sup>48</sup> It requires information about whether states cannot implement sanctions in order to grant exceptions or refine measures; whether states implement measures inconsistently or inadequately in order to provide support or guidance; and whether

43. D. L. BETHLEHEM, *THE KUWAIT CRISIS: SANCTIONS AND THEIR ECONOMIC CONSEQUENCES* xxxiv (1991).

44. MARGARET P. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 82 (2d ed. 1996).

45. *See, e.g.*, Press Release, U.S. Dep't of Treasury, Treasury Announces Largest North Korean Sanctions Package Targeting 56 Shipping and Trading Companies and Vessels to Further Isolate Rogue Regime (Feb. 23, 2018), <https://home.treasury.gov/news/press-releases/sm0297>; Press Release, U.S. Dep't of Treasury, Treasury Sanctions Supporters of North Korea's Weapons Of Mass Destruction and Illicit Finance Networks (Nov. 13, 2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl0269.aspx>.

46. SANDS & KLEIN, *supra* note 4, at 320.

47. Blokker & Muller, *supra* note 5, at 1.

48. *See, e.g.*, Kirsten Schmalenbach, *International Organizations or Institutions, Supervision and Sanctions*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L. L. ¶ 9 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1711?rskey=e29MQK&result=13&prd=EPIL> (last updated Aug. 2014).

states will not implement sanctions at all in order to decide whether to take enforcement action.

More generally, Council supervision helps encourage state compliance with the objectives of sanctions regimes. Compliance theory holds that the behavior of states is informed by international norms, developed collectively and monitored centrally, through international institutions.<sup>49</sup> The supervisory role of IOs helps reduce collective-action problems, including freeriding. By disseminating information that each state is working towards collective goals by complying with regime obligations, centralized supervision reduces the risk of a prisoner's dilemma in which each participant prefers its own interests to those of the collective.<sup>50</sup> As Chayes and Chayes explain, "in problems involving the provision of public goods, where benefits and costs are a function of the total action of the group, the decision of each actor to contribute or not (and how much) is necessarily affected by expectations about the decisions of others."<sup>51</sup> In circumstances where a return to a state will only exceed the cost of its contribution when every other state contributes, then that state will contribute only if it expects all others to do so.<sup>52</sup> International institutions, including the Council, can thereby enhance compliance by generating and disseminating information about states' contributions to regime goals.

In order to monitor sanctions, the Council creates subsidiary organs, known as sanctions committees, under each sanctions regime.<sup>53</sup> The committees act as the Council's interface

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49. See generally Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 538–58 (Walter Carlsnaes et al. eds., 2002); Barbara Delcourt, *Theory of Compliance*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1043?rskey=6FuWIR&result=1&prd=EPIL> (last updated Sept. 2013).

50. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22 (1995) (explaining that transparency "provides reassurance to actors, whose compliance with the norms is contingent on similar action by other participants, that they are not being taken advantage of").

51. *Id.* at 142.

52. *Id.*

53. The Council's legal power to establish subsidiary organs derives from U.N. Charter arts. 7(2), 29, as well as Provisional Rules of Procedure of the Security Council, at r. 28, U.N. Doc. S/96/Rev.7 (1983).

with member states and their primary responsibility is ensuring compliance by those states with their sanctions obligations.<sup>54</sup> This assessment is made principally on the basis of information states submit in implementation reports on a periodic basis.<sup>55</sup> Other functions of committees include granting derogations to sanctions obligations, issuing guidance on implementation, and maintaining lists of sanctions targets.<sup>56</sup> Committees reflect the membership of the Council, although their procedures differ in some respects.<sup>57</sup> Notably, committee decisions require a consensus rather than a majority.<sup>58</sup> The Council created the first sanctions committee in 1968 to monitor the arms and oil embargo against Southern Rhodesia,<sup>59</sup> and there are now fourteen in place.<sup>60</sup>

Over time, a number of practical difficulties have arisen with respect to the committees' monitoring function.<sup>61</sup> Committee members are diplomats with numerous other positions and responsibilities, so meetings may be infrequent.<sup>62</sup> Com-

54. See *infra* Part III Section B.

55. See *infra* Part III Section C.

56. See, e.g., S.C. Res. 1718, *supra* note 33, ¶ 12 (setting out the various functions of the DPRK Committee).

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57. Each committee sets Rules of Procedure, but their voting procedures consistently require consensus rather than majority. See, e.g., Sec. Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, Guidelines of the Committee for the Conduct of Its Work, ¶ 4(a) (Sept. 5, 2018) [hereinafter *ISIL & Al-Qaida Comm. Guidelines*].

58. *Id.*

59. S.C. Res. 253 (May 29, 1968). For a history of sanctions committees, see SIEVERS & DAWS, *supra* note 20, at 519–32.

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60. See *infra* Figure 1. For an overview of current sanctions committees, see the N.Z. MINISTRY OF FOREIGN AFFAIRS, UNITED NATIONS HANDBOOK 2017–18, at 99–109 (55th ed. 2017).

61. See Jeremy Farrall, *Should the United Nations Security Council Leave It to the Experts? The Governance and Accountability of UN Sanctions Monitoring*, in SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD, *supra* note 40, at 191, 195 (writing of the “impracticability of sanctions committees conducting meaningful monitoring of sanctions implementation from New York, combined with the discomfort of sanctions committees at airing genuinely critical recommendations.”).

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62. *Id.* at 194 (“The diplomats representing their nations on sanctions committees do not generally do so on a full-time basis. Indeed, they are usually required to fulfil a range of additional diplomatic responsibilities. The amount of time that a particular sanctions committee member is able to

mittees are based in New York and thus remote from the conduct requiring monitoring.<sup>63</sup> As political bodies, the committees experience “discomfort . . . at airing genuinely critical recommendations” in relation to states’ performance.<sup>64</sup> Furthermore, targeted sanctions are difficult to monitor and require technical expertise.<sup>65</sup> These challenges, among others, led the Council to establish a second tier of sanctions monitoring in the form of specialized bodies, known most commonly as expert panels.<sup>66</sup> Panels are generally authorized by resolution and appointed by the Secretary-General to assist committees in monitoring sanctions implementation.<sup>67</sup> The Council tasks expert panels with assessing states’ implementation reports, conducting case studies on compliance, and presenting their findings.<sup>68</sup>

While committees retain their mandate to monitor implementation, in practice panels now almost exclusively fulfill that role.<sup>69</sup> The Council created the first panel to monitor the arms embargo against Hutu rebels in Rwanda in 1995,<sup>70</sup> and there are now eleven in operation.<sup>71</sup> Enrico Carisch and Loraine Rickard-Martin describe panels as “[p]erhaps the most significant innovation” in sanctions implementation in recent times.<sup>72</sup> The Secretary-General’s High-Level Panel on Threats, Challenges and Change recommended that panels should be

devote to preparing for and attending sanctions committee meetings thus varies considerably.”).

63. As subsidiary organs of the Council, Committees meet in the same location as the Council—New York City.

64. Farrall, *supra* note 61, at 195.

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65. *See infra* Part III Section A (providing an explanation of different types of expertise in the context of different sanctions regimes).

66. These are also known as groups of experts, monitoring groups or monitoring teams. This article refers to these bodies as *expert panels* or *panels*.

67. In limited cases, committees appoint experts directly. *See infra* Figure 1.

68. *See infra* Part III Section B (explaining the mandates of three panels).

69. Telephone Interview with a Representative of a Non-Permanent Member of the Sec. Council (Jan. 26, 2018) [hereinafter Telephone Interview] (discussing the work of sanctions committees). The representative wishes to remain anonymous.

70. S.C. Res. 1013 (Sept. 7, 1995).

71. *See infra* Figure 1.

72. Enrico Carisch & Loraine Rickard-Martin, *Implementation of United Nations Targeted Sanctions*, in TARGETED SANCTIONS THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION, *supra* note 26, at 150, 154.

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routinely established when the Council imposes a sanctions regime.<sup>73</sup> Yet, despite the importance of their role, there is little critical engagement with these bodies and the system in which they operate—including their interaction with committees and the Council.<sup>74</sup> As panels are the primary means through which the Council gathers information on sanctions implementation, their role is central to the international supervision, management, and coordination of sanctions and the legitimacy of the Council's decisions. The question of whether these bodies, and the laws that support them, are equipped to satisfy the system's demands, forms the subject of the remainder of this article.

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73. A More Secure World: Our Shared Responsibility, transmitted by Letter Dated 1 December 2004 from the Chair of the High-Level Panel on Threats, Challenges & Change Addressed to the Secretary-General, ¶ 180(a), U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter A More Secure World].

74. One exception is Jeremy Farrall. *See, e.g.*, Farrall, *supra* note 61, at 195–211 (discussing issues in the relationships between panels, committees and the Council, including in relation to panel accountability).



FIGURE 1

Current Sanctions Regimes	Committee (Y/N)	Panel (Y/N)	Panel members (#)	P5 panel members (Y/N)*	SG appointment (Y/N)**	Panel mandate length (Years)
<b>Afghanistan (Taliban)</b>	Y	Y	10	Y	N	4
<b>Central African Republic</b>	Y	Y	5	N	Y	1
<b>Democratic Republic of Congo</b>	Y	Y	6	N	Y	1
<b>DPRK</b>	Y	Y	8	N	Y	1
<b>Guinea-Bissau</b>	Y	N				
<b>Iraq</b>	Y	N				
<b>ISIL/Al-Qaida</b>	Y	Y	10	Y	N	4
<b>Lebanon</b>	Y	N				
<b>Libya</b>	Y	Y	6	N	Y	1
<b>Mali</b>	Y	Y	5	N	Y	1
<b>Somalia</b>	Y	Y	6	N	Y	1
<b>South Sudan</b>	Y	Y	5	N	Y	1
<b>Sudan</b>	Y	Y	5	N	Y	1
<b>Yemen</b>	Y	Y	5	N	Y	1

All data sourced from the Council’s Subsidiary Organs website [www.un.org/sc/suborg/en](http://www.un.org/sc/suborg/en) as at 31 March 2019.

\*Refers to whether a national of each permanent Council member sits on the panel.

\*\*Refers to whether the Secretary-General appoints the panel. ‘N’ signifies that the panel is appointed directly by the Council.

### III. SYSTEMIC PROBLEMS IN SANCTIONS MONITORING: THREE CASE STUDIES

This part critically assesses and identifies problems in three dimensions of the sanctions monitoring system: (1) the functions of and relationships between committees and

panels; (2) state reporting to the Council on implementation and compliance; and (3) the decision-making standards applied by the panels when assessing states' compliance with their international obligations. This part analyzes these issues by reference to three sanctions regimes: ISIL/Al-Qaida, the DPRK, and Sudan. Part IV then considers the implications of the problems identified in this part for the institutions and norms of sanctions administration.

The little existing scholarship on sanctions monitoring tends to consider either a single sanctions regime in isolation,<sup>75</sup> which does not permit evaluation of the wider system's monitoring performance, or the entire sanctions system in the abstract,<sup>76</sup> which inevitably misses the nuances between different regime institutions. This part bridges the divide by focusing on selected case studies, which represent a cross-section of sanctions regimes.

The case studies present different scopes—from global to intra-state. They pertain to different phenomena—terrorism, weapons proliferation, and civilian protection. They have different purposes—from coercion, to constraint, to signaling. Finally, they have different numbers of experts and financial support—the combined U.N. budget appropriations for the years 2016 and 2017 were \$1.97 million for Sudan, \$5.40 million for the DPRK, and \$12.37 million for ISIL/Al-Qaida.<sup>77</sup> At the same time, each regime relies on a combination of similar targeted sanctions measures, including arms embargoes, travel bans, and asset freezes.<sup>78</sup>

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75. See, e.g., Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745 (2004) (focusing on the Al-Qaida and Taliban sanctions regime).

76. See, e.g., Mohamed Bennouna, *Les sanctions économiques des Nations Unies*, 300 RECUEIL DES COURS 9, 53 (2002); Farrall, *supra* note 61, at 195 (both considering the U.N. sanctions regime as a whole).

77. U.N. Advisory Comm. on Admin. & Budgetary Questions, Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council: Thematic Cluster II: Sanctions Monitoring Teams, Groups and Panels, and Other Entities and Mechanisms, at 3, U.N. Doc. A/72/7/Add.12 (Nov. 24, 2017).

78. See *infra* Part III Section A.

A. *Background to Case Studies*

1. *ISIL/Al-Qaida*

The Council initially established the present-day ISIL/Al-Qaida Sanctions Committee (ISIL/Al-Qaida Committee) in 1999 to monitor sanctions against the Taliban in Afghanistan.<sup>79</sup> The regime expanded in 2000 to incorporate asset freezes against Osama bin Laden and associates of Al-Qaida.<sup>80</sup> Following the terrorist attacks of September 11, 2001, coordinated by Al-Qaida, the Council introduced a number of counter-terrorism measures, including additional sanctions against bin Laden and Al-Qaida in the form of a travel ban and arms embargo.<sup>81</sup> Over time, the interests and objectives of the Taliban and Al-Qaida diverged. The Council separated the sanctions regime in 2011, with the responsibility for Taliban sanctions given to a new committee.<sup>82</sup> The functions of the committee responsible for Al-Qaida expanded again in 2015 to include responsibility for sanctions against ISIL.<sup>83</sup> The sanctions were of the same character as those enacted against Al-Qaida with the identical purpose of constraining ISIL’s ability to commit additional acts of terror as well as signaling to the international community that terrorism is unacceptable.<sup>84</sup>

In 2004, the Council established an expert panel, known as the Analytical Support and Sanctions Monitoring Team (ISIL/Al-Qaida Panel).<sup>85</sup> It consists of ten members, is based in New York, and its current mandate expires in December 2021.<sup>86</sup> The identity of the experts is not public, but the ISIL/Al-Qaida Committee describes them as having “broad government experience in international counter-terrorism issues.”<sup>87</sup>

79. S.C. Res. 1267, *supra* note 33, ¶¶ 4(b), 6.

80. S.C. Res. 1333, ¶ 8(c) (Dec. 19, 2000).

81. S.C. Res. 1390, ¶ 2(a)–(c) (Jan. 16, 2002).

82. S.C. Res. 1988, ¶ 30 (June 17, 2011).

83. S.C. Res. 2253, ¶ 1 (Dec. 17, 2015).

84. GRADUATE INST. GENEVA, UN TARGETED SANCTIONS: QUALITATIVE DATABASE 5–7 (2014) [hereinafter TS QUALITATIVE DATABASE] (discussing the purposes of the sanctions imposed against Al-Qaida, which remained unchanged when the regime was expanded to include ISIL).

85. S.C. Res. 1526, ¶ 6 (Jan. 30, 2004).

86. S.C. Res. 2368, ¶ 94 (July 20, 2017).

87. Rep. of the Security Council Comm., transmitted by Letter Dated 20 December 2017 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic

A national of each of the permanent members of the Council (P5) sits on the panel.<sup>88</sup>

2. *Sudan*

The Council first imposed sanctions in relation to Sudan against non-government forces operating in Darfur in 2003, following the eruption of violence between armed groups and the government.<sup>89</sup> In 2005, after the government and other parties failed to comply with the N'djamena Ceasefire Agreement, Security Council Resolution 1591 expanded the arms embargo to include the government and imposed targeted travel bans and financial sanctions on all groups.<sup>90</sup> The sanctions were meant, among other things, to coerce the government to reduce violence in Darfur, to constrain all parties from engaging in violence against civilians, and to signal support for human rights protection.<sup>91</sup> In 2005, the Council established a committee (Sudan Committee) and requested that the Secretary-General appoint an expert panel (Sudan Panel).<sup>92</sup> The Sudan Panel has five experts, three of whom are from P5 countries—Russia, the U.K. and France.<sup>93</sup> The members have different areas of expertise, including transport and customs, international humanitarian law, arms, and finance. The panel's current mandate expires on March 12, 2020.<sup>94</sup>

3. *DPRK*

Following the October 2006 testing of a nuclear device in the DPRK, the Council imposed sanctions against DPRK leadership and established a committee (DPRK Committee) to monitor sanctions implementation.<sup>95</sup> The sanctions initially

State in Iraq and the Levant (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council, ¶ 44, U.N. Doc. S/2017/1084 (Dec. 29, 2017).

88. Telephone Interview, *supra* note 69.

89. S.C. Res. 1556, ¶¶ 7–8 (July 30, 2004).

90. S.C. Res. 1591, ¶¶ 1, 3(d)–(e), 7 (Mar. 29, 2005); S.C. Res. 2035, ¶ 3 (Feb. 17, 2012).

91. TS QUALITATIVE DATABASE, *supra* note 84, at 102.

92. S.C. Res. 1591, *supra* note 90, ¶ 3(a)–(b).

93. Letter Dated 19 March 2019 from António Guterres, U.N. Sec'y-Gen., to President of the Security Council, U.N. Doc. S/2019/249 (Mar. 19, 2019).

94. S.C. Res. 255, ¶ 2 (Feb. 7, 2019).

95. S.C. Res. 1718, *supra* note 33, ¶ 12.

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only included an arms embargo, a ban on trade of luxury goods, an assets freeze, and a travel ban.<sup>96</sup> As nuclear tests and missile launches continued, the Council has gradually expanded sanctions; including cargo and vessel inspections for prohibited items;<sup>97</sup> financial sector measures against DPRK banks;<sup>98</sup> and bans on goods from specified sectors, such as coal, iron, and iron ore.<sup>99</sup> The sanctions are designed, among other things, to coerce the DPRK to cease nuclear tests and missile launches, to constrain it from accessing weapons proliferation technology, and to signal support for non-proliferation norms.<sup>100</sup> In 2009, the Council asked the Secretary-General to establish an expert panel (DPRK Panel) to act under the direction of the DPRK Committee.<sup>101</sup> It presently consists of eight members, five of whom are nationals of each P5 state.<sup>102</sup> Its members have expertise in different areas, including missile and nuclear technology, air transport, customs and export controls, and finance and economics.<sup>103</sup> The DPRK Panel’s current mandate expires on April 24, 2019.<sup>104</sup>

B. Institutional Relationship Between Committees and Panels

1. Mandates of the Committees

Council resolutions establish the mandates of the committees, and the committees interpret and apply these mandates through published guidelines.<sup>105</sup> In each of the case studies, the committees are charged with the implementation of the sanctions regime, which extends to “compliance, investigations, outreach, dialogue, assistance and cooperation.”<sup>106</sup> The committees have both *observational* and *operational* functions. The observational function relates to the monitoring of imple-

96. *Id.* ¶ 8.  
97. S.C. Res. 1874, ¶ 11 (June 12, 2009); S.C. Res. 2375, ¶ 7 (Sept. 11, 2017).  
98. S.C. Res. 2094, ¶¶ 12–13 (Mar. 7, 2013).  
99. S.C. Res. 2270, ¶¶ 29–30 (Mar. 2, 2016).  
100. TS QUALITATIVE DATABASE, *supra* note 84, at 27.  
101. S.C. Res. 1874, *supra* note 97, ¶ 26.  
102. Letter Dated 24 April 2017 from António Guterres, U.N. Sec’y-Gen., to President of the Security Council, U.N. Doc. S/2017/377 (May 1, 2017).  
103. *Id.*  
104. S.C. Res. 2407, ¶ 1 (Mar. 21, 2018).  
105. *See, e.g.*, ISIL & Al-Qaida Comm. Guidelines, *supra* note 57.  
106. S.C. Res. 1874, *supra* note 97, ¶ 25 (DPRK sanctions regime).

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mentation, which in the case of the ISIL/Al-Qaida and DPRK Committees, has evolved throughout the life of the regimes. The mandate of both committees was originally to gather information on implementation,<sup>107</sup> but was gradually expanded to assessing states' compliance with obligations,<sup>108</sup> identifying violations,<sup>109</sup> and ultimately pinpointing wrongdoers.<sup>110</sup> The Sudan Committee is also mandated to monitor implementation,<sup>111</sup> but this responsibility has not been extended—perhaps on account of the expansive role of the Sudan Panel.

As the committees' responsibility for identifying violations developed, so too did a concomitant mandate to “respond effectively” to cases of non-compliance by sanctions targets.<sup>112</sup> The manner and form of the responding action ranges in severity, from consulting with the violating state in the case of Sudan<sup>113</sup> to designating vessels (which have violated sanctions measures) that states must refuse entry into their ports in the case of DPRK.<sup>114</sup>

## 2. Mandates of the Panels

The Council grants the expert panels short mandates for individual reporting periods—typically one year. In each of the case studies, the Council has continually renewed these mandates.<sup>115</sup> The expert panel associated with the ISIL/Al-Qaida regime has taken two forms; first, a Monitoring Group (2001–04) and second, the ISIL/Al-Qaida Panel (2004–present).<sup>116</sup> According to Rosand, the Council discontinued the Monitoring Group because, among other things, it did not ad-

107. S.C. Res. 1267, *supra* note 33, ¶ 6(a) (ISIL & Al-Qaida sanctions regime); S.C. Res. 1718, *supra* note 33, ¶ 12(a) (DPRK sanctions regime).

108. *See, e.g.*, S.C. Res. 1526, *supra* note 85, ¶ 2 (ISIL & Al-Qaida sanctions regime).

109. *See, e.g.*, S.C. Res. 2087, ¶ 12 (Jan. 22, 2013) (DPRK sanctions regime).

110. *See, e.g.*, S.C. Res. 2270, *supra* note 99, ¶ 16 (DPRK sanctions regime).

111. S.C. Res. 1591, *supra* note 90, ¶ 3(a)(i).

112. *See, e.g.*, S.C. Res. 2094, *supra* note 98, ¶ 27 (DPRK sanctions regime).

113. S.C. Res. 2340, ¶ 12 (Feb. 8, 2017).

114. S.C. Res. 2371, ¶ 6 (Aug. 5, 2017).

115. S.C. Res. 2345, ¶ 1 (Mar. 23, 2017) (DPRK sanctions regime); S.C. Res. 2400, ¶ 2 (Feb. 8, 2018) (Sudan sanctions regime). The ISIL & Al-Qaida Panel currently has a four-year mandate. S.C. Res. 2368, *supra* note 86, ¶ 94.

116. S.C. Res. 1363, ¶ 4(a) (July 30, 2001); S.C. Res. 1526, *supra* note 85, ¶ 6. This article only considers the functions of the ISIL & Al-Qaida Panel.

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equately consult with states and failed to adhere to the ISIL/Al-Qaida Committee’s directions.<sup>117</sup> The Council directly established ISIL/Al-Qaida Panel by resolution,<sup>118</sup> indicating its desire to exercise more control over the panel’s operations.<sup>119</sup> In contrast, the Secretary-General established the Monitoring Group at the request of the Council.<sup>120</sup> The DPRK and Sudan Panels were established in a similar manner, with the Council requesting that the Secretary-General “create” (DPRK)<sup>121</sup> or “appoint” (Sudan)<sup>122</sup> the panel in consultation with the relevant committee. Moreover, while each of the three panels operates under the “direction” of its committee, the ISIL/Al-Qaida Committee has the additional power to give its panel new functions.<sup>123</sup>

The international legal community generally considers panels, like committees, subsidiary organs of the Council.<sup>124</sup> However, the status of the DPRK and Sudan panels is less clear. While the creation of the panels would be within the Council’s powers under Article 29 of the Charter, the fact that the Council requested that the Secretary-General establish the panels may instead constitute a delegation of its functions to the Secretary-General pursuant to Article 98 of the Charter.<sup>125</sup> This distinction is relevant to panels’ independence from the Council.<sup>126</sup>

The panels are mandated to assist the committees in monitoring implementation and compliance with sanctions mea-

117. Rosand, *supra* note 75, at 753–755.

118. S.C. Res. 1526, *supra* note 85, ¶ 6.

119. Rosand, *supra* note 75, at 757.

120. S.C. Res. 1363, *supra* note 116, ¶ 3(a).

121. S.C. Res. 1874, *supra* note 97, ¶ 26.

122. S.C. Res. 1591, *supra* note 90, ¶ 3(b).

123. S.C. Res. 2368, *supra* note 86, annex I, ¶ (dd).

124. JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 174 (2007); E-mail from U.N. Sec. Council Practices & Charter Research Branch, Dep’t of Political Affairs, to present author (Nov. 28, 2017, 5:54 AM) (on file with author).

125. See generally Andreas Paulus, Article 29, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 31, at 983, 989 (observing that “the [Council] may entrust the [Secretary-General] with certain tasks (see Art. 98)”).

126. See *infra* Part IV Section A.

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tures.<sup>127</sup> While this basic function remains the same for each panel, the Council has progressively tweaked the panels’ mandates, giving each a distinctive character and a more expansive role. Notably, the Council granted the ISIL/Al-Qaida and DPRK Panels additional operational functions, including assisting states with capacity-building for enhanced implementation.<sup>128</sup> The Council also incrementally expanded the Sudan Panel’s mandate, allowing it to give open-ended political assessments and to make quasi-judicial determinations on matters well beyond the scope of the sanctions regime. The Council broadened the scope of the panel’s reporting to include, among other things: “impediments to the political process” and “threats to stability in Darfur” in 2008;<sup>129</sup> violations of international humanitarian or human rights law or other atrocities in 2010;<sup>130</sup> the perpetrators of attacks against U.N. African Union Hybrid Operation in Darfur personnel in 2012;<sup>131</sup> and the means of financing armed groups in Darfur in 2017.<sup>132</sup> The Council has not given the panel any outreach or capacity-building duties.

3. Practice of the Panels

While the specific functions accorded to panels in their mandates differ, the language used in resolutions to stipulate their basic role of monitoring implementation and compliance is relatively consistent.<sup>133</sup> Nevertheless, panels differ quite radically in the way they interpret this aspect of their mandate, leading to fundamentally different methods of acquiring and assessing information.

The DPRK Panel’s functions include the duty to “gather, examine and analyse information” on implementation and

127. See, e.g., S.C. Res. 2368, *supra* note 86, annex I, ¶ (h) (ISIL & Al-Qaida sanctions regime). R

128. *Id.* ¶¶ (k), (z); S.C. Res. 2375, *supra* note 97, ¶ 19 (DPRK sanctions regime). R

129. S.C. Res. 1841, ¶ 3 (Oct. 15, 2008).

130. S.C. Res. 1945, ¶ 4 (Oct. 14, 2010).

131. S.C. Res. 2035, *supra* note 90, ¶ 10. R

132. S.C. Res. 2340, *supra* note 113, ¶ 22. R

133. Compare, e.g., S.C. Res. 1874, *supra* note 97, ¶ 9 (DPRK sanctions regime) with S.C. Res. 2255, annex, ¶ (e) (Dec. 21, 2015) (ISIL & Al-Qaida sanctions regime). R



compliance.<sup>134</sup> The panel interprets this mandate as requiring or allowing it to investigate cases of non-compliance and make quasi-judicial determinations on states' fulfillment of sanctions implementation obligations. For example, it physically inspected a shipment of weapons seized by Panamanian authorities en route to the DPRK from Cuba.<sup>135</sup> The panel then actively sought information from the Cuban government and visited Cuba before concluding that Cuba violated its obligation to implement the arms embargo.<sup>136</sup> In so doing, the panel considered and rejected an argument by Cuba that there was no "supply, sale or transfer" within the meaning of paragraph 8(a) of Resolution 1718 because it was only shipping the arms to be repaired in the DRPK and so retained ownership of them.<sup>137</sup> The panel reasoned that "introducing an alternative interpretation of *ownership* relating to *transfer*, would permit the loan or lease of arms" thereby establishing an unacceptable workaround of arms embargoes.<sup>138</sup> The Sudan Panel employs a comparable approach, although its investigations focus more on what takes place in Sudan by sanctions targets, rather than on the conduct of implementing states.<sup>139</sup> This focus is consistent with the scope of the Sudan Panel's mandate.

The mandate of the ISIL/Al-Qaida Panel is also similar, namely, gathering information on instances of non-compliance—including by collecting information from state reports and pursuing its own case studies.<sup>140</sup> Nevertheless, its approach is entirely different. Rather than actively investigating specific cases of its own volition, the ISIL/Al-Qaida Panel pas-

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134. S.C. Res. 1874, *supra* note 97, ¶ 9.

135. Rep. of the Panel of Experts, transmitted by Letter Dated 3 March 2014 from the Coordinator of the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, ¶ 78, U.N. Doc. S/2014/147 (March 6, 2014) [hereinafter DPRK 2014 Panel Rep.].

136. *Id.* ¶¶ 69–89.

137. *Id.* ¶ 76.

138. *Id.* ¶ 78.

139. *See, e.g.*, Final Rep. of the Panel of Experts on Sudan (2005), transmitted by Letter Dated 22 September 2016 from the Chair of the Security Council Comm. Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 161, U.N. Doc. S/2016/805 (Sept. 22, 2016) [hereinafter Sudan 2016 Final Panel Rep.] (reporting on violations of the travel ban by a listed Sudanese national).

140. S.C. Res. 2255, *supra* note 133, annex, ¶ (e).

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sively receives and assesses general information on implementation from state reports. For example, in 2012, several states complained to the ISIL/Al-Qaida Panel about lax enforcement of the arms embargo by other states.<sup>141</sup> Despite noting that the relevant weapons were traceable and that this established a basis for investigation, the panel said that it could not probe further because it had “no investigative mandate.”<sup>142</sup> One might query whether this assessment is accurate given that the Council empowered the panel to pursue its own case studies.<sup>143</sup> Indeed, some members of the ISIL/Al-Qaida Committee reportedly pressed the panel to change its approach to investigations.<sup>144</sup> In addition, the ISIL/Al-Qaida Panel generally refrains from commenting on specific states’ conduct and from drawing legal conclusions. In its earliest reports, the panel did provide information on some violations. For example, in 2006 it observed that listed individuals received arms and training in Afghanistan, Iraq, and Somalia.<sup>145</sup> However, since then, it has mostly avoided naming particular states and has used careful language when characterizing instances of non-compliance. For instance, in 2017 the panel identified “additional challenges for customs agencies” in implementing measures.<sup>146</sup>

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141. Thirteenth Rep. of the Analytical Support & Sanctions Implementation Monitoring Team, transmitted by Letter Dated 31 December 2012 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities Addressed to the President of the Security Council, ¶ 83, U.N. Doc S/2012/968 (Dec. 31, 2012) [hereinafter *ISIL & Al-Qaida 2012 Panel Rep.*].

142. *Id.*

143. See S.C. Res. 2255, *supra* note 133, annex, ¶ (e) (permitting the panel to pursue case studies). R

144. Telephone Interview, *supra* note 69. R

145. Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 15 November 2007 from the Chairman of the Security Council Comm. 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, ¶ 98, U.N. Doc S/2007/677 (Nov. 29, 2007) [hereinafter *ISIL & Al-Qaida 2007 Panel Rep.*].

146. Nineteenth Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 11 January 2017 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Ad-

Despite not conducting investigations of its own volition, the ISIL/Al-Qaida Panel uses another means of acquiring information—meeting directly with government agencies and private sector representatives involved in sanctions implementation. Over time it has gradually expanded its networks to include intelligence officials,<sup>147</sup> energy and financial companies, and the academic community.<sup>148</sup> A part of the justification for why the panel does not conduct investigations or publicly assess individual states is because it fears compromising its relationships with these channels.<sup>149</sup>

4. *Relationship of Panels and Committees*

In practice, the observational function of the committees is almost entirely delegated to the panels;<sup>150</sup> the panels’ mandate to *assist* in monitoring is in effect a mandate to *do* that

\_\_\_\_\_ dressed to the President of the Security Council, ¶ 82, U.N. Doc S/2017/35 (Jan. 13, 2017) [hereinafter ISIL & Al-Qaida 2017 Panel Rep.]. For other instances of the ISIL & Al Qaida Panel refraining from naming states, see Twentieth Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 7 August 2017 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Sec. Council, ¶ 80, U.N. Doc S/2017/573 (Aug. 7, 2017); Twenty-First Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 17 January 2018 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council, ¶ 72, U.N. Doc S/2018/14 (Jan. 26, 2018).

147. Second Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 14 February 2005 from the Chairman of the Security Council Comm. 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, ¶ 22, U.N. Doc S/2005/83 (Feb. 15, 2005).

148. Fifth Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 18 September 2006 from the Chairman of the Security Council Comm. 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, ¶ 85, U.N. Doc S/2006/750 (Sept. 20, 2006).

149. Telephone Interview, *supra* note 69; *see infra* Part IV (considering the consequences of preferring outreach over investigation).

150. Telephone Interview, *supra* note 69.

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monitoring directly. The monitoring role of the committees is thus generally limited to supervising the work of the panels on behalf of the Council. Typically, committees exercise their supervisory role by receiving and considering panel reports and deciding whether to make them public and transmit them to the Council.<sup>151</sup> In other words, they act as a gateway for information passing from panels to the Council.

However, this gatekeeper role creates problems. For instance, Sievers and Daws report that early in the life of the Sudan regime, committee members would sometimes fail to agree on whether panel reports were satisfactory.<sup>152</sup> The committees reach decisions by consensus, granting each of the fifteen members an effective veto,<sup>153</sup> which non-P5 states do not have in Council meetings.<sup>154</sup> Members can use this veto to obstruct the passage of reports containing information they do not want to enter the public domain.

The Council sought to address this problem in the Sudan regime in 2006 by passing a resolution requiring that the Sudan Panel provide a midterm briefing to the Sudan Committee and a final report directly to the Council.<sup>155</sup> Following the problems with the Sudan regime, the DPRK Panel's first mandate required direct reporting to the Council, circumventing the committee.<sup>156</sup> More recent mandates, however, bring the committees into the fold. The DPRK Panel still reports directly to the Council, but only after consultation with the committee.<sup>157</sup> The ISIL/Al-Qaida Panel, for its part, has always submitted reports to its committee.<sup>158</sup> However, in contrast to the other regimes, the ISIL/Al-Qaida Committee engages more transparently with the conclusions of its panel, publishing reports that set out its position on each of the panel's recommendations.<sup>159</sup>

151. *See, e.g.*, S.C. Res. 1651, ¶ 2 (Dec. 21, 2005) (Sudan sanctions regime).

152. SIEVERS & DAWS, *supra* note 20, at 527.

153. Bennouna, *supra* note 76, at 54.

154. U.N. Charter art. 27, ¶ 3.

155. S.C. Res. 1665, ¶ 2 (Mar. 29, 2006).

156. S.C. Res. 1874, *supra* note 97, ¶ 26(d).

157. S.C. Res. 2345, *supra* note 115, ¶ 2.

158. *See, e.g.*, S.C. Res. 2368, *supra* note 86, annex I, ¶ (a).

159. *See, e.g.*, Positions of the Comm. on the Recommendations of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated

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A failure to reach consensus in a committee may be the result of legitimate concerns with the relevant panel’s processes, or may indicate political efforts to censor content that casts a negative light on a state sitting on the committee or one of its allies.<sup>160</sup> For example, political interference in the work of the Sudan Panel apparently caused a “rift” in 2012, prompting three former members of the panel to publish a document that contradicted the panel’s official report at the time.<sup>161</sup> Whereas the panel reported an improvement in the implementation situation, the unauthorized document apparently pointed to serious violations of the sanctions regime by China, Russia, and others.<sup>162</sup>

It is unclear whether altered reporting arrangements reduce efforts to obstruct panel reporting. Sievers and Daws write that, as the composition of the Council and the committees is identical, it remains the practice to discuss reports at the committee level first, meaning delays still occur.<sup>163</sup> For example, a report completed by the Sudan Panel on December 28, 2015 was not made public until September 22, 2016, when the Sudan Committee agreed that it could be issued as a document of the Council.<sup>164</sup>

C. State Self-Reporting on Implementation of Sanctions

Implementation reports submitted by states are the main way that the Council gathers information on implementation

30 November 2016 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da’esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council, U.N. Doc. S/2016/1006 (Nov. 30, 2016).

160. Telephone Interview with Enrico Carisch, Partner, Compliance and Capacity Skills International, LLC (Feb. 2, 2017). Mr. Carisch was previously an expert panel member, including as coordinator for the Sudan Panel. Telephone Interview, *supra* note 69.

161. TS QUALITATIVE DATABASE, *supra* note 84, at 102.

162. *Id.*

163. SIEVERS & DAWS, *supra* note 20, at 527 (discussing the Sudan sanctions regime specifically).

164. Sudan 2016 Final Panel Rep., *supra* note 139; *see infra* Part IV (discussing the implications of panel reporting rules and practices for panel independence).

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and compliance.<sup>165</sup> Council resolutions in the case studies consistently feature requests for states to submit implementation reports, as is true across the majority of sanctions regimes not discussed in detail in this article.<sup>166</sup> The Council typically adopts open-ended language as to the content of reports, asking states to provide information on the “steps taken to implement the [sanctions] measures” outlined in the relevant resolution.<sup>167</sup> Nevertheless, the legal character of the reporting requirement varies across the three regimes. Most of the time, the requirement is voluntary: under the ISIL/Al-Qaida regime, the Council generally uses the language of “calls upon”<sup>168</sup> or “invites” states to report,<sup>169</sup> while under the Sudan regime it “urges” reporting.<sup>170</sup> As of 2017, in the DPRK regime, the Council made reporting a legally binding requirement by deciding under Chapter VII that states “shall report” on implementation.<sup>171</sup>

1. *Quantitative Reporting Problems*

There are significant quantitative and qualitative problems with state reporting across the case studies. Reporting is far from universal. The ISIL/Al-Qaida Committee has received reports from 153 states on implementation of Resolution 1455. The DPRK Committee has received reports from 108 states on implementation of Resolution 2270, but far fewer under more recent resolutions. For example, the committee heard from only fifty eight states for Resolution 2397. The Sudan Committee has received just thirty eight reports under the eight resolutions which urge reporting.<sup>172</sup> Despite the Coun-

165. To a lesser extent, it relies on reports by bodies with overlapping foci, including the Financial Action Task Force and other Council subsidiary organs, including the Counter-Terrorism Committee Executive Directorate. See, e.g., ISIL & Al-Qaida 2017 Panel Rep., *supra* note 146, ¶¶ 79-80. The contribution of these bodies falls outside the scope of this article.

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166. 87 percent of sanctions regimes have reporting requirements. TS QUANTITATIVE DATABASE, *supra* note 27.

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167. S.C. Res. 1455, ¶ 6 (Jan. 17, 2003).

168. S.C. Res. 2253, *supra* note 83, ¶ 36.

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169. See, e.g., S.C. Res. 1390, *supra* note 81, ¶ 8.

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170. See, e.g., S.C. Res. 2265, ¶ 13 (Feb. 10, 2016).

171. S.C. Res. 2371, *supra* note 114, ¶ 18.

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172. These figures include only reports that are publicly available on the Council Subsidiary Organs Website: *Committees, Working Groups and Ad Hoc Bodies*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/security>

cil's emphasis on regional reporting in the Sudan regime, only two of the reports received were from African states.<sup>173</sup> It is also significant that China, despite being a P5 member, did not submit reports under either the Sudan or ISIL/Al-Qaida regimes.<sup>174</sup> There are also significant reporting gaps for non-permanent members of the Council.<sup>175</sup> The non-reporting by these states is notable because, as Council members, they voted to put in place the sanctions regime and associated reporting requirements.

Efforts by committees and panels to request specific information from states have also proven unsuccessful. In one report, the Sudan Panel published statistics of the cooperation it received from specific information requests.<sup>176</sup> It revealed that of the 137 issues with respect to which it made requests, states addressed only forty issues, or 29 percent.<sup>177</sup> The panel requested assistance from China on twenty three issues and received responses on three issues, or 13 percent.<sup>178</sup> Similarly, the DPRK Panel recorded in 2016 that it sent 748 requests for information and received just 215 responses, a mere 29 percent.<sup>179</sup>

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tycouncil/content/committees-working-groups-and-ad-hoc-bodies (last visited Mar. 27, 2019). All data is as of July 28, 2018.

173. For a list of current implementation reports for the Sudan Committee, see *Implementation Reports*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/sanctions/1591/implementation-reports> (last visited Mar. 27, 2019). All data is as of July 28, 2018.

174. *Id.* For implementation reports for the ISIL & Al-Qaida Committee, see *Member State Reports*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/sanctions/1267/memstatesreports> (last visited Mar. 27, 2019). All data is as of July 28, 2018.

175. *See, e.g.*, Rep. of the Panel of Experts, transmitted by Letter Dated 22 February 2016 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, ¶ 11, U.N. Doc. S/2016/157 (Feb. 24, 2016) [hereinafter DPRK 2016 Panel Rep.] (DPRK Sanctions Regime).

176. Rep. of the Panel of Experts, transmitted by Letter Dated 27 October 2009 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1591 (2005) Addressed to the President of the Security Council, at 79–80, U.N. Doc. S/2009/562 (Oct. 29, 2009) [hereinafter Sudan 2009 Panel Rep.].

177. *Id.* at 80.

178. *Id.*

179. DPRK 2016 Panel Rep., *supra* note 175, ¶ 10.

## 2. *Qualitative Reporting Problems*

Even when states submit reports, there are significant shortcomings in their quality. Many reports are extremely brief and contain little useful information on implementation. In the Sudan regime, for instance, the substantive part of Panama's report was sixty four words and pertained only to the arms control requirements and not the travel ban or assets freeze.<sup>180</sup> Panama asserted that arms had never been exported to Sudan from Panama because its laws prohibited such transactions.<sup>181</sup> This conclusion assumes implementation of the law in its territory and effective enforcement by police and courts. There is no evidence to support these assumptions in the report. The Council, committees, and panels have each criticized the lack of useful information in state reports. For instance, the ISIL/Al-Qaida Panel observed that reports seemed to "have been completed as a necessary chore rather than as a useful tool . . . Many were descriptive and did not provide precise details of the action taken on the ground to implement the sanctions regime."<sup>182</sup>

A key problem in report quality is that states often equate the implementation of sanctions with the passage of legislation or the issuance of executive orders. However, there is often no information on executive or judicial action taken to enforce the applicable law. Moreover, states do not provide information on action taken by the subjects of laws or orders, be they government authorities, companies, or individuals. Russia's reports under the DRPK and Sudan regimes merely provide that the government passed decrees implementing the relevant resolutions.<sup>183</sup> Canada, in its report to the DPRK Committee,

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180. Rep. on the Implementation of Measures, transmitted by Note Verbale Dated 11 July 2012 from the Permanent Mission of Panama to the United Nations Addressed to the Chairman of the Comm., U.N. Doc. S/AC.47/2012/3 (Aug. 16, 2012) (Sudan sanctions regime).

181. *Id.*

182. First Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 23 August 2004 from Chairman of the Security Council Comm. 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, ¶ 82, U.N. Doc S/2004/679 (Aug. 25, 2004) [hereinafter ISIL & Al-Qaida 2004 Panel Rep.].

183. Rep. on the Implementation of Measures, transmitted by Note Verbale Dated 27 May 2016 from the Permanent Mission of the Russian Fed-



went one step further by describing the effect of legislative acts, but provided no information as to whether they are followed or enforced in practice.<sup>184</sup> The ISIL/Al-Qaida Panel observed that states “may have found it easier . . . to incorporate the sanctions regime into their national legislation than to ensure its effective implementation on the ground.”<sup>185</sup> However, France provided an example of relevant information on executive and judicial action implementing legislation in 2003 when it explained that its authorities were dismantling the support structure of a Tunisian terrorist organization in Lyon, and that its courts presided over several proceedings relating to groups connected to Al-Qaida.<sup>186</sup>

The Targeted Sanctions Initiative attempts to measure, in quantitative terms, the extent to which the Council received substantive member state reports across all sanctions regimes with reporting requirements since 1991.<sup>187</sup> It defines “substantive” as reports that do more than acknowledge compliance or translation of measures into domestic law.<sup>188</sup> Its data suggests that only 46 percent of received reports are substantive.<sup>189</sup>

The panels view reporting quality as one of the greatest challenges sanctions regimes face.<sup>190</sup> As the DPRK Panel ex-

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eration to the United Nations Addressed to the Chair of the Comm., U.N. Docs. S/AC.49/2016/19 (June 3, 2016); Decree No. 729 of the President of the Russian Federation on Measures to Implement Resolution 2270 (2016), transmitted by Note Verbale Dated 6 February 2017 from the Permanent Mission of the Russian Federation to the United Nations Addressed to the Chair of the Comm., U.N. Docs. S/AC.49/2016/19/Add.1/Rev.1 (May 4, 2017).

184. Rep. of Canada on the Implementation of Measures, transmitted by Letter Dated 31 July 2009 from the Chargé d’affaires of the Permanent Mission of Canada to the United Nations Addressed to the Chairman of the Comm., U.N. Doc S/AC.49/2009/25 (Aug. 5, 2009).

185. ISIL & Al-Qaida 2004 Panel Rep., *supra* note 182, ¶ 31.

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186. Rep. Concerning Sanctions Against al-Qa’idah, transmitted by Letter Dated 1 May 2003 from the Permanent Representative of France to the United Nations Addressed to the Chairman of the Comm., at 2, 4, U.N. Doc. S/AC.37/2003/(1455)/37 (May 7, 2003).

187. TS QUANTITATIVE DATABASE, *supra* note 27.

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188. GRADUATE INST. GENEVA, UN TARGETED SANCTIONS: DATABASE CODEBOOK 16 (2014).

189. TS QUANTITATIVE DATABASE, *supra* note 27.

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190. *See, e.g.*, ISIL & Al-Qaida 2007 Panel Rep., *supra* note 145, ¶ 2; Rep. of the Panel of Experts on the Sudan, transmitted by Letter Dated 5 February 2013 from the Chair of the Security Council Comm. Established Pursuant to

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plains, qualitative problems impede its “ability to report on sanctions implementation and to properly analyse the challenges in national implementation. . . . [T]hese [problems] create the opportunity for the [DPRK] to continue its prohibited activities.”<sup>191</sup> The panel suggests that it is “valuable” to receive reports not just about the successful prevention of the movement of illicit goods, but also concerning occasions where national efforts have been unsuccessful.<sup>192</sup> Reports on domestic implementation failures are, however, very rare. The utility of full and frank information is apparent in a report by the ISIL/Al-Qaida Committee, in which the committee assessed the different legislative modes for introducing asset freezes and provided guidance to states that maintained an unsatisfactory approach.<sup>193</sup> It explained that states that rely on criminal codes for freezing actions would encounter problems because of the involvement of domestic courts, which require criminal standards of evidence before granting the request.<sup>194</sup> In contrast, states with laws allowing for automatic freezing or freezing by executive order represent a superior implementation model.<sup>195</sup>

D. *Standards of Assessment Applied by Panels*

Panels’ mandates to monitor implementation and compliance with sanctions obligations require experts to make fac-

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Resolution 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 157, U.N. Doc. S/2013/79 (Feb. 12, 2013) [hereinafter Sudan 2013 Panel Rep.].

191. DPRK 2016 Panel Rep., *supra* note 175, ¶ 12.

192. Rep. of the Panel of Experts, transmitted by Letter Dated 11 June 2012 from the Coordinator of the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, ¶¶ 53–54, U.N. Doc. S/2012/422 (June 14, 2012) [hereinafter DPRK 2012 Panel Rep.] (discussing the DPRK sanctions regime).

193. Annex I: Paragraph 13 Assessment, transmitted by Letter Dated 1 December 2005 from the Chairman of the Security Council Comm. 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, ¶ 21–22, U.N. Doc. S/2005/761 (Dec. 5, 2005) [hereinafter ISIL & Al-Qaida 2005 Rep.].

194. *Id.* ¶ 22.

195. *See id.* ¶¶ 21–22 (implying that these other modes of asset freezes are superior based on the panel’s dissatisfaction with reliance on criminal codes).

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tual, and in some cases legal, assessments about states' conduct.<sup>196</sup> As this may necessitate publicly naming states that fail to meet their obligations, the panels' work is highly sensitive. Consequently, reviews of the sanctions regimes recommend that the panels adopt and adhere to suitable decision-making standards.<sup>197</sup>

The Council's mandates do not explain the decision-making standards that panels should apply. Instead, various working groups of states and the practice of the panels fosters the normative development of decision-making standards. This section examines these developments by focusing on three types of standards. First, methodological standards—standards about the decision-making process, including the type of information relied upon. Second, factual or evidentiary standards—standards about the way factual conclusions are made, including the degree of persuasion required before determining that particular conduct occurred. Third and finally, legal standards—standards about whether conduct constitutes a breach of an international obligation. As this section shows, while methodological rules are developing, there is less consistency on evidentiary standards, and virtually no common practice on making legal determinations.

States working through the Stockholm Process on the Implementation of Targeted Sanctions (Stockholm Process) and the Informal Working Group of the Council on General Issues of Sanctions (IWG) seek to articulate methodological standards for panels.<sup>198</sup> The report produced under the Stockholm Process recommends that panel findings should be corroborated by independent, verifiable sources.<sup>199</sup> The reliability of confidential information should be questioned, and should never form the sole basis for conclusions.<sup>200</sup> Finally, evidence relied on should be as transparent and verifiable as possible.<sup>201</sup>

196. See *supra* Part III Section B.2.

197. Informal Working Group Rep., *supra* note 8, ¶ 9(a); MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS § 72 (Peter Wallenstein et al. eds., 2003) [hereinafter STOCKHOLM PROCESS]; Fartall, *supra* note 61, at 204.

198. Informal Working Group Rep., *supra* note 8, ¶¶ 21–28; STOCKHOLM PROCESS, *supra* note 197, § 103.

199. STOCKHOLM PROCESS, *supra* note 197, § 103.

200. *Id.*

201. *Id.*

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The IWG Report also recommends relying on verifiable sources, but does not prescribe any minimum requirements.<sup>202</sup> It suggests that first-hand and onsite observations by experts form the strongest basis for factual conclusions.<sup>203</sup> It also cautions against relying on confidential information, but acknowledges that this may be necessary to protect sources.<sup>204</sup> Finally, it suggests that states should be given an opportunity to review and respond to any evidence indicating their wrongdoing.<sup>205</sup>

Both the DPRK and Sudan Panels rely on the more recent IWG methodological standards.<sup>206</sup> In practice, they adhere to those standards in reaching conclusions on sanctions implementation. For instance, when the Sudan Panel reported that Eritrea provided arms to Sudanese rebels, it noted that it based its conclusion on information provided by Sudanese National Intelligence, a member of the Sudan People’s Liberation Movement, and other independent sources.<sup>207</sup> However, when the DPRK and Sudan Panels report on sanctions violations or implementation failures of particular states, they sometimes stop short of making definitive conclusions.<sup>208</sup> The DPRK Panel wrote that it was “concerned” that a memorandum of understanding between Myanmar and DPRK violated Resolution 1718.<sup>209</sup> It did not have a copy of the memoran-

202. Informal Working Group Rep., *supra* note 8, ¶ 21.

203. *Id.* ¶ 22.

204. *Id.* ¶¶ 24–25.

205. *Id.* ¶ 28.

206. Rep. of the Panel of Experts, transmitted by Letter Dated 12 May 2010 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, ¶ 25, U.N. Doc. S/2010/571 (Nov. 5, 2010) [hereinafter DPRK 2010 Panel Rep.] (DPRK sanctions regime); Final Rep. of the Panel of Experts on the Sudan, transmitted by Letter Dated 9 January 2017 from the Chair of the Security Council Comm. Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 10, U.N. Doc. S/2017/22 (Jan. 9, 2017) (Sudan sanctions regime).

207. Rep. of the Panel of Experts Concerning the Sudan, transmitted by Letter Dated 30 January 2006 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 85, U.N. Doc. S/2006/65 (Jan. 30, 2006) [hereinafter Sudan 2006 Panel Rep.].

208. DPRK 2012 Panel Rep., *supra* note 192, ¶ 59; Sudan 2006 Panel Rep., *supra* note 207, ¶ 80.

209. *Id.*

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dum and based its tentative conclusion, in large part, off a single press report of a statement by Myanmar’s Speaker of Parliament.<sup>210</sup> The Sudan Panel wrote that there were “numerous reports” that rebel groups received financing from Libya, Chad, and Eritrea, but it did not make any conclusions relating to these states’ involvement.<sup>211</sup> By reporting on potential violations, the panels can name and shame states while avoiding applicable methodological standards.<sup>212</sup>

Turning to evidentiary standards, the Sudan Panel is the only panel which has articulated the degree of persuasion it requires before making factual conclusions. In its 2013 report it adopted a high standard, writing that, where the evidence allows, it will draw its conclusions based on the criminal “beyond a reasonable doubt” standard but will otherwise apply the civil “balance of probabilities” standard.<sup>213</sup> In 2014 it reversed course and claimed only to apply a civil standard.<sup>214</sup> However, in the same 2014 report the panel explained that “[t]erminology [in the reports] relating to the probability of an event uses a qualitative statement to reflect as associated probability or confidence percentage (certain, > 99 per cent; almost certain, 90–98 per cent; highly probable or likely, 75–89 per cent; probable, 55–74 per cent).”<sup>215</sup> In this respect, it apparently combines evidentiary standards associated with fact-finding or quasi-judicial bodies, based on standards of proof, with those typically seen in scientific reports, based on probability.

The ISIL/Al-Qaida Panel has not reported on the procedural or evidentiary standards it uses to assess compliance with sanctions measures. This is unsurprising given its practice of not investigating or reporting on specific cases of non-compliance.<sup>216</sup>

210. *Id.*

211. Sudan 2006 Panel Rep., *supra* note 207, ¶ 80.

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212. *See infra* Part IV Section C (exploring the implications of this discrepancy).

213. Sudan 2013 Panel Rep., *supra* note 190, ¶ 31.

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214. Rep. of the Panel of Experts on the Sudan, transmitted by Letter Dated 7 February 2014 from the Chair of the Security Council Comm. Established Pursuant to 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 9, U.N. Doc S/2014/87 (Feb. 11, 2014).

215. *Id.* ¶ 8 n.1.

216. *See supra* Part III Section B.

While there is, to the extent outlined above, a limited body of standards and emerging practice applicable to the panels' factual assessments, there are no norms on the making of legal determinations. A preliminary question is whether it is the role of panels to make quasi-judicial decisions on the fulfillment of sanctions obligations. The Council's mandates do not provide a clear answer. For instance, Resolution 2340 requests that the Sudan Panel "share with the Committee any information regarding possible non-compliance with the travel ban and asset freeze" and directs the committee to "respond effectively" to any such reports.<sup>217</sup> This is open to several interpretations. On the one hand, it might suggest the panel is only to provide factual conclusions tending towards a legal violation. On the other, it could indicate that the panel may make legal determinations, but it will be up to the committee to ratify them.

The practice of the DPRK Panel indicates that it considers itself empowered to make quasi-judicial determinations on compliance with sanctions obligations.<sup>218</sup> The Sudan Panel also makes legal determinations in relation to sanctions measures, but does so with considerable inconsistency. In some instances, it applies the scientific probability standard outlined above, not only to questions of fact, but also to legal conclusions.<sup>219</sup> Thus, in 2016 the Sudan Panel found that it was "almost certain" that Egypt violated the travel ban<sup>220</sup> and that South Sudan "certainly violated" the arms embargo.<sup>221</sup> In the same report, the panel made other determinations without using probability terminology. For example, it concluded that a remote control system provided by an Italian manufacturer fell within the meaning of "military equipment" under Resolutions 1556 and 1591, which prohibit transfers of such equipment.<sup>222</sup> However, unlike its earlier findings, in which the panel was prepared to make a final conclusion on a question of law, the panel states that the Council should make the ultimate determination as to whether the system fits the relevant defini-

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217. S.C. Res. 2340, *supra* note 113, ¶ 13.

218. *See supra* Part III Section B.

219. *See, e.g.*, Sudan 2016 Final Panel Rep., *supra* note 139, ¶ 161.

220. *Id.*

221. *Id.* ¶ 50.

222. *Id.* ¶ 45(a).

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tion.<sup>223</sup> If the Council is satisfied that it does, only then will Italy be considered non-compliant with its international obligations.<sup>224</sup>

In making legal determinations, there is a need to distinguish between three different situations: (1) states that take insufficient steps to implement measures where there is no resulting enforcement failure; (2) states that take insufficient steps to implement measures where there is an enforcement failure; and (3) states that deal directly with sanctions targets—sanctions-busting.<sup>225</sup> The DPRK and Sudan Panels consistently treat the third situation as a breach of states’ legal obligations, but they are less consistent about cases in the second bracket.<sup>226</sup> These panels tend to hold states accountable for private actors’ behavior, irrespective of the measures states take to restrain the actors’ conduct. For instance, the DPRK Panel found states responsible for violations when private actors within their jurisdictions purchased iron, steel and other resources from the DPRK.<sup>227</sup> While the ISIL/Al-Qaida Panel generally avoids specifically referring to states that fail to implement measures, on one occasion it discussed the difficulties of states like Mali in introducing effective border controls when implementing the travel ban.<sup>228</sup> The ISIL/Al-Qaida Panel said that “talk of improving border controls in Mali is to deny the reality of a boundary over 7,000 km long that follows no notable physical features . . . . Compliance in such circumstances is a matter of doing what is possible.”<sup>229</sup> In this respect, the panel demonstrated more awareness that due diligence obligations do not require states to actually prevent sanctions targets from obtaining proscribed benefits.<sup>230</sup> As outlined above, an obligation of due diligence only requires that a state take necessary steps to prevent the proscribed conduct, taking

223. *Id.* ¶ 46.

224. *Id.* ¶ 47.

225. *See supra* Part II Section B.

226. *See, e.g.*, Midterm Rep. of the Panel of Experts, transmitted by Letter Dated 28 August 2017 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, ¶ 71, U.N. Doc. S/2017/742 (Sept. 5, 2017) [hereinafter DPRK 2017 Midterm Rep.]; Sudan 2016 Final Panel Rep., *supra* note 139, ¶ 50.

227. DPRK 2017 Midterm Rep., *supra* note 226, ¶ 71.

228. ISIL & Al-Qaida 2012 Panel Rep., *supra* note 141, ¶ 30.

229. *Id.*

230. *See supra* Part II Section B.

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into account that state’s circumstances. Aside from this limited practice, it is not possible to draw any firm conclusions about the way that the panels approach legal determinations, other than to say that their approach is inconsistent both internally and as compared to each other.

IV. INSTITUTIONS AND NORMS OF SANCTIONS  
ADMINISTRATION: PROBLEMS AND SOLUTIONS

The case studies raise a number of important questions regarding the law and institutions developed by the Council to monitor sanctions. This final part critically examines the role of the system’s internal law—governing the relationship between the Council, committees, and panels, as well as the external law—governing the relationship between the Council and states, in contributing to selected issues. These issues are: (1) the accountability and independence of panels; (2) the operation of the self-reporting system; and (3) the factual and legal standards the panels adopt.

These issues, as this part shows, intersect with one another and engage with broader questions regarding the administration of U.N. sanctions. One question is whether the *ad hoc* and disaggregated structure of the sanctions monitoring system remains the best approach. Some critics posit that sanctions monitoring should be centralized and performed by a single permanent body.<sup>231</sup> Others argue for greater normative consistency, either by ensuring the same standards apply across panels<sup>232</sup> or by countering the proliferation of obligations.<sup>233</sup> This part considers these debates in light of the issues enumerated above and ultimately comes out against institutional centralization and in favor of normative consistency.

A related question, which scholarship on sanctions has not considered, concerns the basic identity of the panels. Given the fundamental inconsistencies in panels’ mandate interpretation and standards of assessment, there remains a real

231. See, e.g., FARRALL, *supra* note 124, at 233; Alex Vines, *Monitoring U.N. Sanctions in Africa: The Role of Panels of Experts*, 2003 VERIFICATION Y.B. 247, 260; Bennouna, *supra* note 76, at 59.

232. See, e.g., FARRALL, *supra* note 124, at 232.

233. See, e.g., Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT’L L. 881, 914 (2006).

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question as to their nature as decision-making bodies. This part draws on different conceptions of the role of institutions in ensuring cooperation between states from the field of compliance theory to consider the identity question. The “enforcement theory” of compliance holds that institutions should adopt an adversarial approach to discourage opportunistic behavior by states.<sup>234</sup> Accordingly, threats of reputational damage and other sanctions are the best incentive to ensure that states implement obligations which require significant changes to internal systems or practices.<sup>235</sup> This may be juxtaposed with the so-called “managerialist” model which proposes that compliance is best ensured by transparent participation in, and cooperation through, global institutions.<sup>236</sup> This model is neither accusatory nor adversarial and emphasizes working together to improve performance, including through technical assistance.<sup>237</sup> This part uses these two models to frame and critique the different roles and identities the panels assume within the sanctions system and proposes a preferred common identity for the future. This discussion overlaps with and reinforces the arguments in favor of greater normative coherence across the sanctions system.

Ultimately, the performance of the Council’s monitoring regime must be assessed in light of the purpose for which it was designed. That purpose is to provide the Council with comprehensive and accurate information on the status of implementation.<sup>238</sup> A related consideration is the provision of transparent and objective information to the international community to enhance compliance by states with sanctions regime obligations. Other than the resource burden associated with implementation discussed below, states have few counter-

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234. Raustiala & Slaughter, *supra* note 49, at 542–43.

235. See Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT’L & COMP. L. 379, 390 (2006) (observing that “[t]here are times when the incentives that states face are sufficiently strong that we cannot hope for international law to affect behavior.”).

236. CHAYES & CHAYES, *supra* note 50, at 22; 230.

237. *Id.*

238. See *supra* Part II Section D.

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vailing concerns in relation to sanctions monitoring that may temper the achievement of these objectives.<sup>239</sup>

A. *Panel Accountability and Independence*

There are a number of ways in which the Council and committees exercise control over the panels' work, including mandate content, mandate duration, and reporting arrangements.<sup>240</sup> This section examines whether the sanctions system's institutions and norms are sufficient to ensure panels are accountable but independent. It concludes by suggesting some possible ways forward.

1. *Separation of Political and Technical Power, in Theory*

The division of monitoring responsibilities between technical and political bodies is not a new practice for IOs. The International Labour Organization (ILO) developed the model as early as 1926.<sup>241</sup> At that time, members of the ILO decided to create a Committee of Independent Experts to examine reports submitted by states.<sup>242</sup> A tripartite Committee of the International Labour Conference, partly composed of government representatives from national employers' and workers' organizations, discussed and approved the Committee of Independent Experts' provisional conclusions on compliance.<sup>243</sup> The two-stage procedure—one objective, the other more political—is appealing in other forums, including sanctions monitoring.

The committees' political character renders them an improper forum to make critical recommendations in respect of states' performance under the sanctions regime.<sup>244</sup> At the same time, the committees must respond to and operationalize the findings of the panels. Committee responsibilities, which include managing sanctions lists, entail the use of power delegated by the Council to make decisions on matters that

239. Contrast this with the process for listing sanctions targets, which has brought the international sanctions regime into tension with domestic or regional due process requirements. *See supra* note 9.

240. *See supra* Part III Section B.

241. Blokker & Muller, *supra* note 5, at 290–91.

242. *Id.*

243. *Id.*

244. *See supra* Part II Section D.

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affect states' sovereignty over questions of internal security.<sup>245</sup> Given the sensitivity of these matters, it would be controversial for the Council to delegate to a body comprised of members not closely reflecting the Council's own composition. Otherwise the decision-making procedure could circumvent the procedural and substantive limitations of Council power under the Charter.<sup>246</sup> Committees also operate as an important check on the panels' work by ensuring that experts act within their granted authority, adhere to proper procedure, and form balanced decisions.<sup>247</sup> Nevertheless, while a committee may ensure that a panel acts within the confines of its mandate, it would be inappropriate for it to replace a panel's discretion with its own.<sup>248</sup> As Eyal Benvenisti cautions, in balancing exercises like these, "[q]uestions of relative competence of the different bodies and of their legitimacy become pertinent."<sup>249</sup>

The division of competencies may also contribute to enhanced compliance with the sanctions regime. Under the managerialist approach, informal and cooperative interaction between states is key to "modifying preferences, generating new options [and] persuading the parties to move toward increasing compliance with regime norms."<sup>250</sup> Committees, as the diplomatic interface between the regime and states, provide a space for such interactions. This forum may be even more important in the case of sanctions obligations than other regimes given that the Council imposes sanctions on states, rather than states consenting to obligations under treaty arrangements. Still, as with all collective action problems, states are more likely to pursue regime objectives above their own interests when they know that other states are contributing to those objectives.<sup>251</sup> This requires transparent and objective in-

245. U.N. Charter arts. 25, 29.

246. *See, e.g.*, Paulus, *supra* note 125, at 992 (making this same point in respect of the delegation of enforcement powers under Article 42 of the U.N. Charter).

247. *See* discussion *supra* Part III Section B.

248. *See generally* Eyal Benvenisti, *The Law of Global Governance*, 368 RECUEIL DES COURS 49, 180–82 (2013) (discussing reviewing bodies in international organizations).

249. *Id.*

250. CHAYES & CHAYES, *supra* note 50, at 229.

251. *Id.* at 23; ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 88 (1984).

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formation about states’ performance through monitoring and verification—the duty of the panels. Therefore, while the committees’ place is justified, both as a forum for cooperation and as a means of supervision, it is important that the panels can operate independently and impartially when monitoring and reporting on implementation and compliance.

2. *Separation of Political and Technical Power, in Practice*

The case studies raise a real question as to whether there is a proper balance between committee supervision and panel independence. Commentators often assume that panels are independent.<sup>252</sup> This view is reinforced by the fact that some panels do not appear to be subsidiary organs of the Council, in theory giving them a greater degree of autonomy from the Council.<sup>253</sup> However, as the case studies illustrate, the panels’ independence and impartiality is compromised. Political influence over the work of panels takes place at a number of levels. It is achieved by ensuring that experts’ nationality reflects that of the P5. Enrico Carisch, a former expert panel member, suggests that committees may control a panel’s work program by preventing it from travelling or interviewing people through which it might gain access to sensitive information.<sup>254</sup> The panels’ mandates facilitate this type of control; the ISIL/Al-Qaida Panel, for instance, must obtain pre-approval from the committee for its program of activities, including travel.<sup>255</sup> The replacement of the ISIL/Al-Qaida Monitoring Group in 2004 suggests that the Council’s power to renew mandates might also undermine the independence and impartiality of experts. The short mandates of panels,<sup>256</sup> combined with the possibility of non-renewal, enhances these risks. So too does the fact that experts are usually automatically re-appointed if their panel’s mandate is renewed.<sup>257</sup> In these circumstances, Farrall observes that members may develop “career depen-

252. See, e.g., STOCKHOLM PROCESS, *supra* note 197, § 81; Carisch & Rickard-Martin, *supra* note 72, at 160.

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253. See Part III Section B.

254. Telephone Interview with Enrico Carisch, *supra* note 160.

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255. S.C. Res. 2368, *supra* note 86, annex I, ¶ (e).

256. See *supra* Part III Section B.2.

257. Vines, *supra* note 231, at 258.

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gency” and that this makes it “less likely that experts will engage in genuinely critical analysis.”<sup>258</sup>

Perhaps the most pervasive influence on panels is the control the committees exercise over the content of the panels’ reports. Consistent with the practice identified in the case studies, Farrall observes that committees scrutinize reports “for anything that might be considered inaccurate, offensive or impolitic.”<sup>259</sup> Former experts state that “reporting has been carefully filtered to reflect political messages of the P5, resulting in the lowest common denominator of information.”<sup>260</sup> Committees do not directly edit reports; rather, members exert control by vetoing decisions to submit reports to the Council or to make them public.<sup>261</sup> Panels discuss drafts of their reports with committees before formally submitting them for committee approval.<sup>262</sup> Although it is apparently not the practice of committees to ask panels to change their conclusions,<sup>263</sup> these interactions may mean that panels feel compelled to edit or remove content from draft reports that they are aware is disagreeable to one or more of the committee members. If they do not conform to expectations, their reports may be delayed or never be published,<sup>264</sup> and this may erode political support for the panel and result in the Council not extending its mandate. The committees’ involvement is likely for the most part legitimate, as they ensure that panels consider all available information, including the views of the impugned state, before reaching their conclusions. However, the format in which this en-

258. Farrall, *supra* note 61, at 206.

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259. *Id.* at 203.

260. Carisch & Rickard-Martin, *supra* note 72, at 160. *See also* Farrall, *supra* note 61, at 208 (providing an example from the Panel of Experts on Somalia, which, in March 2003 “‘named and shamed’ a number of African countries, including Yemen and Djibouti, through which arms transited, but it failed to mention the countries in which the arms originated, one of which was Bulgaria. The Chairman of the Somalia Sanctions Committee at the time, whose responsibility it was to forward the report to the Council, happened to be the Ambassador of Bulgaria.”).

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261. *See supra* Part III Section B.

262. Telephone Interview with Peter Scott, Austl. Dep’t of Foreign Affairs & Trade (Mar. 8, 2017). Mr. Scott was Director of Sanctions at Australia’s Permanent Mission to the U.N. during Australian membership on the Council between 2013–2015.

263. *Id.*

264. *See, e.g.*, SIEVERS & DAWS, *supra* note 20, at 527 (discussing delays and decisions not to publish in the context of the Sudan sanctions regime).

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agement takes place not only undermines the appearance of impartiality and independence, it also, at least in some cases, results in direct political interference.<sup>265</sup>

The panels' assumption of certain operational functions beyond their pure monitoring role, including capacity building, may further affect panel's ability to be critical in their assessments of states' implementation of sanctions. It might be too much to expect panels to provide impartial and independent analysis of states' implementation if the panels depend on the cooperation and support of those states for other parts of their work. In this respect, the Council's establishment of the panels' political and support functions, and the outsourcing of the committees' diplomatic responsibilities, is problematic. These practices confuse the panels' identities by requiring that they are both a forum for cooperation and a mechanism for objective supervision.

### 3. *Law as a Solution*

The influence of politics within the U.N. is to be expected; the Charter's framers elected to centralise the power of the United Nations in political organs rather than legal or technical ones.<sup>266</sup> Moreover, even though the function of technical, fact-finding and judicial bodies is non-political, their work is not free from politicization. Martti Koskenniemi speaks of a "politics of redefinition" in which issues are defined by reference to "technical idiom[s]" and so are approached with an "attendant structural bias."<sup>267</sup> The work of panel members, both individually as experts in different fields and as a collective, carries with it an implied political preference for looking at a problem and its solutions in a particular way. Yet, while accepting that "some measure of politics is inevitable" for non-political bodies, it is important that that influence "be con-

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265. *See supra* Part III Section B.4.

266. HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 724-33 (8th prtg. 2000) (explaining that the Council's powers of enforcement under Chapter VII are "purely political measures" because the Council can use its enforcement powers at its discretion to address situations that it considers constitute a threat to international peace and security).

267. MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 67 (2011).

strained by non-political rules.”<sup>268</sup> It may be, as Benvenisti suggests, that independence of an organ or agency is a rebuttable assumption in IOs.<sup>269</sup> However, if that is the case, then the law of the IO must clearly allow for such limitations on independence. In the present context, the role of the law—what it does, what it does not do, and what it should do—in limiting or safeguarding the independence of panels is a key consideration.

The sanctions system’s internal law plays some part in limiting the independence of panels. Council resolutions and committee guidelines indirectly limit independence through mandate length, voting procedures, powers of delegation, and pre-approval procedures. This section critiques these internal laws. The most problematic aspects of the relationship between committees and panels, however, are the behaviors and practices that take place in the gray space—the vacuum of law. M. Cherif Bassiouni, a former U.N. independent expert, observes that powers of U.N. bodies often represent a “spaghetti bowl in which some spaghetti may be long on mandate but thin on substance, while other may be short on mandate and thick on substance.”<sup>270</sup> The “substance,” Bassiouni suggests, is often determined by the degree of the P5’s political support for the body, “which determines its real authority and effectiveness.”<sup>271</sup> As is clear from the case studies, panels are short on mandate, and the substance of their work is determined largely by the role that the committee members (and panel members in response) decide to play. In practice, this means that pressures invisible to the outside observer, including expectations transmitted through a complex web of interactions and relationships, influence the panels’ decisions on what to report and how to report it.

4. *Potential Ways Forward*

a. Institutional Structure

Farrall argues that the disaggregated and multi-tiered monitoring system set up by the Council has failed, in part

268. *Id.* at 36–37.

269. Benvenisti, *supra* note 248, at 157.

270. M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH U. J.L. & POL’Y 35, 35–36 (2001).

271. *Id.* at 38.

because of the “rudimentary and unsophisticated” governance of panels.<sup>272</sup> He recommends relying on other centralized models of sanctions monitoring, including tasking the U.N. Secretariat or a special representative of the Secretary-General with the role.<sup>273</sup> While better supervision of panels is necessary, as apparent from standards of assessment and other matters, Farrall’s alternative is likely to make sanctions supervision more political.<sup>274</sup> Moreover, while there should be greater consistency between the functions and standards of the panels, their mandates need not be identical. Indeed, given the different foci and purposes of sanctions regimes,<sup>275</sup> the institutional centralization necessitated by Farrall’s proposal could prove highly counterproductive. For instance, the Sudan Panel, which concentrates principally on an arms embargo for a civil conflict, requires different types of expertise than does the DPRK Panel, which is concerned with, among other things, efforts to protect assets or the shipping of commodities internationally.<sup>276</sup> For these reasons, the existing two-tier, regime-specific model is conceptually sound. What is needed, however, is a coherent set of system-wide standards and rules that “are external to the fact of power” and which “claim to provide a measure for its acceptability.”<sup>277</sup>

b. Panel Composition

The High-Level Review on Sanctions (HLRS) recommends that the Secretary-General “ensure that appointments of experts are made on the basis of expertise and merit . . . free of conflict of interests.”<sup>278</sup> This recommendation appears justified in light of the appointment to panels of nationals of P5 states, which illustrates the interest of the P5 not only in the

272. Farrall, *supra* note 61, at 209.

273. *Id.* at 210.

274. See, Joanna Naples-Mitchell, *Perspectives of UN Special Rapporteurs on Their Role: Inherent Tensions and Unique Contributions to Human Rights*, 15 INT’L J. HUM. RTS. 232, 236 (2011) (discussing such difficulty in the context of special rapporteurs).

275. See Part III Section A.

276. *Id.*; Sudan 2009 Panel Rep., *supra* note 176, ¶¶ 318-9 (focusing almost exclusively on the arms embargo, with just two of a total of 373 paragraphs dedicated to the travel ban and assets freeze).

277. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT’L L. 325, 328 (1995).

278. *High-Level Review*, *supra* note 7, at 38.

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merit of appointed panel members, but potentially also the inclusion of nationals who may share their perspectives on the relevant situation. However, the recommendation misses the fact that committees sometimes directly make appointments without the involvement of the Secretary-General, as in the case of the ISIL/Al-Qaida Panel.<sup>279</sup> This practice increases the prospect of politicization in selection and reduces perceptions of independence and impartiality. Consequently, appointment powers should remain external to committees.

c. Mandate Functions and Duration

In order to maintain a clear distinction between the roles of the committees and panels, Council resolutions must clearly specify the competencies of each entity. Mandates should not leave space for expansion of duties, either by giving panels open-ended mandates to assist their committee, or by empowering the committee to delegate additional functions. The IWG recommends that expert groups clarify the terms of reference for their work with their committee.<sup>280</sup> This suggestion is also problematic, because it provides committees with an opening to dictate panels' functions by tasking them with operational responsibilities which ought to be performed by the committees.<sup>281</sup> Instead, the Council resolutions should directly specify panels' responsibilities, and the panels should be competent to interpret their mandate to the extent the language permits. This suggestion cuts both ways, meaning that the functions of committees must also be better delineated. As the HLRS suggests, requiring that committees "take a more proactive approach to managing relationships with the focus and key stakeholder States" would make their "role as the forum to discuss implementation and compliance . . . clear, and the expert group's mandate to investigate better understood."<sup>282</sup>

In addition, the short length of panel mandates erodes independence and is difficult to justify in the context of global threats that endure for many years. The Council should consider whether panels' mandates should be set for longer terms

279. See *supra* Figure 1; Part III Section B.

280. Informal Working Group Rep., *supra* note 8, ¶ 9(c).

281. See discussion *supra* Part III Section B; Part IV Section A.

282. *High-Level Review*, *supra* note 7, at 28 (emphasis omitted).

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or should simply continue indefinitely until the Council decides to terminate it.

d. Reporting Procedures

Finally, committees should be permitted to exercise a degree of oversight over panel reporting, including ensuring adherence to methodological and other decision-making standards. This means that it may not be appropriate for committees to be bypassed entirely in the reporting process, as they have been in the past.<sup>283</sup> Nevertheless, reform must occur to prevent political interference. A superior means of balancing accountability with independence may be to reconfigure committee consensus voting procedures for decisions on panel reports to a simple majority vote, eliminating the effective veto.

B. *Reporting Obligations*

The quality and availability of information on implementation of sanctions measures is the greatest problem the panels face in their monitoring and assessment role.<sup>284</sup> This section evaluates the sanctions system's informational requirements and examines the role of reporting obligations and committee guidelines in contributing to reporting problems. It also considers institutional and normative methods for addressing qualitative and quantitative issues.

1. *The Extent of the Information Problem*

The reporting issues identified above present problems due to the high value of information to the function of each sanctions regime. Information is key to both ensuring compliance by states with the sanctions system and informing the Council of the extent of implementation and, ultimately, the effectiveness of the regime in constraining targets.<sup>285</sup> There is a special need for comprehensive information on implementation because sanctions targets may obtain proscribed benefits from a non-compliant jurisdiction notwithstanding the mea-

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283. See *supra* Part III Section B.

284. See *supra* Part III Section C.

285. See *supra* Part II Section D.

asures adopted in other jurisdictions.<sup>286</sup> For instance, the DPRK Panel observes how the DPRK expertly exploits weak links by selling nuclear-related and ballistic missile-related equipment to non-complying client states, such as Iran, Syria, and Myanmar.<sup>287</sup> Accordingly, without comprehensive reporting, there may be situations where one state’s conduct denies a benefit or opportunity to a sanctions target but it is unknown whether the target received a similar benefit from another, non-compliant state.

The panels often express frustration with this predicament. The ISIL/Al-Qaida Panel said that the lack of information on actions by states against sanctions targets raises the question of whether “sanctions have had the intended restrictive effect.”<sup>288</sup> Similarly, the DPRK Panel commented that the lack of state commitment “raise[s] important questions about the overall efficacy of the [U.N.] sanctions regime . . . [which] has still failed to ensure that the [DPRK] abandons its nuclear and ballistic missile programmes.”<sup>289</sup>

Panels are not entirely dependent on the self-reporting system.<sup>290</sup> The DPRK and Sudan Panels carry out investigations, while the ISIL/Al-Qaida Panel consults with a diverse range of stakeholders.<sup>291</sup> While these options may complement state reporting, they cannot replace it. Responsibility for information production on implementation must be decentralized, in part because panels do not have the resources or the means of accessing and collating this material themselves.<sup>292</sup> Furthermore, as investigations occur only after a sanctions violation has taken place (or once it is already in train),<sup>293</sup> they signify a failure in sanctions implementation; they are by their nature reactive. Implementation reports, on

286. Although this may increase the costs or otherwise make it more difficult for targets to obtain benefits. Moreover, wider sanctions objectives, such as stigmatizing and signaling, may not be affected.

287. DPRK 2010 Panel Rep., *supra* note 206, ¶ 49.

288. ISIL & Al-Qaida 2012 Panel Rep., *supra* note 141, ¶ 27.

289. DPRK 2016 Panel Rep., *supra* note 175, at 4.

290. *See supra* Part III Section B.

291. *Id.*

292. For instance, certain implementation information may not be publicly available, such as the status of a state’s prosecution of a sanctions target. *See supra* Part III Section C (referring to France’s reporting on the status of court proceedings against groups connected to Al-Qaida).

293. *See, e.g.*, DPRK 2014 Panel Rep., *supra* 135, ¶ 78.

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the other hand, should provide information that enables pre-emption and prevention of enforcement failures or sanctions busting by the Council, rather than forcing the Council to respond after the fact.

## 2. *Quantitative and Qualitative Requirements of State Reports*

To enable proper assessment of sanctions implementation by the Council, it is necessary that: (a) all states report; and (b) that states provide relevant information in their reports. Political scientist, Ronald Mitchell, observes that some supervisory mechanisms require only “effectiveness-orientated information,” which involves examining only a representative sample of state practice to determine whether the regime operates as intended.<sup>294</sup> However, for the reasons outlined above, sanctions monitoring requires what Mitchell refers to as “compliance-orientated information.” This is a more demanding standard, necessitating detailed information from each member in order to assess whether states individually fulfill regime requirements.<sup>295</sup> Accordingly, the requirement that each state individually report on implementation and compliance remains a necessary component of the sanctions system.

In order to rectify the qualitative deficiencies in reporting, states must provide information on both the steps taken to enforce domestic law and the overall effectiveness of their internal sanctions architecture in preventing targets from acquiring proscribed benefits. As identified above, states tend to outline legislative and regulatory outputs but not the action taken by state organs to implement those domestic obligations.<sup>296</sup> Due diligence obligations, however, are not satisfied if a state has a law in place but its authorities fail to take the necessary steps to enforce it.<sup>297</sup> As legal academic, Andrea Bianchi observes, “[f]ormal incorporation into the domestic legal order of relevant obligations under international law is an essential prerequisite, but not an actual guarantee, that anti-terrorism measures are effectively enforced.”<sup>298</sup>

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294. Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 113 (1998).

295. *Id.* at 109.

296. *See supra* Part III Section C.

297. *See supra* Part II Section B.

298. Bianchi, *supra* note 233, at 895.

The information provided by states to the panels should include not only domestic enforcement action, but also the effectiveness of those actions in preventing the prohibited conduct, including shortcomings and failures. Isobel Roele, a legal academic, explains how reporting to the Council's Counter-Terrorism Committee developed over time so that states would "not merely . . . describe implementation measures, but . . . defend their effectiveness and explain the progress they had made since the last report."<sup>299</sup> Similarly, the Financial Action Task Force (FATF), which promotes domestic standards to combat financial system threats, assesses states' implementation of its standards both in terms of technical compliance and effectiveness.<sup>300</sup> The first element looks at whether specific regulatory measures have been adopted, whereas the second considers actual achievement of defined outcomes.<sup>301</sup>

### 3. *Communicating Reporting Requirements*

Given the sanctions system's informational requirements, the manner in which the Council communicates reporting obligations to states is unsatisfactory. Sanctions obligations are general, so imprecise requirements to report on steps taken to implement sanctions measures are bound to result in the submission of highly generalized reports,<sup>302</sup> without information on enforcement or effectiveness. More recent formulations of the reporting obligation, which require information on "con-

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299. Isobel Roele, *Disciplinary Power and the UN Security Council Counter Terrorism Committee*, 19 J. CONFLICT & SECURITY L. 49, 60–61 (2014). The Counter Terrorism Committee is charged with monitoring the implementation of domestic rules and enforcement measures to counter terrorist attacks prescribed by the Council in S.C. Res. 1373 (Sept. 28, 2001).

300. FIN. ACTION TASK FORCE, *METHODOLOGY FOR ASSESSING TECHNICAL COMPLIANCE WITH THE FATF RECOMMENDATIONS AND THE EFFECTIVENESS OF AML/CFT SYSTEMS* ¶¶ 30–41 (2018).

301. *Id.*

302. *Cf.* Daniel Bodansky, *The Role of Reporting in International Environmental Treaties: Lessons for Human Rights Supervision*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 361, 368 (Philip Alston & James Crawford eds., 2000) (discussing non-specific reporting requirements in environmental treaties).

crete measures” taken to “implement effectively” are unlikely to rectify existing issues, as they remain non-specific.<sup>303</sup>

To overcome the problem, committees must provide better guidance to states regarding the content of their reporting obligations. The DPRK and ISIL/Al-Qaida committees have made some efforts to be more direct and prescriptive, but these continue to fall short of providing all required information. The DPRK Committee issued an implementation assistance notice on the preparation of national reports in the form of a checklist of measures to be adopted by states.<sup>304</sup> The checklist poses the question of whether states “[h]ave concrete measures, procedures, legislation, regulations or policies [which have] been adopted in order to . . .” and then lists states’ due diligence obligations under applicable resolutions.<sup>305</sup> The question is counterproductive because it suggests states need only supply information on regulatory measures rather than steps taken by their organs to implement those measures.

The ISIL/Al-Qaida Committee posed a series of questions for states to respond to in their implementation reports, but in doing so adopted the wrong emphasis. For instance, the committee asked states: “[h]ave your authorities identified inside your territory any designated individuals or entities? If so, please outline the actions that have been taken.”<sup>306</sup> While this question represents an improvement on other reporting instructions because it focuses on the effect of sanctions measures, its ordering is problematic. Were a state to respond to the question in the negative, it would not provide the committee or panel with information on whether that was because it did not adopt or implement appropriate measures, or because no sanctions targets operated within the state’s territory. As such, it may be better to ask: “what steps have your authorities

303. S.C. Res. 2371, *supra* note 114, ¶ 18; S.C. Res. 2375, *supra* note 97, ¶ 19.

304. Sec. Council Comm. Established Pursuant to Resolution 1718 (2006), Implementation Assistance Notice No. 2: Guidelines on the Preparation and Submission of National Implementation Reports (Apr. 24, 2018).

305. *Id.* at 3.

306. Rep. to the Comm., transmitted by Note Verbale Dated 16 April 2003 from the Permanent Mission of the Republic of Korea to the United Nations Addressed to the Chairman of the Comm., at 3, U.N. Doc. S/AC.37/2003/(1455)/9 (Apr. 17, 2003) (ISIL & Al-Qaida sanctions regime).

taken to identify inside your territory any designated individuals or entities? Have these been successful?”

4. *Addressing Systemic Factors Underlying Poor Reporting*

a. *Genesis of Problem*

The primary reasons for non-reporting, according to committees and panels, are lack of political will and insufficient resources.<sup>307</sup> Political will is the interest alignment between states and the victims of non-compliance with sanctions.<sup>308</sup> This perspective might indicate why reporting is so low under the Sudan regime, even on the part of P5 members and developed countries. The DPRK and ISIL/Al-Qaida regimes address global security threats—nuclear proliferation and terrorism—that confront all nations and attract greater interest and investment from the United States and other powers.<sup>309</sup> In contrast, the Sudan regime addresses an intra-state conflict, albeit with some regional repercussions, and there is accordingly less interest alignment between states and the victims of sanctions violations.

The second factor—resource constraints—explains why developing countries have a poor reporting record, both in quantitative and qualitative terms. Developing states are often subject to what legal academics Kevin Davis and Benedict Kingsbury refer to as an “obligation overload” that may either result in non-compliance or pseudo-compliance with international obligations.<sup>310</sup> External political pressure may also dis-

307. See, e.g., ISIL & Al-Qaida 2004 Panel Rep., *supra* note 182, ¶ 78–79; ISIL & Al-Qaida 2005 Rep., *supra* note 193, ¶ 59; Rep. of the Panel of Experts Concerning the Sudan, transmitted by Letter Dated 2 October 2007 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Addressed to the President of the Security Council, ¶ 151-2, U.N. Doc. S/2007/584 (Oct. 3, 2007) (discussing how Chad’s Minister for Justice expressed willingness to implement sanctions, but noting that in practice Chad has taken very limited steps to implement sanctions); DPRK 2016 Panel Rep., *supra* note 175, at 4.

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308. XINYUAN DAI, INTERNATIONAL INSTITUTIONS AND NATIONAL POLICIES 38 (2007).

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309. See, e.g., Donald J. Trump, President of the U.S., Address at the U.N. General Assembly (Sept. 25, 2018), <https://www.vox.com/2018/9/25/17901082/trump-un-2018-speech-full-text> (highlighting foreign policy priorities of, among others, Islamic terrorism and nuclear non-proliferation).

310. Kevin Davis & Benedict Kingsbury, *Obligation Overload: Adjusting the Obligations of Fragile or Failed States 2* (Hauser Globalization Colloquium,

tort domestic policy decisions about the sequencing of implementation of international obligations and other priorities. This problem manifests in the reporting domain, where states may address their procedural obligation to report at the cost of the fulfillment of their substantive obligations to implement.<sup>311</sup> The value IO's place on reporting may incentivize states to appear successful rather than to substantively meet their obligations.<sup>312</sup> The Counter-Terrorism Committee confronted this situation, where developing states complained that "the clerical burden had the counter-productive effect of diverting resources away from implementation efforts."<sup>313</sup>

While the committees and panels treat political will and obligation overload as separate reasons for non-reporting, they are often two sides of the same coin. It is generally not the case that a state refuses to report because it does not agree with combatting terrorism or minimizing the risk of nuclear war.<sup>314</sup> More likely it will have elected not to do so because its re-

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2010). See also Cosette D. Creamer & Beth A. Simmons, *Ratification, Reporting, and Rights: Quality of Participation in the Convention Against Torture*, 37 HUM. RTS. Q. 579, 597 (2015) (discussing similar obligation overloads resulting in decreased reporting in the context of overlapping human rights regimes).

311. Cf. AnnJanette Rosga & Margaret L. Satterthwaite, *Measuring Human Rights: UN Indicators in Critical Perspective*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 297, 305 (Kevin E. Davis et al. eds., 2012) (discussing how fixation on meeting human rights indicators can detract from implementation in the context of human rights regimes).

312. See *id.*

313. Roele, *supra* note 299, at 62.

314. Some disagreement about this remains between the panels. However, the general view of the committees and panels across the three regimes is that poor reporting and/or implementation is not due to opposition to the policy objectives of the sanctions regime. Compare Rep. of the Panel of Experts, transmitted by Letter Dated 23 February 2015 from the Panel of Experts Established Pursuant to Resolution 1874 (2009) Addressed to the President of the Security Council, at 5, U.N. Doc. S/2015/131 (Feb. 23, 2015) (DPRK sanctions regime, noting a potential lack of political will to explain low reporting levels), with Fourteenth Rep. of the Analytical Support & Sanctions Monitoring Team, transmitted by Letter Dated 2 August 2013 from the Chair of the Security Council Comm. Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities Addressed to the President of the Security Council, ¶ 37, U.N. Doc S/2013/467 (Aug. 2, 2013) (stating that "the vast majority of Member States wish to comply with the regime" and attributing low reporting to a "lack of capacity").



source constraints compel it to triage its international obligations and address those that generate it the most return. Viewing the notions of interest and obligation on the same plane allows for a more informed and solutions-oriented critique of the Council's approach to information gathering. One might think, for instance, that the Council can increase states' political interest in reporting by creating separate obligations for each reporting regime and different committees and panels to corral compliance or by making reporting obligations binding. However, increasing burdens may in fact have the perverse consequence of reducing compliance.

b. Reducing Reporting Burdens

Considering the above, the burden of reporting obligations challenges the "normative hypertrophy" of the U.N. sanctions structure<sup>315</sup> and seems to support the argument in favor of greater centralization and coherency. While individual obligations to report are necessary for each regime, as discussed above, the increasing consistency of targeted sanctions measures means that the same implementation information—for example, how an immigration system implements a travel ban—will satisfy the reporting requirements of multiple regimes. Consequently, reporting rules ought to allow states to submit comprehensive sanctions reports addressing implementation across regimes. The circulation of a master template of all sanctions obligations could facilitate this process.<sup>316</sup> Building on this idea, a centralized technical body could identify areas of regulatory overlap across the sanctions regimes in the template and condense state reporting. The template would also provide a single location for committees to more clearly indicate what information states must provide to satisfy their reporting obligations.

A further means of reducing the reporting burden may be creating differentiated reporting requirements for states within each regime based on the likely value of their implementation information. Other international reporting regimes allow for differing levels of involvement.<sup>317</sup> Nevertheless, de-

315. Bianchi, *supra* note 233, at 914.

316. Carisch & Rickard-Martin, *supra* note 72, at 163.

317. For example, the United Nations Framework Convention on Climate Change art. 12, ¶ 5, May 9, 1992, 1771 U.N.T.S. 107 requires industrialized

spite the fact that neither the Charter<sup>318</sup> nor the system of primary sanctions obligations<sup>319</sup> require universal participation, members of the Council have not considered this route. While differentiated reporting might create more complexity, it may be justified if it eases reporting burdens without undermining the effectiveness of the regime.

In the Sudan regime the Council requested “all states, in particular those in the region, to report to the Committee” on implementation.<sup>320</sup> In doing so, the Council implicitly recognized that information on implementation is more useful from states bordering Sudan, as they are most likely to face challenges implementing sanctions measures. In certain cases not involving a global threat it may be more prudent to embrace differentiated reporting by requiring more comprehensive information from certain states. There are other areas where different levels of obligation may be preferable, including reduced reporting requirements for those states that the Council is satisfied have in place legislation that automatically and effectively converts international sanctions obligations into domestic law each time a new resolution is passed.<sup>321</sup>

This solutions framework supports the normative consistency thesis of U.N. sanctions administration outlined above, but not completely. It suggests retaining the current normative output of sanctions reporting obligations while reducing the reporting input required of states through centralized, and where possible differentiated, reporting.

### c. Increasing Political Costs

If the Council reduced reporting requirements, thereby ameliorating the obligation-overload, it could correspondingly increase pressure to comply with the remaining procedural obligations in order to increase states’ interest in participation. In this respect, it would counterbalance a managerialist approach to ensuring compliance by reducing burdens with an

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countries to submit their initial report within six months of the Convention’s entry into force, while developing countries have three years in which to file their initial report.

318. U.N. Charter art. 48, ¶ 1.

319. Exemptions may be granted to sanctions obligations. *See, e.g.* S.C. Res. 2368, *supra* note 86, ¶ 10.

320. S.C. Res. 2265, *supra* note 170, ¶ 13.

321. *See, e.g.*, Policing and Crime Act 2017, c. 3, §§ 152–155 (U.K.).

enforcement element—emphasizing both obligation and sanction. This might be achieved by making remaining reporting requirements legally binding, as the Council did in the case of the DPRK, by applying political pressure to non-conforming states through the committee—especially by the Chairman or P5 representatives—or by publicly naming and shaming states that consistently fail to report.

### C. *Factual and Legal Standards of Assessment*

There are a number of discrepancies and gaps in the standards panels use to make factual and legal determinations.<sup>322</sup> This final section addresses two problems, namely the standard of proof in factual assessments and the analysis of due diligence obligations in quasi-judicial determinations. Before doing so, it returns to and builds upon the question of the identity of the panels. The inconsistent approaches adopted by the panels, both internally—in the case of Sudan—and among one another—ISIL/Al-Qaida compared to Sudan and DPRK—must be considered in order to clarify the standards that should be adopted.

#### 1. *Identity of Panels as Decision-Making Bodies*

The U.N. system often distinguishes between “fact-finding” and “quasi-judicial” bodies.<sup>323</sup> However, this distinction masks potential nuances in the types of decisions that international monitoring and supervisory mechanisms make. For instance, a body could take one or more of the following steps down the decisional pathway: (1) presenting information submitted by states on compliance; (2) establishing facts in relation to compliance; (3) assessing facts in light of the applicable international law; (4) determining whether the international obligation has been violated; (5) determining whether the violation invokes the international responsibility of the state; or (6) issuing recommendations that respond to the es-

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322. See *supra* Part III Section D.

323. See, e.g., G.A. Res. 46/59, Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, ¶ 2 (Dec. 9, 1991); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 459 (2005).

tablished violation.<sup>324</sup> The process of establishing facts is further divisible into “fact-finding and surveillance” and “inspection.”<sup>325</sup> The former relies on information from formal reports, whereas the latter “connotes an altogether more intrusive act: the organisation itself obtains information on a particular matter directly from the place where the facts in issue arose.”<sup>326</sup>

Considering the panels’ approaches in the case studies within this decision-making paradigm, the ISIL/Al-Qaida Panel appears to make decisions within phases 1 and 2, adopting a surveillance approach, while the Sudan and DPRK Panels appear to make decisions within phases 3 to 5, adopting an inspection approach. These differences in approach reflect a more fundamental uncertainty as to the identity and role of the panels, especially considering the similarity of the monitoring mandates of the panels.<sup>327</sup> As with other questions of identity considered throughout this part, compliance theory helps to frame and evaluate these divergences. Under the enforcement model, implementation requirements are legal obligations requiring a compliance-oriented approach from supervisory mechanisms with a direct response—be it naming and shaming or another type of sanction—in the event of violation.<sup>328</sup> Yet, under a managerialist approach, fulfillment of implementation obligations is a common enterprise, where the objective of assessment is determining how to enhance overall system performance.<sup>329</sup> While the practice of the DPRK and Sudan Panels apparently reflect the enforcement model, the ISIL/Al-Qaida Panel’s practice seems to fit within a managerialist approach.

As sanctions obligations are imposed on states not in relation to their own wrongdoing, but as a result of the misdemeanors of a third party, a managerialist approach is arguably

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324. See, e.g., Schmalenbach, *supra* note 48, ¶ 11 (suggesting that “a complete supervisory assessment requires a procedure consisting of, as a minimum, four phases,” namely: (1) obtaining facts; (2) assessing facts according to the rules; (3) allowing the reviewed member a right of reply; and (4) recognizing the violation or non-violation of the rule by that member).

325. SANDS & KLEIN, *supra* note 4, at 323–28.

326. *Id.* at 325.

327. See *supra* Part III Section B.

328. See *supra* Part IV.

329. *Id.*

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preferable. This conclusion may appear to weigh in favor of the fact-finding and surveillance approach of the ISIL/Al-Qaida Panel. However, there are other important factors. First, managerialist theorists agree with enforcement theorists that transparent information on parties' adherence to regime norms is essential to prevent defection.<sup>330</sup> Thus, while the managerialist account is not "primarily accusatory," it does recognize that "exposure or shaming is a powerful spur to action."<sup>331</sup> Arguably the ISIL/Al-Qaida Panel, by avoiding the identification of states that do not meet their implementation obligations, fails to provide the necessary transparency for the effective operation of the sanctions regime.

Second, sanctions obligations are legally binding, and there is value in characterizing states' conduct in terms of compliance rather than cooperation, even if there is no sanction for violations. Actors deliberately choose law over other regimes because "[g]overnment commitments are more credible under precise agreements of high obligation . . . [and] [l]egalization may be particularly important in providing an institutional solution to commitments fulfilled over an extended period of time."<sup>332</sup> Therefore, even if it is inappropriate for panels to determine state responsibility—phase 5 above, it may be productive to at least assess facts in light of applicable international law—phase 3 above. If this is correct, the ISIL/Al-Qaida Panel—by failing to apply the law—may not go far enough. On the other hand, the DPRK and Sudan Panels, by judging states' legal responsibility, may sometimes go too far in their assessments.

Finally, the regimes have varying informational requirements depending on their foci and other circumstances.<sup>333</sup> They also have different sources of information, with the ISIL/

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330. CHAYES & CHAYES, *supra* note 50, at 230.

331. *Id.*

332. Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, in LEGALIZATION IN WORLD POLITICS 277, 279 (Judith L. Goldstein et al. eds., 2001). Cf. Stephen J. Toope, *Emerging Patterns of Governance and International Law*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 91, 93 (Michael Byers ed., 2000) (highlighting the role played by lawyers in "the advocacy of substantive norms, and in the elaboration of procedural innovations which build confidence amongst relevant actors and prompt more co-operative behaviour").

333. See *supra* Part IV Section B.

Al-Qaida Panel relying more heavily on information provided by intelligence agencies.<sup>334</sup> Nevertheless, these considerations do not appear to justify a refusal to conduct investigations, especially where investigations would provide new information not otherwise at the Council's disposal. As the Secretary-General's High-Level Panel on Threats, Challenges and Change recommends, panels should be provided "with the necessary authority and capacity to carry out high-quality, in-depth investigations."<sup>335</sup>

While there ought not be a one-size-fits-all approach to the role of panels, there is a need for greater coherency in their function and approach. For the reasons outlined, the focus of the sanctions system should be on the overall effects on targets rather than on individual compliance by states. Accordingly, the emphasis should be on cooperation and technical assistance. However, in order for panels to provide the "symmetrical information" necessary to deter free-riding,<sup>336</sup> they need to be able to inspect as well as surveil, consider law as well as fact and, where necessary, openly identify states involved in implementation failures.

## 2. *Factual Standards*

Only the Sudan Panel adopts factual standards, but it deploys different standards and applies them inconsistently.<sup>337</sup> Irrespective of the different types of decisions that panels make, it seems necessary that they adopt a consistent and public standard of proof. Unsubstantiated findings draw fierce rebukes from states.<sup>338</sup> As the IWG explains, "insufficiently supported allegations of non-compliance and sanctions violations . . . could call into question the integrity of the entire report."<sup>339</sup> Some experts suggest that "efforts to standardise their work would likely constrain [their] dexterity and quality of work and could compromise their independence."<sup>340</sup> This argu-

334. *See supra* Part III Section B.

335. A More Secure World, *supra* note 73, ¶ 180(a).

336. KEOHANE, *supra* note 251, at 88.

337. *See supra* Part III Section D.

338. Farrall, *supra* note 61, at 204. *See also* Carisch & Rickard-Martin, *supra* note 72, at 169–170 (discussing criticism levied at Panel of Experts for "weak evidentiary standards").

339. Informal Working Group Rep., *supra* note 8, ¶ 18.

340. *High-Level Review*, *supra* note 7, at 26.

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ment is disputable, as domestic and international judicial and fact-finding bodies commonly adhere to consistent evidentiary standards, either formulated by the relevant body or imposed on it by external actors, without compromising independence.<sup>341</sup>

International fact-finding and quasi-judicial bodies are often careful to adopt an achievable standard of proof. For instance, special rapporteurs of the Human Rights Council must adhere to “evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up.”<sup>342</sup> As a former U.N. special rapporteur on torture, Nigel Rodley explains, this “reflects the limitations of fact-finding on the basis of written material.”<sup>343</sup> Consequently, such bodies most commonly adopt a “reasonable suspicion” or “reasonable grounds to believe” standard of proof; less frequently they adopt the stricter “balance of probabilities” standard.<sup>344</sup>

The adoption by panels of an appropriate standard of proof would, alongside appropriate methodological standards, help reassure states that they receive consistent and fair treatment by the panels—reinforcing the legitimacy of the monitoring process. However, the maintenance of too high a standard, especially one that does not correspond to the available information on implementation and compliance, will straight-jacket panels and prevent them from making decisions altogether. For this reason, the balance of probabilities and beyond reasonable doubt standards of proof variously adopted by the Sudan Panel are most likely unsustainable. So too is the panel’s use of competing tests, one based on traditional evidentiary standards, the other based on statistical probability,

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341. For a discussion of the ICJ’s approach to the standard, see *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep 161, 233–34 (Nov. 6) (separate opinion of Higgins, J.).

342. Human Rights Council Res. 5/2, Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, art. 8, ¶ c (June 18, 2007).

343. Nigel S. Rodley, *On the Responsibility of Special Rapporteurs*, 15 INT’L J. HUM. RTS. 319, 325 (2011).

344. For a comprehensive overview of the standards adopted, see OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE 62–63, U.N. Doc. HR/PUB/14/7 (2015).

which not only conflict with one another, but also impose an exceedingly high threshold—perhaps even greater than the criminal standard.<sup>345</sup> Use of a lower standard, such as reasonable suspicion, would give panels greater freedom to make final determinations of fact. It may also reduce the need for panels to make indicative or tentative assessments, which reflect almost as badly on states as final determinations but are made without proper verification or the necessary degree of persuasion.

### 3. *Legal Standards*

Panels are not courts and, as outlined above, there is a real question as to the extent to which they should be making quasi-judicial determinations. This notwithstanding, panels do make legal conclusions on violations of sanctions measures by states, but do so in inconsistent ways. This issue must be addressed. The principal problem identified above is that panels could mechanically hold states responsible if sanctions targets received proscribed benefits in their territory without regard to the steps taken by those states to implement and enforce sanctions measures.<sup>346</sup> However, this is not the correct application of the law. Given the character of due diligence obligations, noncompliance by private actors with sanctions measures does not automatically imply a violation by a state of its international obligations.<sup>347</sup> In order to perform a proper legal assessment, panels need to look behind the result, to the measures adopted by the state to prevent the outcome in light of the state's resources and other relevant circumstances.<sup>348</sup> Hypothetically, this could raise exceedingly complex questions, such as whether decisions by prosecutors not to charge, or courts not to convict, engage the responsibility of the state.

#### D. *Drawing the Threads Together*

The institutions and norms of the sanctions regime limit panel independence, produce poor quality information on implementation and compliance, and result in inconsistent and unsubstantiated decisions on questions of fact and law. This

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345. *See supra* Part III Section D.

346. *See id.*

347. *See supra* Part II Section B.

348. *See id.*



part adopts both a theoretical and practical perspective on how the design of supervising structures and the character of legal obligations contribute to these problems. It considers underlying issues of institutional centralization and normative coherency. It argues that the Council should reject proposals in favor of a centralized sanctions monitoring body. However, it suggests that there is a strong need to maintain consistent standards and rules with respect to committees and panels across regimes. This need applies to the sanctions system's internal law, including common standards to preserve panel independence and provide committee oversight, as well as consistent standards of fact and law in panel decision making. The argument also relates to the system's external law, as regards the sharpening and synthesizing of reporting obligations to both reduce burdens and increase costs of non-compliance.

This part also draws on different theories of compliance and seeks to better frame and critique the role and purposes of panels within the sanctions system. This helps to clearly distinguish the proper functions of committees and panels, to elaborate more sophisticated reporting obligations, and, most importantly, to discern different approaches to panel decision making and corresponding standards. The aim of these discussions is to build a more defined identity for the panels—both to understand their different identities at present and to mount a case for a more common identity in the future. If it is accepted that monitoring bodies ought to remain separate, but that standards and rules must converge, then a common identity for the panels is key.

## V. CONCLUSION

The U.N. sanctions regime generates a complex framework of legal relationships between different bodies of law—international and domestic—and different legal subjects—international organizations, states, and non-state actors. The fragile sinews of this framework support the transmission of innumerable legal obligations, which present interpretation and application difficulties for each actor. These systemic factors, among others, present substantial challenges for international monitoring.

Even though these challenges are, to some extent, inherent to the system, the Council's approach to sanctions moni-

toring should nonetheless be subjected to intense scrutiny. As the favored tool of the small group of states charged with preserving the peace, which imposes enormous resource burdens on the international community, it is the Council's responsibility to monitor sanctions implementation to the best of its ability.

This article suggests that the institutional architecture of the sanctions monitoring system is conceptually sound. This is true of the multi-tiered committee-panel structure and the primary reliance on state self-reporting. However, when the examination moves from theory to practice, it is clear that the legal foundations laid by the Council are entirely insufficient to support the system's structure. As the case studies demonstrate, panels understand themselves differently to the Council and to one another, are susceptible to political interference from committees, have insufficient information to monitor implementation and compliance, and have no common factual or legal standards on which to base their decisions and advice.

This article argues that the causes of these problems are, to some extent, attributable either to the nature of existing legal rules or to an absence of law altogether. This predicament is the result of the resolutions, decisions, and practice of the Council, its committees, and the panels. This article also offers a number of practical solutions—involving reforms to the internal and external laws of the sanctions system—to increase panel independence, reduce and refine reporting obligations, and set appropriate decision-making standards for panel reports.

More broadly, the Council lacks any strategic direction in the creation of panels, and a crisis of institutional identity underlies and informs many of its problems. In an attempt to reverse this trend and provide a basis from which to consider and develop norms of sanctions monitoring, this article proposes a common conception of the expert panel. Drawing from compliance theory, it argues that panels must be structured so as to support a cooperative approach to implementation while having the means to provide transparent information on state performance to deter free riding and advise the Council of non-compliance.

Secretary-General Kofi Annan once observed that “getting sanctions right has been a less compelling goal than getting

sanctions adopted.”<sup>349</sup> This is perhaps at the root of why “practice has led theory” in this space,<sup>350</sup> rather than vice versa. However, trial and error have only advanced the Council so far, and it is time for it, along with the committees and panels, to rectify the institutional and normative constraints that hold back the important work of international sanctions monitoring.

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349. Press Release, U.N. Sec’y-Gen., Secretary-General Reviews Lessons Learned During “Sanctions Decade” in Remarks to International Peace Academy Seminar, U.N. Press Release SG/SM/7360 (Apr. 17, 2000).

350. Chesterman & Pouligny, *supra* note 30, at 506.

