Transnational Legal Order Through Rule of Law? Appraising the United Nations Security Council, 1990-2022

Jeremy Farrall* and Terence Halliday**

Utilizing the theoretical framework of transnational legal orders (TLOs), this article treats two master questions in global governance: what are the limits to the power of the UN Security Council? Can norms of rule-of-law constrain UNSC powers? First, we outline a research design with emphasis on its documentary and unique internal empirical sources. Second, we sketch an interpretive narrative of UNSC engagement from the early 1990s to the present with ROL in three areas of UNSC action: peacekeeping, sanctions, and force. Third, we offer a new conceptual approach by proposing that ROL in the UNSC manifests itself in three dimensions: discourse; procedure (or rules); and structures. These dimensions come into play both internally, within the UNSC itself, and externally, to ROL institution-building in and between states, as well as in post-conflict zones, with a rather gray area between (e.g., when the UN peacekeeping missions are themselves subject to ROL oversight for the behavior of their personnel). Fourth, we examine the emergence of micro-TLOs under construction within the UNSC itself. We conclude with reflections on the potential for empowering elected members of the UNSC and weaker states in the UN to press ROL norms on the UNSC as a springboard for ROL global governance via the UNSC.

* Professor of Law, ANU College of Law, Australian National University.

** Research Professor, American Bar Foundation; Honorary Professor, School of Regulation and Global Governance, Australian National University; Adjunct Professor of Sociology, Northwestern University. An earlier version of this paper was presented at a conference on International Rule of Law at the University of California Irvine, 16-17 September 2022. We are grateful to all participants in the conference for their comments and particularly to Anne Peters for her commentary and to Gregory Shaffer and Wayne Sandholtz for their constructive suggestions for revision.

INTRODUCTION

This paper speaks to the conjunction of two questions that reach to master trends of our time.[1] On the one hand, the UN Security Council (UNSC) stands at the apex of the international political order, the most symbolically powerful political entity in the world beyond the state. The UN Charter empowers the UNSC to make new law, as its decisions are legally binding on all UN member states. Yet the Charter does not set out any clear mechanisms to temper the Council's power. What, then, are the limits on that power? On the other hand, the UNSC has emphasized both the importance of the rule of law (ROL) in international affairs, as well as its own central role in promoting the ROL. As the ROL is arguably at the forefront of global discursive frames for ordering power in the contemporary world, how might its discursive power be translated into effective means of constraining the UNSC?

Both of these questions may be approached productively through the theoretical lens and empirical scholarship on TLO theory. We ask what do struggles over tempering UNSC power through ROL norms and practice reveal about the properties of TLOs? And, conversely, what can TLO theory illuminate in the natural history of the UN's embrace of ROL as ideology and practice? From the vantagepoint of TLO theory and research, the ROL beyond the state and the ROL

1. GREGORY SHAFFER & WAYNE SANDHOLTZ, THE RULE OF LAW UNDER CHALLENGE: THE ENMESHMENT OF NATIONAL AND INTERNATIONAL TRENDS, (on file).

within the UNSC exemplify two distinctives that are associated with a class of TLOs that pose particular challenges for the institutionalization of a legal order that transcends sovereign state boundaries. In contrast to those TLOs where a single global script or law purports to encapsulate a normative consensus, such as the UN treaty on the Carriage of Goods by Sea (The Rotterdam Rules)[2] or the soft law principles on anti-money laundering propagated by the Financial Action Task Force,[3] there is no single codified script for transnational rule of law.[4] And in contrast to TLOs authorized by a single transnational global or regional institution, such as international criminal law, which is codified by the Rome Statute and adjudicated by the International Criminal Court, or European human rights law, which is codified by the European Convention on Human rights and adjudicated by the European Court of Human Rights, ROL has no single authorizing institution or indeed any single institution responsible for holding states and other actors accountable to ROL.

Here, then, is an empirical curiosity. While there is no single script and no single authorizing institution for a global legal order adhering to ROL norms, the apex institution in the post-WWII political order nonetheless pays rhetorical dues to that rather inchoate body of norms. Yet, in an inherent contradiction, the very body that now discursively champions ROL—the UNSC—itself has been reluctant to subject itself to either explicit norms or institutional arrangements that would temper its power.[5] Indeed, Scheppele proposes that ROL has not only been subordinated to expedient great power interest in the UNSC, but may have been appropriated to ends contrary to its loftiest ideals.[6]

The paper unfolds in five parts. First, we outline our research design and its empirical sources. Second, we sketch an interpretive narrative of UNSC engagement from the early 1990s to the present with ROL in three areas of UNSC action: peacekeeping, sanctions, and force. Third, we offer a schematic framework for ROL in the UNSC insofar as it applies to UNSC mandates for these three areas. We propose that ROL in the UNSC manifests itself in three dimensions: discourse;

---

2. *See generally* SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS (2017) (providing background on the lawmaking of the Rotterdam Rules).

3. *See* Terence C. Halliday, Michael Levi & Peter Reuter, *Why Do Transnational Legal Orders Persist? The Curious Case of Anti-Money Laundering*, *in* INTERNATIONAL CRIMINAL JUSTICE AND TRANSNATIONAL LEGAL ORDERING 51 (Gregory Shaffer & Ely Aaronson eds., 2020).

4. On the developing sociological scholarship on global scripts in international law and governance, *see generally*, Terence C. Halliday, Susan Block-Lieb & Bruce G. Carruthers, *Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations*, 8 SOCIO-ECON. REV. 77 (2010); Terence C. Halliday, Shira Zilberstein & Wendy Espeland, *Tempering Unbridled Power: Global Scripts and International Organizations in Struggles for Basic Legal Freedoms*, AM. SOCIO. ASS'N ANN. MEETING (2020); Alexander E. Kentikelenis & Leonard Seabrooke, *The Politics of World Polity: Script-Writing in International Organizations*, 82 AM. SOCIO. REV. 1065 (2017).

5. JOHN FOSTER DULLES, WAR OR PEACE 194–95 (1950) (arguing that the UNSC's powers effectively place it above the law); 9/11 AND THE RISE OF GLOBAL ANTI-TERRORISM LAW: HOW THE UN SECURITY COUNCIL RULES THE WORLD (Arianna Vedaschi & Kim Lane Scheppele eds. (2021).

6. Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMPLE INT'L & COMPAR. L.J. 241 (2013).

procedure (or rules); and structures. These dimensions come into play both *internally*, within the UNSC itself, and *externally*, to ROL institution-building in and between states, as well as in post-conflict zones, with a rather gray area between (e.g., when the UN peacekeeping missions are themselves subject to ROL oversight for the behavior of their personnel). Fourth, we examine the interplay of a so-called meta-TLO for rule of law with three micro-TLOs under construction within the UNSC itself. We conclude with reflections on the capabilities of empowering elected members of the UNSC and weaker states in the UN to press ROL norms on the UNSC as a springboard for ROL global governance via the UNSC.

I. DESIGN

A. An Historical Moment

The Security Council's engagements with the rule of law can be traced back to its very first meeting, on 17 January 1946, when the French Ambassador Vincent Auriol observed: "[W]e are ushering in an epoch of law among peoples and of justice among nations. The UN Security Council's task is a heavy one, but it will be sustained . . . by our remembrance of the sufferings of all those who fought and died that the rule of law might prevail."[7] Yet despite this early appearance in the work of the Security Council, the rule of law featured rarely in the Council's deliberations as the Cold War set in. But it would return with a vengeance following the end of the Cold War, when the concept would become increasingly influential in the UNSC's deliberations and decisions.[8]

Our research pivots on a key moment early in the first decade of the twenty-first century. On 24 September 2003 the Security Council held the inaugural meeting on its new agenda item entitled "Justice and the Rule of Law." The first speaker at that meeting, Secretary-General Kofi Annan, observed that: "This Council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. This applies both internationally and in rebuilding shattered societies."[9]

Arguably, Secretary-General Kofi Annan's clarion call for a UN rule-of-law agenda in his speech of 24 September 2003 marked a turning point for the UNSC. It was an occasion in which Farrall was informally, even serendipitously, implicated (see Appendix 2). The UNSC sessions on ROL in 2003 and 2004 brought to a head numbers of issues arising in global peace and security since the end of the Cold War and opened up prospects for new normative orders in which variants of ROL might be institutionalized as TLOs. The initial UNSC meeting on the rule of law paved

7. U.N. SCOR, 1st Sess., 1st mtg. at 9, U.N. Doc. S/PV.1 (Jan. 17, 1946).

8. For a discussion of the rule of law's 'meteoric' rise in the post-Cold War era, see JEREMY FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 18–24 (Cambridge Univ. Press, 2007) [hereinafter FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW].

9. U.N. Security Council, 58th Sess., 4833 mtg. at ¶ 2, U.N. Doc. S/PV.4833 (Sept. 24, 2003).

the way for the Council's sustained engagement with the concept, beginning with its consideration the following year of a definition proposed by the Secretary-General to guide the UN's work.[10]

We treat the years from 1990 to 2003/2004, and the pivotal moment in the 2003/2004 UNSC sessions on ROL, as a recognition of the dramatic expansion of activity that occurred in the UNSC's use of its powers to maintain international peace and security, following the end of the Cold War and the accompanying decades of paralysis in Security Council decision-making caused by ideological antagonism between key permanent members from both the east and the west.

B. A Hard Case

We acknowledge that the idea that the ROL does or might serve as a constraint on UNSC activities is open to debate. The UN's founders unashamedly established the Council as a political body, pairing the lofty aspirational ideals set out in the UN's principles and purposes, including the promotion of equality and justice, with the pragmatic concession to five great powers of permanent membership and the accompanying veto power. This marriage of convenience between principle and pragmatism secured the participation of those most capable of destabilizing the new experiment in international organization, by granting each of the five permanent members the capacity to prevent the UNSC from taking action by exercising their veto.

This fact, combined with the Charter's vagueness surrounding the limits on the UNSC's exercise of its Chapter VII powers, has led commentators to bemoan both the Council's capacity to do pretty much whatever it wants when the P5 don't disagree, as well as its incapacity, due to the veto, to ensure that it exercises its powers to maintain international peace and security in a consistent, impartial manner.

The UNSC undeniably represents a 'hard' case when it comes to evaluating it as a ROL/TLO case-study. Indeed, it struggles to satisfy most of the checks and balances to arbitrariness identified by Shaffer and Sandholtz, such as application of law to rulers; predictability of published rules; available fora to challenge; proportionate link of means to end so that have some factual grounding; or reason giving.[11] Yet the fact that the UNSC's decisions are binding upon all UN member states under Article 25 of the Charter reinforces the direct relevance of the ROL to its work: the UNSC relies on member states to implement its decisions in good faith in order to be an effective ROL-creator. This raises the stakes when it comes to the UNSC's performance as a ROL-adherent.

C. A Restricted Focus

Our research design can be positioned with regard to important scholarly

10. U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

11. *See* Shaffer & Sandholtz, *supra* note 1.

interpretations and interventions on UNSC activities vis-à-vis the ROL and with respect to our own empirical data and methods.

With respect to scholarly framing, there are several studies of the contemporary role and activities of the UNSC in general,[12] yet before 2010 the effect of the concept of the rule of law on UNSC practice had attracted less scholarly attention. While there was already a substantial literature on the general promotion of the rule of law as part of development and peacebuilding,[13] less scholarship had analyzed the particular role of the UNSC in promoting the rule of law or the extent to which the UNSC's activities to maintain international peace and security themselves promote the rule of law. Some legal scholars had explored whether and how the Council's almost unfettered power to take Chapter VII action might be reconciled with the notion of the rule of law.[14] Others had examined the UNSC's relationship with the rule of law in carrying out particular activities, such as imposing sanctions[15] or deploying peacekeeping operations.[16] But prior to Charlesworth and Farrall's Australian Research Council funded partnership with the Australian Civil Military Centre on the project 'Strengthening the Rule of law through the UN Security Council,' there had been a dearth of systematic studies examining the theory and practice of the UNSC's relationship with the rule of law when employing its most prominent tools to maintain international peace and security: peace operations, sanctions, and the use of force.

An exception is Chesterman's earlier work on UNSC and the rule of law in cooperation with the Austrian government.[17] Using examples from various UNSC activities, his research provides a general analysis of the UNSC in different 'modes' of decision-making, such as "legislator," "executive," and "judge." He does not,

12. DAVID M. MALONE, THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (2004); VAUGHAN LOWE, ADAM ROBERTS, JENNIFER WELSH & DOMINIK ZAUM, THE UNITED NATIONS SECURITY COUNCIL AND WAR (Oxford University Press, 2008).

13. THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (2006); Veronica Taylor, *Big Rule of Law (Patent Pending): Branding and Certifying the Business of the Rule of Law*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE SECURITY COUNCIL 28 (Jeremy Farrall & Hilary Charlesworth eds., 2016); JANE E. STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (Cambridge University Press, 2006); AGNES HURWITZ & REYKO HUANG, CIVIL WAR AND THE RULE OF LAW: SECURITY, DEVELOPMENT, HUMAN RIGHTS (Lynne Rienner, 2008).

14. MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS (1994); DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE (2001); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); Simon Chesterman, *'I'll Take Manhattan': The International Rule of Law and the United Nations Security Council*, 1 HAGUE J. ON RULE L. 67, 67-73 (2009).

15. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8.

16. Jessica Howard & Bruce Oswald, *The Rule of Law on Peace Operations* (Asia-Pacific Centre for Military Law, 2002).

17. Simon Chesterman, The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative, 2004-2008 (2008) (Also published as Letter Dated 18 April 2008 from the Permanent Representatve of Austria to the United Nations Addresed to the Secretry-General U.N. Doc. A/63/69–S/2008/270 (May 7, 2008)).

however, study comprehensively or systematically the theory and practice of the UNSC and ROL in any particular one of the UNSC's mandates, including the now well-defined UNSC spheres of activity in peacekeeping, sanctions, and use of force. Chesterman's policy proposals, moreover, exude more confidence in the prospect of extrapolating the institutional separation of powers model within states to the global domain.

Most recently Scheppele and her colleagues[18] have offered a powerful critique of the UNSC's adherence to the ROL in its interventions directed at anti-terrorism. Perversely, argues Scheppele, the UNSC in an "imperial mode" subverts the ROL, not only setting itself above these norms but wilfully acting contrary to the very values it preaches to the world. Dominated by the P5,[19] and the common cause found by an otherwise divided P3 (US, UK, France) v P2 (Russia and China), the UNSC permits, even promotes, the expediency of force, sacrificing the inconvenience of ROL norms for an instrumental goal.

Although both these frames warrant careful engagement on their own terms, we take a more defined and constrained approach. Our exclusive focus on peacekeeping, sanctions, and force, which share some overlaps with both Chesterman's and Scheppele's work, nevertheless bounds us more closely to appraise the breadth and depth of UNSC decision-making and behavior vis-à-vis the ROL. By restricting ourselves to the three areas of UNSC action, peacekeeping, sanctions, and force, we attend to the pointy end of Council activity, as they are perhaps the most well-publicized, ambitious, and controversial measures it employs to fulfil its primary responsibility under the UN Charter for the maintenance of international peace and security.[20]

D. Interior Empirical Data

Our empirical design combines two bodies of data. Like other scholars, we draw heavily on official sources. Unlike most other scholarship, we benefit from the interplay of Farrall's participant observation *internal* to the UNSC operations and his involvement in *external* activism by academics, civil society, the military, and states to reshape ROL practices internal to the UNSC and externally in its operations. Our perspective for this narrative overview ranges across insider and outsider roles, encompassing different periods in which Farrall has undertaken stretches of insider and outsider observance, as well as stints in which he has engaged actively as a participant with the intent to strengthen the UNSC's capacity both to promote and to respect the rule of law. Farrall interned at a UN-accredited non-government organization (the Quaker United Nations Office, 1996-1997), and was later a UN Secretariat Staffer working inside the UNSC and its sanctions

18. Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMPLE INT'L & COMPAR. L.J. 241 (2013); ARIANNA VEDASCHI & KIM LANE SCHEPPELE, 9/11 AND THE RISE OF GLOBAL ANTI-TERRORIST LAW: HOW THE UN SECURITY COUNCIL RULES THE WORLD (2021).

19. The significance of elected members of the UNSC, the E10, don't feature in this account.

20. U.N. Charter art. 24, ¶ 1.

committees in New York (2001-4); on the UN Secretary-General's Good Offices Mediation Team in Cyprus (2004, 2008); and for the UN's then biggest peace operation, the UN Mission in Liberia (2004-6). As a scholar he worked initially on UN sanctions and international law (1998-2004) and subsequently as an Australian Research Council Chief Investigator on two multi-year research projects analyzing the UNSC and its relationship to the rule of law (2011-2022).[21]

Across these roles, he has sought to influence the UNSC's relationship with the ROL in at least three ways. First, his book *United Nations Sanctions and the Rule of Law*[22] presents in an appendix a series of basic policy recommendations to increase the Council's capacity to reinforce the rule of law through its sanctions practice.[23] Second, in March 2016, Hilary Charlesworth and Jeremy Farrall, with accompanying expert commentary by Terence Halliday, presented sixty-six policy proposals for strengthening the ROL through the UNSC to a packed conference room at UN headquarters in New York, following which the document setting out the proposals was published as an official UNSC document.[24] Third, with his colleagues on the 'E10 Influence Project', he has developed an analytical framework to evaluate and demonstrate instances in which elected members (the 'E10') have shaped UNSC outputs, despite the fact that they do not possess a veto power.[25] Drawing on empirical studies of E10 influence, the project is advancing proposals to enhance the capacity of the E10 to influence UNSC decision-making.[26]

II. THE UNSC AND THE ROL AFTER THE COLD WAR

A. UNSC Formal Powers to Promote the Rule of Law: A Double-Edged Sword

The UN Charter grants the Council primary responsibility for the maintenance

---

21. The first project was Australian Research Council (ARC) Linkage Project 110100708: *Strengthening the Rule of Law through the United Nations Security Counci*l (2011-2014). The second was ARC Discovery Project 150100300: *Leveraging Power and Influence on the UN Security Council: The Role of Elected Members* (2015-2022).

22. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8.

23. *Id.* at 244–46.

24. Jeremy Farrall, Hilary Charlesworth & Alan Ryan, Policy Proposals for Strengthening the Rule of Law through the UN Security Council (Australian Civil-Military Centre et al. eds., 2016). Also published as an official document of the UN Security Council: Letter Dated 25 April 2016 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/397 (Apr. 27, 2016). At the time, Hilary Charlesworth, now a judge on the International Court of Justice, was Professor and Director of the Centre for International Governance and Justice, in the Regulatory Institutions Network (RegNet), at the Australian National University. Jeremy Farrall was a Research Fellow at the same Centre. Dr. Alan Ryan was the Executive Director of the Australian Civil-Military Centre, the Australian Government industry partner with ANU on ARC Linkage Project 110100708: *Strengthening the Rule of Law through the UN Security Council* (2011-2014).

25. Jeremy Farrall et al., *Elected Member Influence in the United Nations Security Council*, 33 LEIDEN J. INT'L L. 101, 101–15 (2020) [hereinafter Farrall, Elected Member Influence in the United National Security Council].

26. Farrall's insider access, of course, raises the vexing challenges and tensions of the participant-observer acting within as an advocate, and standing without, as a scholarly observer.

of international peace and security.[27] The Charter further equips the Council with a wide range of powers to promote the peaceful settlement of international disputes,[28] and to take coercive action, including mandating the application of sanctions and authorizing the use of force, to maintain or restore international peace (Chapter VII).[29] Critically, the Charter also requires all UN member states to give effect to the Council's decisions (Article 25), thus giving those decisions the force of law.

This ability to take legally binding decisions gives the Council substantial capacity to promote the rule of law in international affairs. Ultimately, the Council's effectiveness hinges on the capacity and willingness of UN member states to take the necessary steps to convert its decisions into action.[30] States are more likely to do this if the Council has a reputation for promoting and respecting the rule of law.

B. The UNSC's Expanding Use of Its Powers Since the End of the Cold War

In the UN's first four and a half decades the ideological divide between East and West severely restricted the UNSC's ability to exercise its powers to promote peaceful settlement and maintain international peace and security, with the consequence that the intervention tools we focus on here, namely peacekeeping, sanctions, and force, were rarely employed. As a consequence of the infrequency of UNSC action in its first four decades, much of the Cold War era scholarly literature on the Council's powers, including in particular its Chapter VII powers to apply sanctions and authorize the use of force, focused on the question of how to enable the Council to use its powers more regularly.[31] The notion that the Council might exceed its Chapter VII authority was practically unimaginable to the Cold War academy. However, things changed dramatically after the Cold War, with the Council expanding its activities across all three areas.

The development of **peacekeeping** is widely considered to be a Cold War success-story. Peacekeeping was an innovation borne of necessity in the UN's early years, when it proved impossible to realize the Charter's vision of UN member states contributing their own military forces to a standing UN army under UN command.[32] Instead, the Secretary-General worked initially with the UN General Assembly, then increasingly with the UNSC, to deploy peacekeepers between hostile forces who had agreed to cease-fires. From 1946 until 1988, the UN established thirteen peacekeeping operations (PKOs). These first-generation operations, premised on three core peacekeeping principles of consent, impartiality, and non-use of force (except in self-defense), were generally tasked with the basic

27. U.N. Charter art. 24, ¶1.

28. U.N. Charter, arts. 33-38.

29. U.N. Charter art. 39-51.

30. For thoughtful discussion of how UNSC decisions translate into domestic obligations, see MACHIKO KANETAKE, THE UN SECURITY COUNCIL AND DOMESTIC ACTORS: DISTANCE IN INTERNATIONAL LAW (Routledge, Oxon and New York, 2018).

31. *See* FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8, at 36–37.

32. U.N. Charter, art. 43.

responsibility of monitoring cease-fire lines. Following the end of the Cold War, however, the incidence, scope, and ambition of peace operations expanded significantly. Since 1988, the UNSC has created fifty-eight additional PKOs, deployed around the globe, from Haiti to East Timor and from the Balkans to Mozambique. These post-Cold War operations have been tasked with a broad range of responsibilities. In the case of UN transitional administrations in Kosovo and Timor-Leste, this has even included responsibility for practically all the tasks normally carried out by state institutions. Of particular interest for this paper, twenty-first century peace operations have routinely been mandated to strengthen the ROL, with a focus on (re)building police forces, corrections facilities, and judicial systems.

In the area of **sanctions**, between 1946 and 1989, the UNSC was only able to apply two sanctions regimes. In 1966 the Council applied its very first sanctions regime against the illegal white minority regime of Ian Smith in Southern Rhodesia.[33] In 1977 the Council applied its second sanctions regime, comprising an arms embargo, against the apartheid administration in South Africa.[34] Since the end of the Cold War, however, the Security Council has been able to achieve the necessary agreement to impose sanctions far more frequently. In the twenty-five years since the Cold War, the Council has created thirty-two additional sanctions regimes, bringing the total number of UN sanctions regimes to thirty-four.[35] The Council has employed its sanctions powers so frequently in the post-Cold War era that the focus of contemporary scholarly literature now tends to be on how to *constrain*, rather than *facilitate*, the Council's use of sanctions.[36]

In the area of **force**, Blokker has observed that during the Cold War it was

33. S.C. Res. 232, ¶ 2 (Dec. 16, 1966) (applying prohibitions against the import from and export to Southern Rhodesia of specific commodities and products, including petroleum and leather goods). Less than two years later these sanctions were strengthened substantially, making the Southern Rhodesian sanctions regime the first instance of UN comprehensive sanctions, as it sought to prevent the flow to and from Southern Rhodesia of virtually all products and commodities. *See* S.C. Res. 253, ¶¶ 3-6 (May 29, 1968).

34. S.C. Res. 418, ¶¶ 2, 4 (Nov. 4, 1977) (applying an arms embargo).

35. The first twenty-five UN sanctions regimes are charted in the appendices of Farrall 2007. The most recent nine sanctions regimes have been: the 1970 (Libya) regime, applied by resolution 1970 (2011); the 1988 (Taliban) regime, applied by resolution 1988 (2011); the 1989 (Al Qaida and ISIL) regime, applied by resolution 1989 (2011); the 1907 (Eritrea) regime, applied by resolution 1907 (2011); the 2048 (Guinea-Bissau) regime, applied by resolution 2048 (2011); the 2127 (Central African Republic) sanctions regime, applied by resolution 2127 (2013); the 2140 (Yemen) regime, applied by resolution 2140 (2014); the 2206 (South Sudan) regime, applied by resolution 2206 (2015); and the 2374 (Mali) regime, applied by resolution 2374 (2017).

36. *See, e.g.*, Larissa van den Herik, *Peripheral hegemony in the quest to ensure Security Council accountability for its individualized sanctions regimes*, 19 J. CONFLICT & SEC. L. 427 (2014); ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS (Oxford University Press, 2011); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); Erika de Wet, *From Kadi to Nada: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions*, CHINESE J. INT'L L.12 (2013); Alexander Orakhelashvili, *The Impact of Peremptory Norms on Interpretation and Application of the UN Security Council Resolutions*, EUR. J. INT'L L. 1 (2005).

"inconceivable" that the UNSC would authorize the use of force.[37] However, there was one extraordinary instance during the Cold War. It occurred on 7 July 1950, when the Soviet Union made the ill-judged decision to absent itself from a UNSC meeting on the item 'Complaint of aggression upon the Republic of Korea,' in protest at the alleged misrepresentation of China on the UNSC. However, with the Soviet Union not present to exercise a veto, the UNSC subsequently proceeded to adopt resolution 84 (1950), in which it determined that an armed attack upon the Republic of Korea by forces from North Korea constituted a breach of the peace,[38] then recommended that UN member states assist the Republic of Korea by making military forces available to a unified command under the United States.[39] As with peacekeeping and sanctions, the UNSC's authorizations of force have increased substantially since the end of the Cold War. Writing in 2000, Blokker identifies twenty-seven resolutions containing authorizations of force, for purposes including the enforcement of sanctions, liberating a country from foreign occupation, and returning to power ousted legitimate authorities, spanning eleven situations on the Council's agenda, ranging from Iraq in 1990 to East Timor in 1999.[40] Bannelier and Christakis trace an additional twenty-one resolutions authorizing the use of force between 2000 and 2014.[41]

C. Rule of Law Challenges in the Areas of Peacekeeping, Sanctions, and Force

The Security Council has taken important steps since 1990 to strengthen the rule of law through its use of peace operations, sanctions, and force. However, considerable rule of law challenges remain.

In the area of **peacekeeping**, while the Council has routinely included the task of strengthening the rule of law in the mandates of its twenty-first century multidimensional peace operations,[42] inadequate responses to peacekeeping misconduct scandals during this same period, including in the Democratic Republic of Congo and the Central African Republic, revealed that peace operations and peacekeepers were not always held to the same legal standards as those whose peace they were keeping.

In the area of **sanctions**, in 2009 the Council made a significant effort to provide greater due process afforded to individuals subject to targeted sanctions under the 1267 (Taliban/Al Qaida) sanctions regime by creating the Office of the

37. Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of force by 'Coalitions of the Able and Willing'*, 11 EUR. J. INT'L L. 541, 543 (2000).

38. S.C. Res. 84, preamble (July 7, 1950).

39. *Id.* at ¶ 3.

40. Blokker, *supra* note 37, at 543–44.

41. Karine Bannelier & Théodore Christakis, *Between Flexibility and Accountability: How can the Security Council Strengthen Oversight of Use-of-Force Mandates?*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 209, 209-223 (Farrall & Charlesworth eds., 2016).

42. For discussion of the Council's use of peace operations to promote the rule of law during the period 1990-2016, see STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 87–178 (Jeremy Farrall & Hilary Charlesworth eds., 2018).

Ombudsperson.[43] In 2011, when the Council split that sanctions regime into two separate regimes, the 1988 (Taliban) and 1989 (Al Qaida) sanctions regimes, it empowered the Office of the Ombudsperson, which would now apply only to the 1989 sanctions regime, to investigate the grounds upon which individuals were included in the targeted sanctions list and, when appropriate, to recommend delisting.[44] Moreover, the Council clarified that the Ombudsperson's delisting recommendations must be implemented unless the 1267/1989 sanctions committee as a whole or the Council itself were to decide otherwise.[45] Nevertheless, despite this significant improvement in the due process accorded to individuals on the 1989 Al Qaida sanctions list, those on the other (dozen or so) active targeted sanctions lists do not have recourse to any Ombudsperson process.

In the area of **force**, the endorsement of the 'Responsibility to Protect' doctrine by member states in 2005 recognized the responsibility of all states to protect their own civilians threatened by genocide, crimes against humanity, ethnic cleansing, and war crimes.[46] Where a state was unwilling or unable to meet its responsibility to protect, there was now a responsibility on the international community to intervene to protect those civilians, using force when necessary and acting through the Council. This new doctrine sought to introduce more principled decision-making into the highly politically-charged environment surrounding decision-making on the prospective use of force. Yet excesses in the implementation of the Council's authorization to use force to protect civilians in Libya under Resolution 1973 (2011) raised concerns about the Council's accountability under the rule of law.[47]

The Council's capacity to serve as an effective promoter of the rule of law and guardian of international peace and security is shaped by its response to these challenges. There is thus a strong need to continue refining the way in which the Council's decisions and activities both promote and respect the rule of law.

III. RULE OF LAW AND THE UN SECURITY COUNCIL: A CONCEPTUAL FRAME

An overview of the UNSC's encounters with the ROL since the 1990s reveals

43. For the Ombudsperson's initial mandate, see S.C. Res. 1904, ¶¶ 20–21, Annex II (Dec. 17, 2009). For discussion of the role of elected UNSC members and non-UNSC members in the creation and evolution of the Ombudsperson mechanism, including through the activities of the reform-minded group of predominantly small states called 'Accountability, Coherence and Transparency,' see Jeremy Farrall & Christopher Michaelsen, *Managing the Ebb and Flow of Sanctions Reform: An Important Role for Non-Permanent Security Council Members*, *in* 99 ELECTED MEMBERS OF THE SECURITY COUNCIL: LAME DUCKS OR KEY PLAYERS? 217, 217–36 (Nico J. Schrijver & Niels Blokker eds., 2020).

44. S.C. Res. 1989, ¶ 23, Annex II (June 17, 2011). For discussion, *see* Kimberly Prost, *The Office of the Ombudsperson: A Case for Fair Process*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, 181, 181–92 (Jeremy Farrall & Hilary Charlesworth eds., 2016).

45. S.C. Res. 1989, ¶ 23, Annex II (June 17, 2011).

46. G.A. Res. 60/1, ¶ 138–39 (Oct. 24, 2005).

47. For discussion, see the contributions in Part IV of STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL (Jeremy Farrall & Hilary Charlesworth eds., 2016) at 207–84.

that ROL manifests itself in three dimensions: discourse, procedures and rules, and structures, which we elaborate below.[48] Each of these has an internal focus, within the UNSC itself, and an external focus, in the fields of activity in which the UN mounts its missions.

We designate as *internal* those aspects of deliberation and decision-making that occur within the UNSC itself, whether as an actor or an arena. We designate as *external* those occasions where the UNSC seeks to strengthen ROL because it judges that there has been a breakdown or vacuum of some sort. Thus, peace operations are tasked to strengthen ROL because local ROL authorities and institutions are incapable or unwilling to do so. Sanctions are applied against governments and other actors who represent a threat to the peace, which in turn undermines the international ROL. And force is authorized against governments and other actors who represent an even more urgent threat to or breach of international peace and security, and hence to the international ROL.

It is useful to cross-classify these dimensions and review them systematically (Table 1).

48. We are grateful to Martin Krygier for the comment that a fourth dimension could be added, viz., that of practices. However, insofar as our focus here mirrors that of scholarship on transnational legal orders, we restrict ourselves to the normative elements of an order that may be theoretically distinguishable from the behaviors and practices that stimulate norm or rule-making or the behavioral outcomes to which a normative order is directed. In any empirical situation, norms and behavior are inextricably interwoven, as for instance, when norms come to be taken-for-granted in everyday behavior by actors. Conceptually and theoretically, however, there is value in teasing them apart for more precise scrutiny of their attributes.

Table 1: Dimensions of ROL in the UN Security Council

ROL as: **Locus of ROL:**	**Discourse**	**Rules**	**Structure**
Internal	• Secretary General • UNSC debates • Rhetoric of UN states (P5, E10)	Four principles expressed as 66 recommendations in *Strengthening ROL* (2016)	Eight bodies, including: • Ombudsperson • Subsidiary bodies • UN Sanctions Coordination Committee (R40)
External	• Political & legal philosophy • Academic research • Political leaders • Public intellectuals	• Applied to peacekeeping & sanctions in field • Applied to institution-building in states	• International tribunals • National courts

A. Discourse

We designate as "discourse" the bundle of abstract formulations about the rule of law that are expressed through speeches, policy statements, academic writings, and reflective commentary in the public sphere that is brought to bear on the UN in general and the UNSC in particular. These correspond substantially with the "meta-principle" of rule of law identified by Shaffer and Sandholtz.[49] Each discursive form has its own distinctive properties, its own internal logic, rhetorical characteristics, epistemological frames, target audiences, arenas of engagement, and platforms for presentation. While these warrant much more refined empirical analyses in their own right, for present purposes we proceed on a basic distinction between internal and external forums or arenas in which discourse is situated.

The *internal* rhetoric on ROL is well-marked by Secretary-General Kofi Annan's pivotal speech on September 24, 2003. The speech points to the wider phenomenon of rhetorical expression of ROL in pronouncements, statements, and justifications by actors within the UNSC, within the UN, and in the wider

49. Shaffer & Sandholtz, *supra* note 1.

international community of nations. In his analysis of UNSC resolutions in the decade before 2005, Farrall observed that its pronouncements on the rule of law were "increasingly frequent," yet "fluid" in meaning, "elusive" and "chameleon-like."[50] At least five clusters of meaning variously pointed to "law and order" or "holding criminals accountable," to "principled governance" or "protection and promotion of human rights," or to "resolving conflicts in accordance with law."[51] Sometimes these complemented each other, sometimes one or another appeared, and sometimes it wasn't clear which of these adequately captured the vague allusions of a resolution. They functioned as rallying calls for adherence to abstract ideals which might serve as an umbrella for normative consensus and as legitimation for UNSC action. As rhetoric they valorized an inchoate ideal that arguably had an inner core of commitment to minimizing the "misuse or abuse of political power."[52] We shall observe, however, that from 2003 through 2020 the discourse within the UNSC become more clearly articulated and sharpened as it was expressed in action-items and pragmatic recommendations (below and Appendix 1).

External formulations of ROL of course rest upon the vast scholarly literature on ROL in its historical emergence, comparative and contextual expression, and philosophical and theoretical debates.[53] Our focus, however, adheres more closely to scholarship that holds the UNSC itself to account by ROL norms.[54] Here we position ourselves more closely to Chesterman's ambitious and optimistic agenda for the UNSC to extrapolate from an institutional configuration within states to a global configuration across states and less closely to Scheppele's pessimistic indictment of the UNSC as a subverter rather than propagator of ROL beyond the UNSC in its anti-terrorism activities following 9/11. Our focus is particular—on use of force, peacekeeping, and sanctions—and limited on what might be possible in the milieux of power within the UNSC.

It is also disciplined by an interior awareness of how the UNSC functions in day-to-day activities and is conditioned by a realism of what is conceivably possible, given that other realism of great power politics. Here we find an affinity with Krygier's efforts to valorize ROL as a prevailing value, rhetorically expressed as "tempering unbridled power," yet to undertake research on what means to this end will fit a context "where the institutions typically thought of in connection the ROL

50. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8 at 32, 35.

51. *Id.*

52. *Id.* at 35.

53. BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

54. Simon Chesterman, The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative, 2004-2008 (2008) (Also published as Letter Dated 18 April 2008 from the Permanent Representatve of Austria to the United Nations Addresed to the Secretry-General U.N. Doc. A/63/69–S/2008/270 (May 7, 2008)); Martin Krygier, *The Security Council and the Rule of Law: Some Conceptual Reflections*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE SECURITY COUNCIL 13 (Jeremy Farrall & Hilary Charlesworth eds., 2016); Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMPLE INT'L & COMPAR. L.J. 241 (2013); ARIANNA VEDASCHI & KIM LANE SCHEPPELE, 9/11 AND THE RISE OF GLOBAL ANTI-TERRORIST LAW: HOW THE UN SECURITY COUNCIL RULES THE WORLD (2021).

in domestic circumstances don't exist in the international arena."[55]

B. Procedure and Rules

If the multiple discourses of ROL could arguably be convergent on a generic ideal of checking power, the procedures and rules within the UNSC offer a mid-level of doctrinal specification where empirical research can disclose whether discernible rules or implicit rule-bound actions reflect the higher ideals in ROL discourse.[56] At this mid-level, principles and rules can be layered. In their policy proposals to the UNSC in 2016, Farrall, Charlesworth, and Ryan advance a responsive model of the ROL centered on four basic principles—transparency, consistency, accountability, and engagement.[57] However, they extrapolate directly from these to specific recommendations which might be construed as rules.[58]

For ROL recommendations-cum-rules *internal* to the UNSC, for instance, they propose under the principle of transparency in peace operations that "when the UNSC creates or modifies a peace operation mandate that seeks to strengthen the rule of law, the Council should ensure that the mandate clearly identifies the operation's central rule-of-law objectives" (R10, p43). Under the principle of accountability as it is applied to UNSC use of force, they recommend that the UNSC adopt a practice, or operational rule, that "the UNSC should request regular briefings by states and groups of states implementing use of force mandates" (R57, p48).

For ROL recommendations-cum-rules *external* to the UNSC, on peacekeeping, in adherence to the principle of transparency, they propose that "the UNSC should request the Secretary-General to undertake periodic qualitative and quantitative monitoring and evaluation of each peace operation's rule-of-law objectives (R12,p43); and in keeping with the principle of accountability, they propose that "when the UNSC establishes or extends the mandate of a peace operation, it should emphasise the need for troop-contributing countries to ensure accountability for the investigation and prosecution of allegations of serious crimes by their troops" (R19, p44).

---

55. Martin Krygier, *The Security Council and the Rule of Law: Some Conceptual Reflections*, *in* STRENGTHENING THE RULE OF LAW THROUGH THE SECURITY COUNCIL 13, 19 (Jeremy Farrall & Hilary Charlesworth eds., 2016).

56. In fact, rules within the UNSC are open to a wider sociolegal program of research on the hierarchical ordering of rule-types, subsumed under principles, and elaborated for their formal properties as drafting reflects the politics of rule-making and the objects of rule-governing. *See* BLOCK-LIEB AND HALLIDAY, *Creative Design in Legal Technologies*, *in* GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS 227, 227–64 (2017).

57. JEREMY FARRALL, HILARY CHARLESWORTH & ALAN RYAN, POLICY PROPOSALS FOR STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 8–9. (2016). Also published as an official document of the UN Security Council. Letter Dated 25 April 2016 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/397 (Apr. 27, 2016). Adapted from the five ROL principles proposed by Farrall (2007).

58. *Id.* at 42-49.

C. Structures

The ROL as an institutional configuration within states is conventionally understood to require countervailing institutions that divide power and balance it amongst them. Whether through a separation of powers among executives, legislatures or judiciaries, or a division of government between federal and subsidiary centers of government, or variants on fracturing power within the state and balancing it with forces outside the state, this structural element of ROL appears integral to its ability to temper power. This of course raises the vexing question: is it empirically, theoretically, or normatively acceptable to extrapolate from institutional configurations within a state to the global order writ large?

Can we treat the UNSC as such an extrapolation? Critics of the UNSC's wide-ranging powers have argued that the Charter permits it to act above the law,[59] even enabling it to engage in imperialism.[60] While the UN's founders might have anticipated that two of the UN's other primary organs, namely the UN General Assembly and the International Court of Justice, would play the roles of global legislature and judiciary, thus balancing the UNSC's executive mode, the Charter system falls short of a meaningful separation of powers. Indeed, as Chesterman has persuasively argued, the UNSC's practice in the Cold War era reveals instances of the UNSC itself acting in executive, judicial, and legislative modes.[61] Nevertheless, the process of structural differentiation, with a prospect of allocating power to different social entities across different mandates of the UNSC, may open up a line of inquiry to appraise such prospects within the UN itself.

Internal to the UNSC we observe minimal and fragile but discernible structures which may contribute to UNSC accountability and transparency, among other principles. Eight social entities of one or another kind have been created to advise, enable, and monitor the UNSC's ROL initiatives.[62] To what extent do they perform purely executive functions without any degrees of freedom or can they exert de facto limits or influences on UNSC actions? For instance, the *Sanctions Committees* display variations in their adherence to ROL norms in the procedures and working methods they adopt to execute UNSC imposition of sanctions, to administer exemptions, and to evaluate humanitarian impact, among others. For a time, a *Working Group on Sanctions* convened to produce recommendations to improve the effectiveness of sanctions. *Bodies of experts* are created for each sanctions regime. Since 2003 on Liberia, and subsequently on Iraq, UNITA, Sierre Leone, Afghanistan/Al Qaida and Sudan, among others, they have become institutionalized and tasked with investigation of implementation and violations of

59. *See* Dulles, *supra* note 5.

60. *See* Vedaschi & Scheppele, *supra* note 18.

61. Simon Chesterman, The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative, 2004-2008 (2008) (Also published as Letter Dated 18 April 2008 from the Permanent Representatve of Austria to the United Nations Addresed to the Secretry-General U.N. Doc. A/63/69–S/2008/270 (May 7, 2008)).

62. FARRALL, *supra* note 8, at 32-35.

sanctions. The experts are usually based in their home countries and undertake field missions to sanctions sites. Complementing them are *monitoring bodies,* based at UN headquarters in New York, and staffed by UN civil servants. They track implementation of sanctions and report periodically to the relevant Sanctions Committee. They tend to have a higher status and are more institutionalized than other expert bodies. None are permanent. Their terms and mandates are extended from time to time until the sanctions regime is terminated.

The most important of subsidiary or partially differentiated bodies within the UNSC may be the formation of the Ombudsperson's Office in the sanctions regime.[63] Established in 2009, this office was created to deal with applications by individuals and other targeted entities for de-listing by the UNSC.[64] Notably, its creation emerged from a series of criticisms after 1999 on the lack of due process in the sanctions regimes. Concerns expressed by many member-states obtained legal impetus when the European Court of Justice brought its international juridical authority to bear in the litigation over the *Kadi* case.[65] Here, a global body, the UNSC, hitherto for the most part unchecked by any judicial body of comparable jurisdiction, was prompted to improve the fairness of its sanctions procedures due to a decision by a court with a notable regional but no global jurisdiction.

Prost,[66] a serving Ombudsperson for the Security Council Al-Qaida Sanctions Committee, has asserted that the Ombudsperson office "represents an important step forward in terms of enhancing the rule of law at the international level."[67] In her 2016 stock-taking she maintains that elements of fairness and due process have been introduced, with varying degrees of success, in four aspects of the Ombudsperson's proceedings: sharing evidence with petitioners of the case against them; giving them an opportunity to answer the charges in that case; seeking to obtain a more independent review of information salient to a case; and undertaking all this in a "fair and timely process." Nevertheless, she also concedes limits to transparency and fairness within proceedings, while confronting the fundamental underlying condition that the UNSC has kept the Ombudsperson's office on a series of temporary extensions rather than giving it any kind of formal continuity and independence.

External structural and institutional tempering of power cannot come from arbiters external to the UNSC. While some international courts have addressed

---

63. Kimberly Prost, *supra* note 44.

64. Farrall, Elected Member Influence in the United National Security Council, *supra* note 24, at 109-111 (2020).

65. *See* Joined Cases C-402/05 P & C-415/05, Yassin Abdullah Kadi & Al Barakaat Int'l Found.n v. Council of the Eur. Union & Comm'n of the Eur. Communities, 2008 ECR I-6351 (Sept. 3, 2008); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Eur. Comm'n & the Council of the Eur. Union v. Yassin Abdullah Kadi, 2013 ECR 00000 (July 18, 2013). *See also* Case T-315/01, Yassin Abdullah Kadi v. Council of the Eur. Union & Comm'n of the Eur. Communities, 2005 ECR II-3649 (Sept. 21, 2005); Case T-85/09, Yassin Abdullah Kadi v. Eur. Comm'n, 2010 ECHR II-0000 (Sept. 30, 2010).

66. Prost, *supra* note 44, at 183-87.

67. *Id.* at 190.

ROL issues in sanctions regimes, these instances are rare and haphazard, as no court exerts systemic or coherent constraints on the UNSC, even if they potentially influence its internal politicking and structural adaptations. Yet external structural expressions of UNSC ROL can be seen in certain issue-areas where the UNSC seeks to get beyond itself: to temper power more directly through its peacekeeping forces; to set up or enhance existing structures to ensure that UNSC sanctions regimes, among others, do not abrogate ROL norms that apply to vulnerable populations; and to build ROL institutions within countries. Quite apart from the relative effectiveness of any of these modest extensions of ROL outside UNSC deliberations themselves, they nonetheless may be readily subverted by a perceived lack of adherence by the UNSC to ROL, as we have noted, whether in its internal deliberations, or in its wholesale assertion of force by P5 states in seeming disregard for legal processes that would constrain naked power in pursuit of national interest.

IV. TRANSNATIONAL LEGAL ORDER

The comparative and inter-disciplinary project on transnational legal orders seeks to elaborate a systematic framework for building empirically-grounded theory on the ordering of law beyond the state. There are increasing indications that TLO theory enables scholars from many disciplines to hold in creative tension the rise and fall of a startling diversity of legal orders beyond the state that purport to solve social problems as unlike as climate change and inhibitions to lending, anti-money laundering and post-conflict resolution, fiduciary relationships and double taxation, constitution-writing and failing businesses, among many others.[68]

The double confounding of rule of law and the UN presents a special challenge. On the one side, the rule of law, a long and amorphous tradition of thought, institutions, rhetoric, and investments seems constantly to resist encapsulation in theory or practice. On the other side, the sheer vastness of the UN, and its ubiquitous presence or shadow over every international arena, presents a research site so bewilderingly entangled that empirical work invariably falls short. Since ROL, in one or another of its familiar academic formulations, can be found in all the UN's conventions, and no sphere of human behavior falls entirely outside the UN's reach, their conjunction presents a rare challenge to sociolegal scholarship.

For these reasons, as we intimated earlier, we sharply constrict our focus to the apex of the UN as an institution—the UN Security Council—and to ROL in its deliberations and three of its mandates. Now we begin to explore whether the lens of TLO theory, and its accumulating evidentiary base, can create some meaning, clarity, or coherence, where a universal discourse encounters a universal institution.

Three conceptual aspects of TLO come immediately to the fore. First, whereas much other work on TLOs reaches to regional and global orders on trade or human rights or crime, *transnational* may also be understood as a legal order occurring among nations *within* a given transnational arena such as UNSC. Cf. UNCITRAL.

68. Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, 5 UC IRVINE J. INT'L, TRANSNA'L & COMPAR. L. 1, 1-2 (2020).

i.e., the *order* applies both to the object of the lawmaking and the lawmaking process itself. Second, the nomenclature that emerged inductively from earlier TLO studies pointed to the merits of imagining, identifying, and researching scales of TLOs. In climate change, for instance, one may point to a meta-TLO (e.g., The Paris Agreement), various mega-TLOs[69] (e.g., within the EU), and micro-TLOs, as Bodansky (2015) characterizes agreements on greenhouse gas inventories or maritime transport emissions. Rajah[70] proposes, in fact, that "transnational rule of law discourse may be seen as a meta-TLO that frames and contextualizes all efforts to manage and regulate . . . conceptions of legality in the sphere of the transnational." We view the competing visions of ROL in the UNSC as a struggle over the scope and substance of three micro-TLOs on peacekeeping, sanctions, and force, yet each is also nested within a meta-TLO on ROL that presses the UNSC to attain its highest ideals and core principles.

The logic of TLO theory begins with a presenting problem, growing gradually through facilitating circumstances and then sharply through a precipitating event, which energizes social actors to seek a solution through transnational law. That problem is framed in a particular way that lends itself to a particular legal solution; through a series of recursive moves over months or years, between local, national and transnational levels of action, and driven by four mechanisms (diagnostic struggles, actor mismatch, inconsistency, contradictions), an order may emerge that is eventually institutionalized or settled such that a new set of legal norms come to be taken for granted as appropriate bases for action and they are mutually reinforcing by concordance in transnational, national, and local law. This TLO may be more or less aligned with an underlying problem, or it may overlap, compete, or co-exist with other TLOs or forms of order that strive for normative primacy.

The speech to the UNSC by Kofi Annan on 23 September 2003 is a marker for ROL as an explicit normative framing for UN action. It follows fourteen years of post-Cold War reconfigurations in the world geopolitical order where the fall of the Berlin Wall, the dissolution of the Soviet Union, the civil wars in the former Yugoslavia, Iraq's invasion of Kuwait, military and other conflicts in many regions, and a massive enterprise of economic and political development in the 1990s. If collapse of command economies in favor of economic liberalism, if the exhaustion of authoritarian regimes in favor or democracies, if the repudiation of rule by law regimes in favor of rule of law all heralded, if perhaps, "the end of history", in a now sadly ironic expression of hubris, then the shock of 9/11 and the US and UK invasion of Iraq suddenly precipitated a global re-appraisal of military force exercised by the world's hegemon and the questionable status of the UN as a

69. *Cf.* TERENCE C. HALLIDAY & GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERS 3–72 (Cambridge Univ. Press 2015); Jothie Rajah, *'Rule of Law' as Transnational Legal Order*, *in* TRANSNATIONAL LEGAL ORDERS 340, 340, 343 (Terence C. Halliday & Gregory Shaffer eds., 2015); Daniel Bondansky, *Climate Change: Transnational Legal Order or Disorder?*, *in* TRANSNATIONAL LEGAL ORDERS 287 (Terence C. Halliday & Gregory Shaffer eds., 2015).

70. Jothie Rajah, *'Rule of Law' as Transnational Legal Order*, *in* TRANSNATIONAL LEGAL ORDERS 340 (Terence C. Halliday & Gregory Shaffer eds., 2015).

peacekeeper of last resort. While we cannot point definitively to 9/11 and Iraq as the trigger for the Secretary-General's launch of the ROL agenda for the UN, it is striking how widely he throws down a gauntlet and how instantly he restricts it to a narrow strand of UN endeavors: "[t]his council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. This applies both internationally and in rebuilding shattered societies. It is the latter that I wish to speak about today."[71]

The problem-at-large confronted by the UNSC, just six months after the US invaded Iraq, is construed generically as the need "to maintain international peace and security." But Annan instantly retreats to the much safer terrain of "rebuilding shattered societies." If ROL-writ-large was shunted aside in the extraordinary events that led to the UN's inculpation in the Iraq war, Annan invoked the ROL-writ-small, seemingly to keep law, not war, as a prevailing ideal of international conflict-resolution, and as a practical tool in very specific domestic trouble spots. From this moment the ROL agenda writ large radiates across the institutional landscape of the UN in ways far beyond the scope of this paper. The UNSC's continuing formal engagement with that agenda is captured by Appendix I, which tabulates the evolution from 2003 to 2020 of the Council's thematic meetings dedicated to ROL issues.

A. Micro-TLOs in the Making?

A more precise grasp on ROL in the UNSC may be obtained by narrowing attention to the construction of three micro-TLOs—one on each of the UNSC's mandates for peacekeeping, sanctions, and force. Arguably, these micro-TLOs in formation are vehicles for conforming the UNSC's deliberations as a whole, both symbolically and as practice, to the meta-TLO expressed by its discursive proponents within and beyond the UN.

From 2000 to the present we observe several successive, somewhat interconnected, initiatives to create legal order in the UNSC that adheres to more explicitly articulated ROL procedural and structural norms. Nevertheless, the respective initiatives differ in their prescriptions. A TLO analysis begins to disentangle some of those convergences and divergences as an incipient episode of TLO-making that has unfolded since 2000.

An initiative, from 2004-2008, began through cooperation between the government of Austria and NYU's Institute for International Law and Justice (hereafter Austria/NYU). A subsequent initiative, from 2010-2016 and beyond, was led principally by sociolegal scholars at the Australian National University and the government of Australia (hereafter Australia/ANU). Each resulted in a report delivered to the UN, included in UN proceedings, and delivered to UN forums. Thereafter, a continuing effort has been mounted to influence ROL in the UNSC by mobilizing elected UNSC members to exert their influence in ways not

71. U.N. SCOR, 58th Sess., 4833 mtg., at 2, U.N. Doc. S/PV.4833 (Sept. 24, 2003).

adequately recognized or mobilized until more recently.

The construction of TLOs, small or large, begins with a presenting problem purportedly to be solved by law.[72] Each of the initiatives from below were animated respectively by the research of Chesterman on international humanitarian intervention, UN state-building and global administrative law,[73] and Farrall's work inside the UN Secretariat and research on UN sanctions and post-conflict peacebuilding.[74] In all cases they observed deficits in UNSC decision-making, which subverted its legitimacy and probable effectiveness, and pathologies in UN practices in the field. In each case they observed manifest deviations from at least the spirit of high ROL ideals and in each case it appears their initiatives were triggered by the explicit ROL turn in discourse as it was expressed in Kofi Annan's 2003 speech and the UK's effort to put ROL more prominently on the UNSC's agenda. Significantly, in both cases the push for transnational reform came from "below" and in a partnership of state and non-state institutions.

Insofar as diagnostic struggles are an integral element of recursive cycles in the rise and fall of TLOs, we observe convergence and divergence. The earlier and later cycles of ROL-making share the view that UNSC-authorized operations fail frequently in their administration of sanctions, their control over peace-keeping forces, and their harms to vulnerable populations, such as women and children. Austria/NYU, however, approaching these problems from a global administrative law frame, diagnose the problem as a failure of the UN essentially to adopt an institutional and procedural configuration of ROL that is conventional in well-established ROL orders within states. Failures are structural insofar as the UNSC and UN as a whole have not adequately differentiated its legislative, judicial, and executive functions and made the UNSC sufficiently accountable to a global judiciary. The UNSC has insufficient barriers to check what too easily can be abusive power. Australia/ANU, approaching these problems from a more sociolegal and regulatory governance perspective, observes a similar scope of UNSC breaches in the ROL, with particular attention to the deficiencies of sanctions regimes.[75] While Australia/ANU can concur with the Austria/NYU depiction of the global order as deficient in institutional configurations that are morphologically parallel to those within states, it departs from the Austria/NYU in its appraisal of where the fulcrums of change can be found and in the realism of what prescriptions might follow.

A driver of TLOs in formation or reformation frequently is actor mismatch—

---

72. Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 473, 495-96 (Terence C. Halliday & Gregory Shaffer eds., 2015).

73. SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2006); SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION AND STATE-BUILDING (2004).

74. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8; Jeremy Farrall, *Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict*, *in* THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS 134 (Cambridge Univ. Press 2009).

75. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8.

those actors who write and promulgate the global norms are not inclusive of all the actors essential for implementation. Those left out use their powers of resistance or non-compliance or governance-skepticism to subvert international norms. It can be noted that in both the Austria/NYU and Australia/ANU proposals for ROL reforms in the UNSC there is an alliance of relative outsiders to the P5 power configuration within the UNSC. Austria used Chesterman's report and the buildup to it to build its legitimacy and case for election to the Council in October 2008, prior to serving on the Council in 2009-10. In Australia's case, its campaign for ROL reforms extended from a similar bid for UNSC elected membership, through the benefits amplified by Australia's UNSC membership in 2013-2014, where the Australia/ANU conferences on ROL in New York could profit from greater access to key players in and around the Council, including some P5 diplomats (US, UK), and to follow-through after Australia stepped off the UNSC. Put another way, whereas Austria/NYU rode an electoral bid before membership, Australia/ANU rode a rising wave into the UNSC, a bigger wave during UNSC membership, and then the longer wave of post-membership legacy protection.

Close analysis reveals two further differences. The Austria/NYU initiative is driven by a small state in cooperation with an academic institution. It is true that its many conferences from 2004-2008 include numerous senior international law scholars, former senior and some serving UN officials, experienced former judges in international tribunals, and numbers of diplomats from small countries, but it is a configuration principally of outsiders to the UNSC and it has none of the force of P5 members. The ANU initiative several years later similarly mobilizes states and non-actors in its series of consultations in Canberra and New York. The Australia/ANU cycle of reform consultations, however, involve actors of a different hue. The ANU alliance with the Australian government is forged through a partnership with a whole-of-government body dedicated to promoting civil-military coordinated responses to natural and man-made disasters in the Asia-Pacific region. By including the military, with expertises essential to peacekeeping and force, there is a legitimating inclusion of an actor integral to UNSC operations. Moreover, from the beginning the ANU project not only aligned itself with Australia's ultimately successful bid to become an elected member of the UNSC for the term 2013-2014, but its reformist cycle embraced and ratcheted up the aspirations of that large number of states that aspire to an elected two-year term on the UNSC.[76] Further, the Australia/ANU proposal deliberately sought to translate the balance of power asymmetries between the P5 and E10 in the UNSC into a new idiom of UNSC debates where ROL might present a common ground of discourse,

76. Formally, the relationship between the Government of Australia and ANU scholars was a little more loose-linked, a structural connection that had benefits for both sides. On the one side, while the partnership with the Civil Military Centre enhanced a de facto relationship with multiple branches of government, the absence of a formal partnership allowed the Government to distance itself—as it did on one occasion—from any part of the report presented to the U.N. which it could not support. On the other side, the underwriting of the academic research by the Australian Research Council assured independence for scholars in their findings and proposals.

procedure, and structure that gave the E10 powers of persuasion that otherwise would be discounted or neglected.

The diagnoses and mix of actors in the Austria/NYU and Australia/ANU led to clear commonalities in principle in their respective sets of norms, but also observable differences. The fact that the ANU initiative could observe the substance and reception of the Austria/NYU proposals enabled the later cycle of proposed reforms and their propagation to adapt appropriately. To contrast each in broad brush strokes: Whereas the Austria/NYU report derived its recommendations from diffuse ROL norms, the Australia/ANU report explicitly articulated four master norms,[77] themselves revised from an earlier set of five norms.[78] Whereas the NYU ordered its expansive recommendations on the presumption that a state-like separation of powers can be established beyond the state, the Australia/ANU report took a more pragmatic strategy, judging that reforms were only feasible and more probable if they were modest and able to be implemented within the constraints of extant UNSC procedures and structures. Whereas the Austria/NYU recommended its diffuse norms to be applied to a scattering of UNSC-related operations, the Australia/ANU report tightened its application of its four sets of explicit norms to the three designated areas of sanctions, peacekeeping, and force, thus more sharply linking the application of particular norms to particular spheres of UNSC decision-making and operations. And whereas the 2008 launch of the NYU norms took place prior to Austria's UNSC term, with the aim of bolstering the legitimacy of its UNSC candidacy, the Australia/ANU ROL recommendations were launched in 2016, with the co-sponsorship of Australia, as a recent UNSC member, and Japan, as a current member, supported by the UN Secretariat's ROL unit within the Executive Office of the Secretary-General, in a chamber of 100 or more diplomats and staffers packed into a UN conference room at UN HQ, a launch explicitly embedded within the motivating frame of increasing the impact of elected members of the UNSC before, during, and after their terms of office.

From Farrall's initial focus on sanctions, to a widening of scope in the Austria/NYU norms, to the tightening and linking of explicit ROL norms to particular UNSC procedures and operations, the iterative process of three cycles both reinforced the pressure for ROL norms and brought the impetus for change more forthrightly into a broader set of impulses in the UN for the vast majority of states to exert greater influence in the UNSC as elected members.

Thus, we should see the succession of the Farrall (2007), NYU (2004-8) and

77. These four norms/principles are Transparency, Consistency, Accountability and Engagement. For a description of the way these elements combine to form a responsive model of the ROL, for the purpose of application across UNSC decision-making, peacekeeping, sanctions and force, see FARRALL, CHARLESWORTH & RYAN, *supra* note 24, at 8–9.

78. In 2007, Farrall constructed a pragmatic model of the ROL for application to the UN sanctions system, comprising the five norms/principles: transparency, consistency, equality, due process, and proportionality. *See* FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW, *supra* note 8, at 39–41.

ANU (2010-16) initiatives not as independent moments of intervention but as successive recursive cycles of multiple TLO-building efforts that together constitute an episode to identify and propagate restraining norms that temper inconsistent and arbitrary exercises of unbridled power too often displayed by the UNSC. Focused TLO-building on norms respectively for peacekeeping, sanctions, and force were premised upon and might also lead to an expansive conformity of UNSC deliberations to a meta-TLO on ROL.

In subsequent related work on the E10 Influence Project, a team of scholars from the University of New South Wales, ANU, and the University of Queensland have interrogated a basic assumption underpinning conventional understandings of how the UNSC works, namely that all of the power and influence on the UNSC resides with the P5 and that the elected members (E10) are just there to make up the numbers.[79] Farrall et al (2020) identify three examples in which E10 members, working either individually, in specific UNSC terms, or collectively, across multiple terms or different members, have been able to shape UNSC decision-making, despite the fact that they do not possess the raw power epitomized by the veto power.[80] All three examples – Brazil and the Responsibility While Protecting; Australia and the human rights situation in North Korea; and a broad, sustained coalition comprising successive E10 members and UN member states not on the UNSC for the establishment of the 1267 Ombudsperson[81] – represent attempts to rein in the UNSC's propensity to undermine the ROL and thus to boost its capacity to strengthen the ROL.

The E10 influence project, like its predecessor, the strengthening the ROL project, has benefited from the engaged support of the Australian Mission to the UN. The research team undertook multiple rounds of fieldwork in New York between 2016 and 2019, consulting widely with UN practitioners and diplomatic representatives, in order to identify prospective examples of E10 influence. During this fieldwork, the Australian Mission provided valuable strategic advice to the team, hosting multiple seminars, bringing the team in close conversation with current and candidate E10 members, on the opportunities and constraints facing the E10 when seeking to shape UNSC decision-making.

How then may we appraise this incipient TLO-making to tighten and sharpen ROL procedures and practices in the UNSC? Insofar as the ROL dimensions in Table 1 are salient to the UNSC, there is little doubt that the ROL came to be relatively institutionalized as a discursive frame and a standing agenda item for the

79. Australian Research Council Discovery Project 150100300: 'Leveraging Power and Influence on the UN Security Council: the role of elected members' (2015-2022). Jeremy Farrall & Jochen Prantl, *Leveraging Diplomatic Power and Influence on the UN Security Council: the Case of Australia*, AUSTL. J. INT'L. AFF. 601–11 (2016).

80. Farrall, Elected Member Influence in the United National Security Council, *supra* note 25, at 101–15. For discussion of important E10 contributions to the UNSC, see ELECTED MEMBERS OF THE SECURITY COUNCIL: LAME DUCKS OR KEY PLAYERS?, *supra* note 42.

81. *See id.* at 106-107 for Brazil and the Responsibility to Protect; *id.* at107-109 for Australia and the human rights situation in North Korea, and 109-111 for the 1267 Ombudsperson.

UNSC, recurring repeatedly from 2003 to 2022 (Appendix I). The fact that the Austrian/NYU report, and, even more, the Australian/ANU policy proposals on ROL could evoke growing attention by some P5 members, many E10 members, and states with the UN General Assembly in itself demonstrated a vibrancy of the ROL discourse in this global diplomatic context. Nonetheless, it is not uncontested. Russia, in particular, has in recent years resisted ROL items on the UNSC agenda. There is some evidence that some states may be adopting a discursive work-around whereby they reach ROL issues but in the language of "accountability" or "justice," among other less evocative terms.[82]

In terms of the reception by the UNSC of the procedures and rules proposed by the Australian/ANU report, the clearest example relates to the accountability of UN peacekeeping operations. Proposal 20 states that "When the Security Council establishes or extends the mandate of a peace operation, it should reaffirm that allegations of sexual exploitation and abuse must be investigated and prosecuted by troop-contributing countries."[83] In the months following the distribution of the proposals,[84] the UNSC included a provision requesting troop-contributing countries to ensure full accountability for acts of sexual exploitation and abuse by their troops in eight separate resolutions renewing the mandates of eight different peace operations.[85] While it might be a stretch to claim that the UNSC would not have included this provision in these eight resolutions in the absence of proposal 20, the fact that the UNSC did so at this moment indicates that the proposal was tapping into currents of change demanding greater ROL adherence by peacekeepers and their countries of origin.

The potentially most significant shift in constraining UNSC arbitrariness on sanctions came with the establishment of the Office of the Ombudsperson. The Australian/ANU Report recommended that its temporary status be made permanent and that its restriction to one sanctions regime be expanded to others.

---

82. For instance, Albania very recently introduced the theme 'Strengthening accountability and justice for serious violations of international law' in its one-month role holding the UNSC Presidency. For the provisional verbatim record of the meeting, see U.N. SCOR, 77th Sess., 9052nd mtg. U.N. Doc. S/PV.9052 (June 2, 2022). For Albania's concept note setting up the meeting, see U.N. Security Council, Letter dated 24 May 2022 from the Permanent Representative of Albania to the United Nations addressed to the Secretary-General, U.N. Doc. S/2022/418/Rev.1 (May 24, 2022). In diplomatic moves by other states, including Australia, it may be that the toxicity of ROL for Russia requires it to be reached by an alternative linguistic route.

83. FARRALL, CHARLESWORTH, AND RYAN, *supra* note 24, at 25.

84. While the policy proposals were formally launched on 16 March 2016 at U.N. Headquarters, they were distributed electronically to all U.N. member states the previous month, as an attachment to the formal invitation to the launch.

85. *See* S.C. Res. 2277, ¶ 39 (March 30, 2016) (extending the mandate of MONUSCO in the Democratic Republic of the Congo); S.C. Res. 2285, ¶ 14 (April 29, 2016) (extending the mandate of MINURSO in Western Sahara); S.C. Res. 2295, ¶ 27 (June 29, 2016) (extending the mandate of MINUSMA in Mali); S.C. Res. 2300, ¶ 13 (July 26, 2016) (extending the mandate of UNFICYP in Cyprus); S.C. Res. 2301, ¶ 48 (July 26, 2016) (extending the mandate of MINUSCA in Central African Republic); S.C. Res. 2305, ¶ 12 (Aug. 30, 2016) (extending the mandate of UNIFIL in Lebanon); S.C. Res. 2313, ¶ 31 (Oct. 13, 2016) (extending the mandate of MINUSTAH in Haiti); and S.C. Res. 2330, ¶ 10 (Dec. 19, 2016) (extending the mandate of UNDOF in the Golan).

De jure permanence has not happened; *de facto* continuity has taken place as the Office has been extended to further terms. And just as a trigger event brought the Office into being in the first instance, it is not inconceivable that another trigger event might ensure both its permanence and extension to other sanctions regimes.

CONCLUSION

We began with a conjunction—the apex of geopolitical power and universality of a legal discourse—and a conundrum: can an operationalization of the abstract discourse of ROL temper the arbitrary or unbridled power that might be unleashed by the permanent five members of the UNSC? By focusing on three key UNSC mandates, and drawing on empirical observations inside reform initiatives since 2003, we have proposed that question can be constructively approached, first, by developing an analytic frame that more precisely delineates dimensions of ROL in the particular context of the UNSC, and second, by adopting the systematic framework of transnational legal order which draws seemingly discrete or disconnected actions into a temporally sequenced and dynamic account of cumulative action to effect change in a normative order.

We conclude with some provisional observations. First, the discourse of a meta-ROL order can be operationalized in an empirically observable effort at a micro-TLO construction directed inside the UNSC. Those recursive cycles build upon each other to produce a widely accepted frame of lawmaking which in turn is concretized in specific rules and procedures, being reflected in structures, none highly consequential in themselves, but all cumulatively indicative of momentum towards a now explicit set of norms for decision-making and action by the UNSC. In these senses, the micro-TLO building represents a tactical shift from what Krygier characterizes as the "emptiness" and "conceptual unclarity" of ROL abstractions to particularities and activities adapted for the singular context represented by the UNSC. Arguably this momentum reflects a counter-current to retreats from international rule of law documented elsewhere.[86]

Second, there endures a tension between the idealistic view of a classic institutional balancing of powers beyond the state and a pragmatic view that accepts this as a bridge too far. Again, we find Krygier's framing on point. In contrast to the leanings of the Austrian/NYU initiative towards the replication and extrapolation of a within-state institutional separation of powers into the transnational realm, the Australian/ANU iteration of reforms proceeds on the judgment that a macrocosm of the national in the international would require amendments to the UN Charter, a prospect so unrealistic as to be a non-starter. The perfect would become the enemy of the good. Why should we expect a global institution to achieve in decades what has taken many countries centuries to accomplish, nations still manifestly confronting the forces that will subvert ROL given the seduction of arbitrary power? An incrementalism *within* the UNSC may

86. Shaffer & Sandholtz, *supra* note 1; Vedaschi & Scheppele, *supra* note 18.

parallel the centuries-long struggles among centers of power within states as exceedingly uneven paths to ROL unfolded through revolutions, civil war, and intense political struggles. Hence the Australian approach adopts a more realist expectation that ROL in the UNSC and its operations will probably be more effective when states themselves, especially the P5, with support or persuasion of some E10 members, draw their own ROL values into the UNSC. This takes the form of internalization rather than exterior pressure or moral suasion.

Third, by extending the ecology of UNSC-engaged actors from the P5 to the E10 and all other UN member states, ROL as an ideology takes on another hue. We postulate that the ROL is an idiom of legalism by which weak states—those outside the P5—seek to convert their relative political impotence into a force for influence where ROL offers a unifying basis to temper the raw political powers of the P5. Like King John's barons, individually weaker than the Crown, but together strong enough to compel the sovereign to yield power, the elected UNSC members, present or future, might wield a moral and legal authority to compel dominant and imperial powers to check their "wild power" and naked national interest in order to maintain some measure of their historical hegemony. Put another way, this raises the question of whether the P5 will find it expedient to make incremental reforms in order to maintain some modicum of their own moral authority. Although the micro-TLO that has been proposed for the UNSC since 2000 appears far removed from the capacity to restrain imperial propensities of the UNSC, might it be that one small episode in a long historical trajectory represents a moment where the concerted and incremental actions of the relatively weak present a modest constraint on the powers of the putatively strong?

APPENDIX 1: UNSC Meetings on the ROL, 2003–22

UNSC Meeting	Date	Agenda Item Title	Sub-Item/Agenda Doc(s)	Decision
4833	24 Sept. 2003	Justice and the Rule of Law: the United Nations Role		S/PRST/2003/15
4835	30 Sept. 2003	Justice and the Rule of Law		
5052	6 Oct. 2004	Justice and the Rule of Law: the United Nations Role	Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616)	S/PRST/2004/34
5474	22 June 2006	Strengthening International Law: Rule of Law and Maintenance of International Peace and Security	S/2006/367 (non-paper identifying 3 areas of focus: ROL in conflict and post-conflict situations; ending impunity for international crimes; & enhancing the efficiency and credibility of sanctions regimes)	S/PRST/2006/28
6347	29 June 2010	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security	S/2010/322 (concept note identifying 3 areas of focus: ROL in conflict and post-conflict situations; international justice and peaceful settlement of disputes; & the efficiency and credibility of sanctions regimes)	S/PRST/2010/11
6705 (& resume 1)	19 Jan. 2012	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security	Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2011/634)	S/PRST/2012/1

6849 (& resume 1)	17 Oct. 2012	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: "Peace and Justice, with a Special Focus on the Role of the International Criminal Court"	Concept note on peace and justice, with a special focus on the role of the International Criminal Court (S/2012/731)	
6913	30 Jan. 2013	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security	Interim briefing by Deputy Secretary-General on "United Nations system support to the promotion of the rule of law in conflict and post-conflict situations"	
7113	19 Feb. 2014	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security	Report of the Secretary-General on measuring the effectiveness of the support provided by the UN system for the promotion of the rule of law in conflict and post-conflict situations (S/2013/341); concept note on improving the effectiveness of UN promotion of ROL in conflict and post-conflict situations (S/2014/75)	
7115	19 Feb. 2014	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security	Report of the Secretary-General on measuring the effectiveness of the support provided by the UN system for the promotion of the rule of law in conflict and post-conflict situations (S/2013/341);	S/PRST/2014/5

			concept note on improving the effectiveness of UN promotion of ROL in conflict and post-conflict situations (S/2014/75)	
8262	17 May 2018	Maintenance of International Peace and Security: Upholding International Law within the Context of the Maintenance of International Peace and Security	Concept note on upholding international law within the context of the maintenance of international peace and security (S/2018/417/ Rev.1)	
8499	1 April 2019	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: International Humanitarian Law		
8596	13 Aug. 2019	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: International Humanitarian Law		
8599	20 Aug. 2019	The Promotion and Strengthening of the Rule of Law in the Maintenance of	Concept note on international humanitarian law (S/2019/629)	S/PRST/2019/8

		International Peace and Security: International Humanitarian Law		
VTC	18 Dec. 2020	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: Strengthening Cooperation between the UNSC and the ICJ	Briefing by President of ICJ to UNSC (S/2020/1286)	
VTC	21 Dec. 2020	The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: Strengthening Cooperation between the UNSC and the ICJ		S/PRST/2020/13
9052	2 June 2022	Strengthening Accountability and Justice for Serious Violations of International Law	Concept note on strengthening accountability and justice for serious violations of international law (S/2022/418/Rev.1)	

APPENDIX 2. A Researcher's Serendipity

At a pivotal moment in August 2003, Jeremy was working as a United Nations secretariat staffer, with responsibility to attend, observe, and report on all of the Security Council's formal and informal meetings for the month, in order to prepare an in-house analysis of key developments in the Council's procedural and substantive practice. Towards the end of the month, during the daily informal consultations of the whole, Jeremy was fascinated to hear the Permanent Representative of the United Kingdom, (which would take its turn as the monthly president of the Council during the following month) announce the scheduling of a meeting on a new agenda item, entitled "Justice and the Rule of Law." The inaugural meeting on this agenda item would take place in September, a high-profile time for UNSC activities because the majority of leaders of UN member states are in New York to participate in the UN General Assembly's "Leaders' Week." The Security Council was about to discuss the rule of law at a high level and at a high-stakes moment.

As a UN Secretariat staffer, Jeremy did not participate directly in the Security Council's decision-making process, as that is the privilege of the diplomats who represent the fifteen Council members. However, later on the same day he was presented with a serendipitous opportunity. While waiting for the elevator back to his office, he found himself standing next to one of UN Secretary-General Kofi Annan's speech-writers. As they stepped into the elevator, Jeremy told the colleague he was fascinated that the Council would soon hold a meeting on the rule of law. The colleague said it was uncanny that Jeremy should mention this, as he was about to draft the Secretary-General's comments for that meeting. As Jeremy stepped out on to his floor and the elevator door began to close, the colleague invited him to send any thoughts he might have on what the Secretary-General should say. As soon as he got back to his desk, Jeremy fired off a quick email with half a dozen bullet-points on the importance of the Security Council's relationship with the rule of law. On 24 September 2003 the Security Council held the inaugural meeting on its new agenda item entitled "Justice and the Rule of Law." The first speaker at that meeting, Secretary-General Kofi Annan, observed that: "This Council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. This applies both internationally and in rebuilding shattered societies."[87] These words bore an uncanny resemblance to the first bullet-point in Jeremy's email!

[87] U.N. Security Council, 58th Sess., 4833 mtg. at ¶ 2, U.N. Doc. S/PV.4833 (Sept. 24, 2003).