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United Nations Sanctions and the Rule of Law

JEREMY MATAM FARRALL

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The United Nations Security Council has increasingly resorted to sanctions as part of its efforts to prevent and resolve conflict. *United Nations Sanctions and the Rule of Law* traces the evolution of the Security Council's sanctions powers and charts the contours of the UN sanctions system. It also evaluates the extent to which the Security Council's increasing commitment to strengthening the rule of law extends to its sanctions practice. It identifies shortcomings in respect of key rule of law principles and advances pragmatic policy-reform proposals designed to ensure that UN sanctions promote, strengthen and reinforce the rule of law. In its appendices, *United Nations Sanctions and the Rule of Law* contains summaries of all twenty-five UN sanctions regimes established to date by the Security Council. It forms an invaluable source of reference for diplomats, policy-makers, scholars and advocates.

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by

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Preface

This book began life as a doctoral thesis. I originally expected the thesis to focus less on the UN Security Council's sanctions practice and more on theoretical questions arising from the Council's application of sanctions. However, early in my research I discovered that most books on UN sanctions analysed sanctions from a broad policy perspective and did not pay too much attention to the finer print of the provisions of Security Council resolutions that establish and modify each UN sanctions regime. Although there were valuable studies of this type concerning individual sanctions regimes, there was no central source tracing the evolution of the Security Council's many sanctions regimes. I thus began to prepare the summaries of UN sanctions regimes that feature in Appendix 2. Once I had completed these summaries, I moved on to the challenging assignment of describing and analysing the contours of the UN sanctions system.

Just as I did not originally set out to describe the UN sanctions system, neither did I intend to explore the relationship between those sanctions and the rule of law. I had planned to analyse the legitimacy of sanctions, which I still consider to be an extremely important theme. But on 24 September 2003 I witnessed a Security Council debate on justice and the rule of law, culminating in the adoption of a Security Council presidential statement affirming the vital importance of the rule of law in the Council's work. I immediately began to wonder whether the Council's commitment to the rule of law might be said to extend to its own sanctions system. How would the Council's sanctions practice measure up when viewed through a rule of law lens? What lessons might be learned from such an analysis and how might they be used to strengthen the Council's future sanctions policy and practice?

This book therefore has two basic aims: to describe the evolution of UN sanctions and to examine the relationship between sanctions and the rule of law. The book's practical goal is to advance policy proposals for improving the rule of law performance of UN sanctions. But my major hope is modest: I hope that readers find the following pages interesting and helpful, whether they are seasoned sanctions policy-makers or students engaging with sanctions for the very first time.

I am indebted to many people, whose support, guidance and inspiration have helped to shape this book. I owe a particular debt to the University of Tasmania Faculty of Law and my PhD supervisors: Professor Stuart Kaye, for his exemplary mentorship; Professors Donald Chalmers and Margaret Otlowski, for their kind and generous support; and Professor Ryszard Piotrowicz, for his guidance with early research. I would also like to thank my PhD examiners, Professors Ivan Shearer and Gerry Simpson, for their helpful suggestions on improving the manuscript.

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Australian National University, Canberra, January 2007

Abbreviations

AJIL	American Journal of International Law
AMIS	African Union Observer Mission in Sudan
AU	African Union
AYBIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CSCE	Conference on Security and Cooperation in Europe
CTC	UN Counterterrorism Committee
CY	Conference on Yugoslavia
DJILP	Denver Journal of International Law and Policy
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
EC	European Community
ECOMOG	Monitoring Group of the Economic Community of West African States
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EU	European Union
FRY	Federal Republic of Yugoslavia
FRYSM	Federal Republic of Yugoslavia (Serbia and Montenegro)
GA	General Assembly
GEMAP	Governance and Economic Management Assistance Program
GIA	Governor's Island Agreement
GRL	Goods Review List
GYIL	German Yearbook of International Law

HILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFY	International Conference on the Former Yugoslavia
ICIR	International Commission of Inquiry on Rwanda
ICISS	International Commission on Intervention and State Responsibility
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IFOR	Multinational Implementation Force
IGAD	Intergovernmental Authority on Development
ILJ	International Law Journal
ILM	International Legal Materials
ILR	International Law Review
JIL	Journal of International Law
KFOR	International Security Forces in Kosovo
LAS	League of Arab States
LR	Law Review
LURD	Liberians United for Reconciliation and Democracy
MODEL	Movement for Democracy in Liberia
MONUC	United Nations Organization Mission in the DRC
NATO	North Atlantic Treaty Organization
NJIL	Nordic Journal of International Law
NPT	Treaty on Non Proliferation of Nuclear Weapons
NTGL	National Transitional Government of Liberia
NYUJILP	New York University Journal of International law and Politics
OAS	Organization of American States
OAU	Organization of African Unity
OFFP	Oil-for-Food Programme
OHCHR	Office of the High Commissioner for Human Rights

OIP	Office of the Iraq Programme
OSCE	Organization for Security and Cooperation in Europe
PCASED	Economic Community of West African States Programme for Coordination and Assistance for Security and Development
Res.	Resolution
RUF	Revolutionary United Front
SADC	Southern African Develop Community
SAM	Sanctions Assistance Mission
SAMCOMM	Sanctions Assistance Missions Communications Centre
SC	Security Council
SCOR	UN Security Council Official Records
SICI	Sudan International Commission of Inquiry
SLA	Sudan Liberation Army
TLCP	Transnational Law & Contemporary Problems
UK	United Kingdom
UN	United Nations
UNAMSIL	United Nations Assistance Mission in Sierra Leone
UNASOG	United Nations Aouzou Strip Observer Group
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNCIO	United Nations Conference on International Organization
UNGA	United Nations General Assembly
UNGAR	United Nations General Assembly Resolution
UNHCR	United Nations High Commissioner for Refugees
UNIIIC	United Nations International Independent Investigation Commission
UNITA	National Union for the Total Independence of Angola
UNITAF	United Task Force
UNMAS	United Nations Mine Action Service
UNMICI	United Nations Mission in Côte d'Ivoire
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNMOVIC	United Nations Monitoring Verification and Inspection Commission
UNOCI	United Nations Operation in Côte d'Ivoire

UNOL	United Nations Office in Liberia
UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
UNSCR	United Nations Security Council Resolution
UNSG	United Nations Secretary-General
US	United States
VJIL	Virginia Journal of International Law
WCO	World Customs Organization
WEU	Western European Union
WMD	Weapons of Mass Destruction

PART I • SETTING THE SCENE

[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 hope, which is shared by the people, and by our remembrance of the sufferings of all those who fought and died that the rule of law might prevail.

French Ambassador Vincent Auriol, at the inaugural meeting of the UN Security Council
17 January 1946

We meet at the hinge of history. We can use the end of the Cold War to get beyond the whole pattern of settling conflicts by force, or we can slip back into ever more savage regional conflicts in which might alone makes right. We can take the high road towards peace and the rule of law, or we can take Saddam Hussein's path of brutal aggression and the law of the jungle.

US Secretary of State James Baker, when the Council authorised the use of force against Iraq
29 November 1990

This Council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security.

UN Secretary-General Kofi Annan, at the Council's meeting on justice and the rule of law
24 September 2003

1 Introducing UN sanctions

Looking back from an early twenty-first century vantage-point, it is easy to forget that there was once a time when the United Nations Security Council could not easily employ its sanctions tool. From 1946 until the middle of 1990, Cold War politics prevented the Council from imposing the coercive sanctions provided for in Article 41 of the United Nations Charter more than twice. In 1966 the Council imposed sanctions against Southern Rhodesia and in 1977 it applied them against South Africa.[1] By contrast, the post-Cold War period has witnessed a dramatic increase in UN sanctions. Since August 1990 the Security Council has initiated no fewer than twenty-three additional UN sanctions regimes.[2] UN sanctions now form a prominent feature of the international relations landscape.

While the end of Cold War tensions created the preconditions for a sanctions renaissance, two other factors have contributed to the rise of sanctions. First, sanctions can often represent the least unpalatable of the coercive alternatives available to the UN Security Council when faced with the task of taking action to maintain or restore international peace and security. From a political perspective, it can be extremely difficult to garner the support necessary to authorise collective military action under Article 42 of the UN Charter, as the governments which would be expected to shoulder the burden of collective forceful action are reluctant to assume responsibility for the serious financial, political and humanitarian consequences that are likely to flow from the use of military sanctions. The imposition of non-military sanctions, by contrast, is generally thought to entail fewer costs than the use of force. By authorising sanctions, the Security Council can be seen to be taking

[1] See Appendix 3, Table B. [2] *Ibid.*

strong symbolic action against threats to international peace and security, without having to assume the responsibility for, or incur the costs of, using force. Second, there is the perception that the potential of sanctions to achieve their policy objectives has increased with advances in international technology, communications and trade. Globalisation has fostered a climate of growing interdependence, in which states are increasingly reliant upon trade and communication links with the international community. In such an interdependent economic environment, a stringent UN sanctions regime has the power to devastate a target economy and to rein in target political elites.

The Security Council has employed a broad variety of sanctions, ranging from comprehensive measures which prevent the flow to and from a target of virtually all products and commodities,[3] to simple measures that target specific items, such as arms,[4] timber[5] or diamonds,[6] or particular activities, such as diplomatic relations[7] or travel.[8] UN sanctions have been applied around the globe, from Southern Rhodesia to Yugoslavia and from Haiti to North Korea.[9] They have targeted nations, rebel groups and terrorist organisations.[10] The Council has imposed sanctions for a range of objectives, including compelling an occupying state to withdraw its troops,[11] preventing a state from developing or acquiring weapons of mass destruction,[12]

[3] See Appendix 2, summaries of the 232 Southern Rhodesia, 757 Federal Republic of Yugoslavia (Serbia-Montenegro) (FRYSM), 820 Bosnian Serb and 841 Haiti sanctions regimes.

[4] See Appendix 2, summaries of the 418 South Africa, 713 Yugoslavia, 733 Somalia, 788 Liberia, 918 Rwanda, 1160 Federal Republic of Yugoslavia (FRY) and 1298 Eritrea and Ethiopia sanctions regimes.

[5] See Appendix 2, summaries of the 1343 and 1521 Liberia sanctions regimes.

[6] See Appendix 2, summaries of the 864 UNITA, 1132 Sierra Leone, 1343 and 1521 Liberia and 1572 Côte d'Ivoire sanctions regimes.

[7] See Appendix 2, summaries of the 748 Libya and 1054 Sudan sanctions regimes.

[8] See Appendix 2, summaries of the 232 Southern Rhodesia, 661 Iraq, 748 Libya, 841 Haiti, 864 UNITA, 1054 Sudan, 1132 Sierra Leone, 1267 Taliban and Al Qaida, 1343 and 1521 Liberia, 1493 DRC, 1556 Sudan, 1572 Côte d'Ivoire, 1636 Hariri, 1718 North Korea and 1737 Iran sanctions regimes.

[9] See Appendix 3, Table B.

[10] The majority of sanctions regimes have targeted states: see Table B. Rebel groups have been targeted in the 820 Bosnian Serb, 864 UNITA, 1132 Sierra Leone and 1493 DRC sanctions regimes. The 1267 Taliban and Al Qaida sanctions regime targets terrorist organisations. See the summaries of these regimes in Appendix 2.

[11] This was the initial objective of the 661 sanctions regime against Iraq: see Appendix 2.

[12] Non-proliferation was an objective of the 418 South Africa, 1718 North Korea and 1737 Iran sanctions regimes, as well as the primary reason for maintaining the 661 Iraq sanctions regime after the conclusion of 1991 Gulf War hostilities. See Appendix 2.

countering international terrorism,[13] stemming human rights violations[14] and promoting the implementation of a peace process.[15]

The collection of sanctions regimes stacking up in the Security Council's trophy-cabinet is impressive. Yet UN sanctions attract many critics. Some denounce sanctions as ineffective.[16] Others warn that sanctions can be counterproductive, galvanising opposition to UN intervention and strengthening the target government's position of power.[17] At the other end of the spectrum, sanctions are criticised for being too effective due to the devastating impact they can have on innocent civilian populations. Sanctions have been described as 'the UN's weapon of mass destruction',[18] as 'a genocidal tool'[19] and as 'modern siege warfare'.[20]

This book adds another voice to the critical chorus. But the criticism ventured here is designed to be constructive. No matter how ineffective, counterproductive or indiscriminate they might appear, the Security Council is not about to remove sanctions from its peace and security toolkit. As Secretary-General Kofi Annan observed in his 2005 report *In Larger Freedom*, sanctions constitute 'a necessary middle ground between war and words'.[21] Enthusiasm for sanctions may wax and wane, but the Council will continue to resort to its sanctions tool when diplomacy is failing and other policy options are unpalatable or

[13] Preventing and responding to international terrorism was an objective of the 748 Libya, 1054 Sudan, 1267 Taliban and Al Qaida and 1636 Hariri sanctions regimes. See Appendix 2.

[14] Stemming human rights violations has been an objective of the 232 Southern Rhodesia, 418 South Africa, 841 Haiti, 1160 Federal Republic of Yugoslavia (FRY) and 1556 Sudan sanctions regimes. See Appendix 2.

[15] Promoting the implementation of a peace process was an objective of the 788 and 1521 Liberia, 864 UNITA, 918 Rwanda, 1132 Sierra Leone, 1493 DRC and 1572 Côte d'Ivoire sanctions regimes. See Appendix 2.

[16] See, e.g., Robert A. Pape, 'Why Economic Sanctions Do Not Work' (1997) 22 *International Security* 90–136.

[17] Johan Galtung, 'On the Effects of Economic Sanctions: With Examples from the Case of Rhodesia', in Miroslav Nincic and Peter Wallensteen (eds.), *Dilemmas of Economic Coercion* (New York: Praeger, 1983), pp. 17–60, 46.

[18] Denis Halliday, 'Iraq and the UN's Weapon of Mass Destruction' (1999) 98 *Current History* 65–68; John Mueller and Karl Mueller, 'Sanctions of Mass Destruction' (1999) 78(3) *Foreign Affairs*, 43–53.

[19] Geoffrey Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (London: Pluto Press, 1999); George E. Bisharat, 'Sanctions as Genocide' (2001) 11 *TLCP* 379–425.

[20] Joy Gordon, 'Sanctions as Siege Warfare' *The Nation*, 22 March 1999.

[21] A/59/2005 (21 March 2005): *In Larger Freedom: Towards Development, Security and Human Rights for All*.

impractical. The key is thus to reform the Council's sanctions practice so that sanctions are less ineffective, less counterproductive and less indiscriminate.

1. Defining UN sanctions

The term 'sanctions' can have many meanings. In the national sphere, sanctions generally represent a range of action that can be taken against a person who has transgressed a legal norm.[22] Thus, a person who has committed the crime of manslaughter might receive the sanction of a term in prison. The nature, scope and length of potential national sanctions are generally determined by legislatures. The sanctions are then applied to concrete cases by judiciaries or juries, and they are then enforced by police forces and penal systems. National sanctions may serve a number of purposes, including defining the limits of permissible behaviour, punishing wrongdoers and deterring potential future wrongdoers.[23] But whatever specific purpose a particular sanction may serve, the essence of national sanctions lies in their nexus with legal norms. This nexus separates sanctions from simple acts of coercion. In the national context, sanctions are imposed in order to enforce the law and they therefore aim to reinforce the rule of law.

In the international sphere, however, the term 'sanctions' is commonly used to describe actions that often bear only a slight resemblance to their domestic relative. Media commentators, diplomats and scholars employ the term to refer to a wide array of actions, taken for a variety of purposes, by a range of actors against a variety of targets.[24] The spectrum of action commonly described as 'sanctions' includes military and non-military action. The term 'sanctions' can be used to describe action which aims to place physical restrictions upon the ability of a target to engage in the use of force itself, or to depict action which seeks to restrict the target's freedom in other respects, such as in relations of an economic, financial, diplomatic or representative, sporting or cultural nature.

[22] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Steven & Sons, 1951), p. 706.

[23] Margaret P. Doxey, *International Sanctions in Contemporary Perspective*, 2nd edn (New York: St Martin's Press, 1996), p. 7.

[24] Galtung and Doxey both provide useful summaries of the different types of international 'sanctions': Galtung, 'On the Effects of Economic Sanctions', 21; Doxey, *International Sanctions*, p. 15.

The fundamental difference between the meaning of sanctions in the national context and the popular understanding of sanctions in the international context is that the action commonly referred to as sanctions in the international sphere does not necessarily serve the purpose of enforcing a legal norm.[25] The term 'sanctions' is widely used to refer to action which seeks either to coerce the target into behaving in a particular manner, or to punish it for behaviour considered unacceptable by the sender. The motive for imposing sanctions may be to respond to a breach of a norm or to prevent such a breach, but it may also be to pursue a foreign policy agenda or to gain some advantage over the target.[26] Some commentators have even employed the term 'positive sanctions' to refer to acts of a non-coercive nature which seek to induce a particular type of behaviour.[27]

The range of actors who impose sanctions on an international basis includes individual states, groups of states, the international community as a whole, and non-state actors. When one state initiates coercive action, its actions are commonly referred to as 'unilateral sanctions'. A prominent example of unilateral sanctions is the regime which has been maintained against Cuba by the United States since the Cuban missile crisis.[28] When action is initiated by a group of states, the action becomes 'multilateral' or 'regional' sanctions. Examples of multilateral/regional sanctions regimes include those imposed against Haiti by the Organization of American States[29] and against the former Yugoslavia by

[25] This can also be the case with UN sanctions, as it is not a requirement that they be applied in response to a violation of Charter obligations. Thus they can be interpreted as 'political measures' which the Security Council has the 'discretion' to apply in order to maintain or restore international peace and security. See Kelsen, *The Law of the United Nations*, p. 733.

[26] The US sanctions regime against Cuba is one example of a 'sanctions' regime imposed in pursuit of a foreign policy agenda. Since it first adopted a resolution on the subject in 1992, the UN's General Assembly has condemned on an annual basis the continued application of US 'sanctions' against Cuba. For the initial resolution, see A/RES/47/19 (24 November 1992). For the most recent resolution, see A/RES/58/7 (18 November 2003). For the annual resolutions in between, see A/RES/58/7 (18 November 2003), preambular para. 6.

[27] Peter A. G. Van Bergeijk, *Economic Diplomacy, Trade and Commercial Policy: Positive and Negative Sanctions in a New World Order* (Brookfield: Edward Elgar Publishing, 1994).

[28] For a comprehensive list of instances of unilateral sanctions, see Gary Clyde Hufbauer, Jeffrey J. Schott and Kimberly Ann Elliott, *Economic Sanctions Reconsidered*, 2nd edn (Washington, DC: Institute for International Economics, 1990).

[29] For a detailed account of the Haiti sanctions, see Elisabeth D. Gibbons, *Sanctions in Haiti: Human Rights and Democracy Under Assault* (Westport: Praeger, 1999), especially ch. 3.

the European Union.[30] When action is taken by a majority of states, it is referred to as 'collective' or 'universal' sanctions. These terms have generally been reserved to describe sanctions applied by the League of Nations or the United Nations.[31] Finally, even non-forceful coercive activities initiated by non-state actors, such as citizen-initiated boycotts, are sometimes described as sanctions.[32] The range of actors who could potentially be the target of sanctions generally mirrors the actors who can impose sanctions. In practice, forms of sanctions have been imposed against one state, a group of states, and extra-state entities.

In this study, the focus is upon the 'collective' or 'universal' sanctions applied by the United Nations. The term 'UN sanctions' denotes binding, mandatory measures short of the use of force that are applied against particular state or non-state actors by the UN Security Council, as envisaged by Chapter VII and Article 41 of the UN Charter.[33] As provided in Article 41, 'UN sanctions' thus fall within the following description:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[34]

[30] On the EU sanctions regime against the Former Yugoslavia, see Christine Chinkin, 'The Legality of the Imposition of Sanctions by the European Union in International Law', in Malcolm D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Brookfield: Dartmouth, 1997), pp. 183–213; Jean-Pierre Puissochet, 'The Court of Justice and International Action by the European Community: The Example of the Embargo Against the Former Yugoslavia' (1997) 20 *Fordham ILJ* 1557–1576.

[31] M. S. Daoudi and M. S. Dajani, *Economic Sanctions, Ideals and Experience* (London: Routledge, 1983), pp. 56–90 (ch. 2).

[32] For further discussion, see Hersch Lauterpacht, 'Boycott in International Relations' (1933) 14 *BYIL* 125–140; Maged Taher Othman, *Economic Sanctions in International Law: A Legal Study of the Practice of the USA* (Ann Arbor: University Microfilms International, 1982), pp. 19–25.

[33] Like the general term 'sanctions', the term 'UN sanctions' can also be used to refer to a variety of measures. Without further qualification, UN sanctions may denote: military or non-military action; action that is authorised by the Security Council or the General Assembly; and action that is requested and thus 'voluntary' or action that is binding and thus 'mandatory'.

[34] Article 41, UN Charter. Article 41 was designed to be read in concert with Article 39, such that UN sanctions should be applied to maintain or restore the peace once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.

Since the birth of the United Nations, the Security Council has acted upon its Article 41 sanctions powers to create twenty-five UN sanctions regimes.[35] In addition to its actions establishing and modifying those twenty-five sanctions regimes, the Security Council has at times requested states to impose measures that might be described as 'voluntary sanctions'. In the cases of Southern Rhodesia and South Africa, prior to the eventual imposition of mandatory sanctions the Council requested states to take certain action against Southern Rhodesia and South Africa, without requiring the application of such measures under Chapter VII.[36] Similarly, in the case of Cambodia, the Council requested states bordering Cambodia to prevent the import of timber products from Khmer-Rouge controlled areas.[37] These instances are not covered as part of the current analysis, as the measures requested were neither imposed under Chapter VII nor framed in mandatory language.

The Security Council has also taken some other initiatives that might be interpreted to fall within the scope of Article 41, due to the fact that they involved action short of the use of military force taken under Chapter VII and after the Council had determined the existence of a threat to the peace. These initiatives include the creation of two international criminal tribunals,[38] which have in fact each determined that their establishment falls within the scope of Article 41.[39] The Council has also applied wide-ranging measures short of the use of force in an

[35] See Appendix 3, Table B.

[36] For the Southern Rhodesian instance, see: SC Res. 217 (20 November 1965), para. 8. For the South African instance, see SC Res. 181 (7 August 1963), para. 3. The status of the measures called for in the South African instance as 'voluntary' is clear with the benefit of hindsight: see SC Res. 418 (4 November 1977), preambular para. 8.

[37] See SC Res. 792 (30 November 1992), para. 12. For further details of that case, see David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner, 2000), pp. 135–145. Unfortunately, however, Cortright and Lopez do not distinguish between the non-mandatory character of the measures requested in the Cambodian instance and the mandatory nature of the other examples of UN sanctions to which they refer, which are all imposed under Chapter VII of the UN Charter.

[38] In May 1993 the Council established the International Criminal Tribunal for the former Yugoslavia (the ICTY): SC Res. 827 (25 May 1993), paras. 1–2, annex. In November 1995 the Council established the International Criminal Tribunal for Rwanda (the ICTR): SC Res. 955 (8 November 1995), para. 1.

[39] *Prosecutor* v. *Dusko Tadić*, Case IT-94–1-AR72, Appeals Chamber, (2 October 1995), para. 36; *Prosecutor* v. *Joseph Kanyabashi*, Case No. ICTR-96–15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997), para. 27.

effort to prevent and suppress terrorism[40] and to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery.[41] These instances are not treated as examples of UN sanctions regimes for the purposes of this study, however, as they do not possess the key characteristics of UN sanctions regimes, which are applied traditionally against states or particular, readily identifiable groups of non-state actors.

2. Central contention and key objectives

The central contention of this book is that sanctions have been applied in such a way that they have undermined the rule of law, thus weakening the authority and credibility of the UN Security Council and its sanctions tool. As a consequence, states are less likely to have full confidence in the UN sanctions system and are thus less likely to comply fully with their obligation under Article 25 of the UN Charter to implement sanctions. The end result is that sanctions are less effective than they could be. Until the UN Security Council's sanctions practice can be reformed so that there is widespread confidence in its integrity, sanctions are unlikely to serve as an effective tool for resolving international conflict. Without such reform, the UN sanctions system will remain a destabilising influence upon, rather than a symbol of, the rule of law in international society.

The challenge is therefore to reform the UN Security Council's sanctions practice so that the Council and the UN sanctions system command such respect and inspire such confidence that states both desire and feel compelled to comply with sanctions regimes and thus implement sanctions effectively. This book proposes a pragmatic model of the rule of law that is designed to be used in the context of Security Council decision-making on sanctions. If followed, this model would help to reassure the broader community of states that the Security Council is genuinely committed to the rule of law. By ensuring that

[40] In the wake of the 11 September 2001 terrorist attacks in the United States, the Council established a collection of mandatory counterterrorism measures to be taken against terrorists and terrorism and created a Counterterrorism Committee to monitor the implementation of those measures. See SC Res. 1373 (28 September 2001).

[41] In April 2004 the Council adopted resolution 1540 (2004), requiring states to take a range of measures designed to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery. The Council also established the 1540 Committee to administer the measures. See SC Res. 1540 (28 April 2004).

its sanctions practice reinforces, rather than undermines, the rule of law, the Council could induce greater compliance with its sanctions regimes.

This book has two major objectives. The first is to trace the evolution of the UN sanctions system. For the uninitiated, it is no easy task to identify the parameters of a single UN sanctions regime, let alone to distil themes of sanctions policy that emerge across dozens of instances of sanctioning. The official story of sanctions is scattered across thousands of identical-looking UN documents that are differentiated simply by their UN serial number. Finding even one short chapter of that story requires painstaking forensic examination of Security Council resolutions, correspondence between the Council and UN member states, and technical reports prepared by a variety of UN bodies charged with sanctions administration and monitoring. This book aims to save other readers from the need to engage in such forensic forays. If it serves as a useful guide to the UN sanctions system, then it will have achieved its first objective.

The second major objective is to explore the relationship between sanctions and the rule of law. This objective has three subsidiary goals. The first is to construct a pragmatic model of the rule of law that can be used to analyse the UN Security Council's sanctions practice. The second is to demonstrate how UN sanctions have undermined the rule of law. The third is to provide pragmatic policy proposals designed to ensure that UN sanctions can reinforce the rule of law in future.

3. The path ahead

Analysis in this book is divided into four Parts. Part I sets the stage for subsequent analysis. This chapter has introduced UN sanctions and explained the book's central contention and key objectives. Chapter 2 examines the relationship between the UN Security Council and the rule of law. It explains the Security Council's reliance upon law and describes the increasing influence of the concept of the rule of law upon the Council's activities. It explores the meaning of the rule of law, charting the many ways in which the concept can be interpreted and criticised. The chapter concludes by constructing a pragmatic model, according to which the primary aim of the rule of law is to prevent the misuse or abuse of power. It proposes five basic principles of the rule of law that seek to prevent the misuse or abuse of power: transparency, consistency, equality, due process and proportionality.

To the extent that the Security Council and its sanctions practice respect and promote those five basic principles, they reinforce the rule of law.

Parts II and III then trace the evolution of UN sanctions. Part II explores the origins of the UN Security Council's sanctions powers. Chapter 3 delves into the pre-history of UN sanctions, surveying historical precedents in international relations for the employment of non-military coercive strategies to compel the resolution of international disputes. These precedents range from early forms of sanctions employed in the days of ancient Greece through to the ill-fated League of Nations sanctions experience against Italy. Chapter 4 describes the UN sanctions framework that was created by the UN founders and enshrined in the United Nations Charter. It thus outlines the legal basis for the Security Council's sanctions powers.

Part III describes how UN sanctions have operated in practice, charting the contours of the evolving UN sanctions system. Chapter 5 explains how the Security Council has established the legal basis for the application of sanctions by identifying threats to the peace and invoking Chapter VII of the Charter. Chapter 6 illustrates how the Council has delineated the scope of its sanctions regimes. It also outlines the different types of targets against which sanctions have been applied. Chapter 7 describes the Council's efforts to fine-tune sanctions by setting sanctions objectives, defining the temporal application of sanctions and seeking to address the unintended consequences of sanctions upon civilian populations and third states. Chapter 8 surveys the manner in which the Council has bestowed responsibility for sanctions administration and monitoring upon a range of subsidiary bodies.

Part IV then applies the pragmatic model of the rule of law developed in Part I to the UN sanctions system described in Parts II and III. Chapter 9 scrutinises the relationship between the UN sanctions system and the rule of law, identifying shortcomings in respect of each of the key component principles of the pragmatic model of the rule of law. Chapter 10 advances policy reform proposals designed to address those shortcomings and enhance the capacity of the UN sanctions system to promote and reinforce the rule of law. Chapter 11 contains concluding remarks.

The book also contains three appendices, which are included as an aid for research and analysis of UN sanctions. Appendix 1 recapitulates the key sanctions policy proposals designed to strengthen the UN sanctions system's rule of law performance. Appendix 2 contains summaries of all

twenty-five UN sanctions regimes. Each summary outlines the constitutional basis for sanctions, as well as their objective(s) and scope, and describes the UN bodies created and/or tasked with responsibilities for sanctions administration and monitoring. Appendix 3 presents tables which gather together Security Council resolution provisions and other UN documents that aid analysis of the Council's practice with respect to the rule of law and the UN sanctions system.

2 Towards a pragmatic rule of law model for UN sanctions

We are here to strengthen and adapt this great institution, forged 55 years ago in the crucible of war, so that it can do what people expect of it in the new era – an era in which the rule of law must prevail.

UN Secretary-General Kofi Annan[1]

[W]hile prescribing norms and standards for national or international conduct, the UN Security Council must scrupulously accept those norms for itself.

Prime Minister Rao, of India[2]

At the end of the Cold War, the UN Security Council awoke from its slumber and began to flex its peace and security muscles. The Council had only applied sanctions twice in the forty-five years from 1946 until 1989, but between 1990 and 2006 it established twenty-three new sanctions regimes.[3] The Council also increased its activities exponentially in the field of peacekeeping, creating three times as many peace operations between 1990 and 2006 as it had during the Cold War.[4] In many respects these two boom areas of Council business go hand in hand, as demonstrated by the concurrent existence of a number of peace operations in states subject to sanctions, including Somalia and Haiti in the early 1990s, Sierra Leone at the turn of the century, and Liberia, Côte d'Ivoire and Sudan in the early years of the twenty-first century. Both sanctions and peacekeeping aim to prevent further exacerbation of situations that threaten international peace and security. Sanctions

[1] Secretary-General Kofi Annan, speech delivered at the opening session of the UN Millennium Summit: PR/GA/9750 (6 September 2000).

[2] Prime Minister Rao, of India, speaking at the Security Council Summit Meeting: S/PV.3046 (31 January 1992), p. 97.

[3] See Appendix 3, Table B.

[4] http://www.un.org/Depts/dpko/list/list.pdf.

seek to enforce stability from the top down, whereas peacekeeping aims to build stability from the ground up.

But there is one striking difference between the Security Council's peacekeeping and sanctions practice. In its oversight of peacekeeping operations, the Council frequently emphasises the importance of the rule of law, portraying it as one of the key building blocks of a stable society and routinely incorporating the objective of strengthening the rule of law in peace operation mandates. Yet when it comes to sanctions decision-making, the Council's practice tends to undermine the rule of law. Sanctions are often applied and modified in an ad hoc and selective manner. Decisions are generally made behind closed doors, with little or no public record of the decision-making process. Sanctions tend to have disproportionate effects upon innocent civilian populations and third states, and individuals subject to travel bans or assets freezes are regularly denied due process.

This chapter explains the relevance of the rule of law to the Security Council's sanctions practice, exploring the Council's complex relationship with law and charting the increasing importance of the rule of law to the Council's practice. It examines the promise and perils of employing a rule of law-based approach, tracing scholarly debate surrounding the concept. It then constructs a pragmatic model of the rule of law, which can be used both to evaluate and to reform the Security Council's sanctions practice.

1. The relevance of the rule of law to the UN Security Council's activities

At the birth of the United Nations, the rule of law was effectively snubbed. Despite concerted efforts at the San Francisco Conference to ensure that the principles of justice and the rule of law would guide the action of the UN Security Council,[5] the concept of the rule of law is conspicuously absent from the provisions of the United Nations Charter. The UN Charter established the Security Council as a political organ, with primary responsibility for the maintenance of international peace and security.[6] Although threats to international peace and

[5] Herbert Vere Evatt, *The United Nations* (Cambridge, MA: Harvard University Press, 1948) p. 36. See also *Documents of the UNCIO*, vol. 1, pp. 129–130 (statement by the Chinese delegate).

[6] See UN Charter, Chapters III and V.

security may take the form of violations of international law, these two concepts do not necessarily overlap.[7] When acting in accordance with its power to maintain international peace and security, the Council does not necessarily respond to a violation of international law, nor even to a violation of the UN Charter.[8] In fact, some commentators have interpreted the broad discretion granted to the Security Council for the maintenance of international peace and security to mean that the Security Council is 'a law unto itself'; that it can, does and should act above the law.[9] Why then should the Security Council be expected to take rule of law considerations into account when formulating its sanctions policy?

While the Security Council's political nature is undeniable,[10] it does not necessarily follow that the Council is or should be uninterested in the rule of law. There are two compelling reasons why the Security Council might be expected to take rule of law considerations into account when formulating sanctions policy. First, the Security Council has a close relationship with and reliance upon law and the rule of law. Second, the Security Council has increasingly proclaimed the importance of strengthening the rule of law.

1.1 The Council's close relationship with and reliance upon law

The relationship between the Security Council and law is complex and multifaceted. On the one hand, the Council is a political body which takes decisions in an environment that is highly charged. On the other, by virtue of its power to issue decisions that are legally binding upon UN member states,[11] and authorise mandatory non-military and military coercive action to maintain or restore international peace and security,[12] the Council is a body whose activities have profound legal implications.[13] The Council thus sits prominently at the juncture between politics and law in international affairs.

[7] Kelsen, *The Law of the United Nations*, pp. 724–731. [8] *Ibid*., pp. 732–737.
[9] John Foster Dulles, *War or Peace* (New York: Macmillan,1950), pp. 194–195.
[10] Although the term 'political' does not feature in the UN Charter's provisions pertaining to the Security Council, the Council's political nature has been widely acknowledged. See, e.g., Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963).
[11] UN Charter, Articles 25, 48. These provisions are discussed further in Chapter 4.
[12] UN Charter, Chapter VII, Articles 39, 41, 42. These provisions are also discussed in Chapter 4.
[13] As discussed in Chapter 4, the Security Council's power to bind UN member states derives from Articles 25 and 48 of the UN Charter.

The Security Council's ability to create legal obligations that are binding on practically all states has led commentators to describe aspects of the Council's activities as quasi-legislative in character.[14] Although the Council's law-making process may be less sophisticated than the legislative process in many national parliamentary or congressional legislatures, the legal consequences flowing from Council decisions can bestow upon those decisions a quality akin to legislation. Examples include the Council's resolutions requiring states to take global action to counter terrorism, beginning with resolution 1373 (2001), as well as its decisions pressing for action to prevent the supply to non-state actors of weapons of mass destruction, commencing with resolution 1540 (2004).[15] On occasion the Security Council has also declared certain activities to be illegal, thus interpreting and applying international law in a quasi-judicial manner.[16] Examples of the Council's law-interpreting activities include declarations regarding the illegality of claims of statehood in the cases of Southern Rhodesia[17] and the 'Turkish Republic of Northern Cyprus',[18] as well as declarations concerning boundary delimitation, as in the case of the border between Iraq and Kuwait.[19]

The Security Council's close relationship with law is particularly evident in its sanctions practice, where it has donned both quasi-legislative and quasi-judicial hats. Whenever the Council applies sanctions, it enters quasi-legislative mode. The mandatory provisions of its sanctions resolutions establish the contours of each sanctions regime, creating a new web of legal obligations. This amounts to legislation. The Council has also entered quasi-judicial mode in connection with its sanctions regimes. Indeed, prior to establishing its very first sanctions regime, the Council characterised the white minority regime in Southern Rhodesia as 'illegal'[20] and described its purported declaration of independence as having 'no legal validity'.[21] The Council has made

[14] Paul C. Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 900–905; José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) pp. 184–198.
[15] SC Res. 1373 (28 September 2001); SC Res. 1540 (28 April 2004).
[16] Oscar Schachter, 'The Quasi-Judicial Role of the UN Security Council and the General Assembly' (1964) 58 *AJIL* 960–965; Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press), p. 708.
[17] SC Res. 216 (12 November 1965), paras. 1 and 2; SC Res. 217 (20 November 1965), para. 3.
[18] SC Res. 541 (18 November 1983), paras. 1–2; SC Res. 550 (11 May 1984), para. 2.
[19] SC Res. 687 (3 April 1991), preambular paras. 6 and 7, paras. 2–4.
[20] SC Res. 216 (12 November 1965), paras. 1 and 2; SC Res. 217 (20 November 1965), para. 1.
[21] SC Res. 217 (20 November 1965), para. 3.

other quasi-judicial proclamations in connection with its sanctions regimes against Iraq and Haiti. In 1990 it declared Iraq's attempted annexation of Kuwait to have 'no legal validity'[22] and stated that Iraq was liable under international law 'for any loss, damage or injury arising in regard to Kuwait and third States' as a result of its 'invasion and illegal occupation' of Kuwait.[23] In 1994 the Council described as 'illegal' the de facto government which assumed control of Haiti following the ouster of the democratically elected government of President Jean-Bertrand Aristide.[24]

In order for sanctions to be effective, the Security Council relies heavily upon the good will and good faith of states. UN sanctions are not self-implementing – it falls upon states to take the necessary steps to bring sanctions into effect. Article 25 of the UN Charter places a binding legal obligation upon states to implement the Council's sanctions decisions, but if states choose not to comply with the Council's decisions, sanctions will prove ineffective. The Council is therefore dependent upon the commitment of states to respect and act in conformity with the rule of law. The Council's reliance upon the rule of law raises the stakes in relation to its own rule of law performance. States are more likely to implement sanctions, and thus to act in accordance with the rule of law, if they perceive the Security Council to be acting in accordance with its own responsibilities under the rule of law.

1.2 The increasing emphasis upon the rule of law in Security Council practice

The expectation that the Security Council should respect the rule of law has also been prompted by the Council's own practice. Despite the failure of attempts at San Francisco to enshrine the rule of law in the UN Charter as a guiding principle for Security Council action, the concept has wielded surprising influence over the Council's activities. This influence, which has been particularly pronounced in the post-Cold War era, was foreshadowed at the Council's very first meeting. At the inaugural Council meeting, held on 17 January 1946, a number of Council members emphasised that they expected the Council to play a pivotal role in strengthening the rule of law.[25] France, for example,

[22] SC Res. 662 (9 August 1990), para. 1.
[23] SC Res. 674 (29 October 1990), para. 8.
[24] SC Res. 917 (6 May 1994), para. 3(d).
[25] See, e.g., the statements made by Australia and France: *Security Council Official Records, First Year, First Series, January–February 1946*, 6 (Australia), 9 (France).

observed that: 'The Security Council's task is a heavy one, but it will be sustained by our hope, which is shared by the people, and by our remembrance of the sufferings of all those who fought and died that the rule of law might prevail.'[26]

As the Cold War settled in, this utopian vision of a Security Council that would actively promote the rule of law quickly dissipated. The Council's ability to fulfil its responsibilities under the UN Charter became severely circumscribed by the frequent failure of the Council's permanent members to achieve consensus. The Security Council began to function less as an effective agent for the maintenance of international peace and security and more as a stage for ideological battles between East and West. During this period, the UN's rule of law-related activities tended to focus on the creation and expansion of international legal agreements. This approach of equating the promotion of the rule of law with the codification of international law can be seen in General Assembly resolution 2627 (XXV), adopted in October 1970 to mark the UN's twenty-fifth anniversary. In that resolution, member states declared that: 'The progressive development and codification of international law . . . should be advanced in order to promote the rule of law among nations.'[27] Examples of successful codification efforts negotiated during the Cold War years include the Convention on the Prevention and Punishment of the Crime of Genocide (1951),[28] the International Covenant on Economic, Social and Cultural Rights (1976),[29] the International Covenant on Civil and Political Rights (1976)[30] and the United Nations Convention on the Law of the Sea (1994).[31]

Following the end of the Cold War, the rule of law began its rise to prominence in the Security Council's rhetoric and practice. In January 1992, world leaders gathered in New York for the first ever Security Council summit meeting, where they discussed the theme 'The Responsibility of the Security Council in the Maintenance of

[26] *Ibid*., 9. [27] GA Res. 2627 (XXV) (24 October 1970), para. 3.

[28] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

[29] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 23 January 1976).

[30] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[31] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

International Peace and Security'.[32] At that landmark meeting, which was to set the agenda for UN action in the post-Cold War era,[33] leaders from countries with a broad range of political and socio-economic traditions underlined the importance of strengthening the rule of law in international affairs.[34] The President of the United States, George H. W. Bush, urged the Security Council to 'advance the momentous movement towards democracy and freedom ... and expand the circle of nations committed to human rights and the rule of law'.[35] The Prime Minister of Cape Verde also stressed that the Security Council must act 'as a catalyst for the promotion of the primacy of the rule of law in international relations'.[36]

The importance of the rule of law has subsequently been reinforced at multiple high-level UN meetings. In September 2000, world leaders again gathered for the Millennium Summit, where they adopted the Millennium Declaration.[37] Ranked first among the Declaration's objectives of 'special significance'[38] was strengthening respect for the rule of law in international affairs.[39] Five years later, at the 2005 World Summit, leaders reaffirmed the Millennium Declaration.[40] They acknowledged that 'good governance and the rule of law at the national and international levels' were 'essential for sustained economic growth'[41] and they recognised that the rule of law belonged to 'the universal and indivisible core values and principles of the United Nations'.[42] Leaders further reaffirmed their commitment to 'an international order based on the rule of law and international law'.[43]

[32] For the verbatim record of the meeting, see S/PV.3046 (31 January 1992).
[33] At the end of the meeting, the Council requested the Secretary-General to prepare a report with recommendations for strengthening UN capacity in preventive diplomacy, peacemaking and peacekeeping: see S/23500 (31 January 1992): *Presidential statement dated 31 January 1992*, paras. 15–16. The resulting report proved extremely influential over UN and Security Council policy in the 1990s: S/24111 (17 June 1992): *An Agenda for Peace*.
[34] See, e.g., S/PV.3046 (31 January 1992), pp. 8–9 (UNSG Boutros-Boutros Ghali), p. 18 (President Mitterand, France), p. 23 (President Borja, Ecuador), p. 36 (King Hassan II, Morocco), p. 47 (President Yeltsin, Russian Federation), pp. 50 (a-z) and 50 (President Bush, United States), pp. 59–60 (President Perez, Venezuela), p. 67 (Chancellor Vranitsky, Austria), pp. 78–79 (Prime Minister Veiga, Cape Verde), p. 97 (Prime Minister Rao, India), p. 107 (Prime Minister Miyazawa, Japan).
[35] *Ibid*., p. 50. [36] *Ibid*., pp. 78–79.
[37] A/RES/55/2 (18 September 2000): *United Nations Millennium Declaration*.
[38] *Ibid*., para. 7. [39] *Ibid*., para. 9.
[40] A/RES/60/1 (24 October 2005): *World Summit Outcome*, para. 3.
[41] *Ibid*., para. 11. [42] *Ibid*., para. 119. [43] *Ibid*., para. 134.

Within the Security Council itself, mounting interest in the rule of law led to the establishment in September 2003 of a thematic agenda item entitled 'Justice and the Rule of Law'.[44] Discussion in the Council's debates on the rule of law has focused on the need to strengthen the rule of law within post-conflict societies. However, a number of speakers have taken the opportunity to emphasise that the rule of law is equally important in international affairs.[45] UNSG Kofi Annan, for example, has observed that the Security Council has a 'heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security'.[46] Russia has also emphasised that the principle of the rule of law is 'an imperative for the entire system of international relations'.[47]

UN member states have also stressed that the Council should not only promote, but *respect*, the rule of law.[48] Mexico has urged that, 'for the sake of justice and the rule of law, the Security Council must continue to act on the bases of legality that provide support for its mandate'.[49] Chile has underscored that the rule of law offers the Council 'the possibility of basing its work on a concept that embodies the core values of the United Nations'.[50] Austria has warned that a Security Council that is 'dedicated to the resolute implementation of international law' is 'the best incentive for the implementation of law at the national level'.[51]

The Council's meetings on justice and the rule of law culminated in the adoption of two presidential statements devoted to the topic. Security Council presidential statements are adopted by the Council as a whole and must therefore be supported by all Council members. While they may not carry as much weight as Security Council resolutions, presidential statements nevertheless provide an important indication of the Council's position on a given matter. In the first of these statements, adopted on 24 September 2003, the Council reaffirmed the 'vital importance' of justice and the rule of law.[52] The Council also

[44] For meetings held under this new agenda item, see S/PV.4833 (24 September 2003); S/PV.4835 (30 September 2003); S/PV.5052 (6 October 2004).
[45] See, e.g., S/PV.4833 (24 September 2003), p. 2 (Secretary-General Kofi Annan), p. 4 (Pakistan), p. 5 (Russian Federation), p. 13 (Guinea), p. 14, (Spain), p. 21 (United States), p. 21 (Chile); S/PV.4835 (30 September 2003), p. 22 (Sweden).
[46] S/PV.4833 (24 September 2003), p. 2. [47] *Ibid*., p. 5.
[48] See, e.g., S/PV.4833 (24 September 2003), p. 9 (Mexico), p. 22 (Chile); S/PV.4835 (24 September 2003), p. 13 (Austria), p. 16 (Switzerland).
[49] S/PV.4833 (24 September 2003), p. 9. [50] *Ibid*., p. 22.
[51] S/PV.4835 (24 September 2003), p. 13.
[52] S/PRST/2003/15 (24 September 2003), para. 1.

recalled the 'repeated emphasis' given to justice and the rule of law in its own work, including with respect to the protection of civilians in armed conflict, peacekeeping operations and international criminal justice.[53] In the second statement, adopted twelve months later, the Council stressed the importance and urgency of the restoration of justice and the rule of law in post-conflict societies.[54] The Council also observed that justice and the rule of law at the international level were 'of key importance for promoting and maintaining peace, stability and development in the world'.[55]

The Security Council's promotion of the rule of law has extended beyond hosting talk-fests within the walls of UN Headquarters. Perhaps the most striking illustration of the transformation of the rule of law from curiosity to familiar friend lies in the term's increasing appearance in the Council's resolutions. During the Cold War, the rule of law featured in Security Council resolutions a mere handful of times.[56] By contrast, in the nine years from the beginning of 1998 until the end of 2006, the phrase 'rule of law' appeared in no fewer than sixty-nine Council resolutions.[57] The Council has invoked the rule of law in a range of ways. It has called upon parties to an international conflict to resolve their differences in accordance with the rule of law, as in the case of the dispute between the governments of the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia.[58] It has emphasised the importance of (re-)establishing the rule of law in post-conflict situations.[59] It has incorporated the task of promoting and strengthening the rule of law in peace operation mandates, including those in the Central African Republic,[60] Angola,[61] the Democratic Republic of the Congo (DRC),[62] Afghanistan,[63] Haiti,[64] Iraq,[65] Guinea-Bissau,[66] the Sudan[67] and Burundi.[68]

[53] *Ibid.* [54] S/PRST/2004/34 (6 October 2004), para. 3.
[55] *Ibid.*, para. 6. [56] See, e.g., SC Res. 161 (21 February 1961).
[57] For a list, see Appendix 3, Table A. [58] SC Res. 1345 (21 March 2001), para. 5.
[59] See., e.g., S/PRST/2003/15 (24 September 2003), para. 1; S/PRST/2004/34 (6 October 2004), para. 3.
[60] SC Res. 1159 (27 March 1998), para. 14(e).
[61] SC. Res. 1433 (15 August 2002), para. 3B(i). [62] SC. Res. 1493 (28 July 2003), paras. 5, 11.
[63] SC Res. 1536 (26 March 2004), para. 10. [64] SC Res. 1542 (30 April 2004), para. 7(I)(d).
[65] SC Res. 1546 (8 June 2004), para. 7(b)(iii).
[66] SC. Res. 1580 (22 December 2004), paras. 2(a), 2(h).
[67] SC Res. 1706 (31 August 2006), para. 8(k).
[68] SC Res. 1719 (25 October 2006), para. 2(d).

Although the Security Council's resolutions have not drawn an explicit link between the application of sanctions and the promotion of the rule of law, this connection has been made during the Council's debates surrounding the potential establishment or modification of sanctions regimes. In August 1990, when the Council debated the application of sanctions against Iraq, the United States emphasised that the proposed sanctions aimed to prevent 'disregard for international law'.[69] Canada suggested that sanctions sought to 'safeguard respect for the rule of law'.[70] The United Kingdom argued that sanctions would reinforce a 'world order based on respect for law'.[71] In March 1992, when the Council met to consider applying sanctions against Libya, the United States argued that such a step would 'preserve the rule of law'.[72] In October 2005, when the Council prepared to apply sanctions against suspects involved in the terrorist bombing that killed former Lebanese Prime Minister, Rafiq Hariri, Denmark observed that: 'At stake are the sovereignty and integrity of Lebanon, the principle of the rule of law and the credibility of the Security Council in following through on its own resolutions.'[73] Sanctions have thus been portrayed in the Council's debates as an instrument which can be used to strengthen, reinforce and promote the rule of law.

Council debates also demonstrate concerns with the potential negative impact of sanctions upon the rule of law. Speakers have stressed that the Security Council should not engage in 'double standards' when choosing whether to impose sanctions and that, once sanctions are employed, they should be applied in a consistent and uniform manner.[74] They have spoken of the need for the Security Council and its sanctions committees to act transparently.[75] They have also emphasised the need to ensure that sanctions are applied proportionately, so that the negative effects upon civilian populations and third states are minimised.[76]

[69] S/PV.2933 (6 August 1990), p. 18. [70] *Ibid*., p. 25.
[71] *Ibid*., p. 28. [72] S/PV.3063 (31 March 1992), p. 67.
[73] S/PV.5297 (31 October 2005), pp. 3–4 (United Kingdom: 'Turning our backs on the crime, because it appears politically difficult to solve, will not only lead the Lebanese people to lose faith in this body, it will undermine the Council's credibility and authority and damage our enforcement of the international rule of law'); p. 8 (Denmark: 'At stake are the sovereignty and integrity of Lebanon, the principle of the rule of law and the credibility of the Security Council in following through on its own resolutions').
[74] S/PV.2977 (Part I: 13 February 1991), pp. 27–28 (Cuba); S/PV.3046 (31 January 1992), p. 79 (Cape Verde).
[75] S/PV.4833 (24 September 2003), p. 9 (Mexico).
[76] S/PV.4833 (24 September 2003), p. 22 (Chile).

The rule of law is therefore extremely relevant to the Security Council and its sanctions practice. For its decisions to be effective, the Council relies upon the compliance of states with the rule of law. The Council has increasingly championed the importance of the rule of law and underlined that it expects states and non-state actors to comply with the rule of law. But in order to ensure that its actions genuinely promote the rule of law, the Council should ensure that its own extraordinary powers are not themselves susceptible to misuse or abuse. This book demonstrates that the Council's rhetorical commitment to promoting the rule of law does not yet extend to its sanctions practice.

2. The promise and perils of the rule of law

The Security Council tends to refer to the rule of law as if the concept is both clearly understood and inherently desirable. A case in point is resolution 1265 (1999), which was adopted to strengthen the protection of civilians in armed conflict.[77] In that resolution the Council lists the rule of law as one of a number of phenomena that help to prevent the outbreak of armed conflict, along with poverty eradication, sustainable development, national reconciliation, good governance, democracy and the protection of human rights.[78] The Council does not see the need to clarify the meaning of the rule of law, nor to explain why it is a positive phenomenon. It simply presents the rule of law as something that is essential to peaceful society.

The tendency to treat the rule of law as both inherently positive and requiring little elaboration is not restricted to the Security Council. The rule of law has been described as 'an unqualified human good'[79] and 'the most important political concept today'.[80] It has been prescribed as 'a solution to the world's troubles'.[81] Its promise has been trumpeted by presidents of countries with vastly different political, economic, religious and cultural traditions, such as China, Indonesia, Iran, Mexico,

[77] SC Res. 1265 (17 September 1999). [78] *Ibid*., preambular para. 6.
[79] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), p. 266.
[80] Brian Z. Tamanaha, *On the Rule of Law*: *History, Politics, Theory* (Cambridge: Cambridge University Press, 2005), back cover.
[81] Thomas Carothers, 'The Rule-of-Law Revival', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad* (Washington, DC: Carnegie Endowment for International Peace, 2006), pp. 3–13, 3 (characterising the approach of others to the rule of law).

Russia, the United States and Zimbabwe.[82] The rule of law is frequently used as a trump-card in contentious discussions. As the aftermath of the 2000 US presidential elections graphically illustrated, this trump-card can even be played by opposing parties to the same dispute.[83] The rule of law appears to possess a 'power or force of its own'.[84] It seems so self-evidently good that it cannot be challenged and it need not be defined.

Yet despite its apparent magnetism, rhetorical power and simplicity as a political ideal, the rule of law is a remarkably slippery concept.[85] Indeed, the problem of the rule of law has preoccupied political philosophers and legal theorists alike for 2,500 years.[86] The rule of law has been criticised as 'opaque',[87] 'chameleon-like',[88] 'impossible'[89] and 'meaningless'.[90] It has been exposed as 'mere ideology'[91] and 'a slogan without substance'.[92] Even theorists who tenaciously defend and promote the merits of the rule of law, begrudgingly acknowledge that the term is 'remarkably elusive',[93] 'essentially contested'[94] and susceptible to 'promiscuous use'.[95]

The decision to employ a rule of law-based approach to analyse UN sanctions is thus something of a double-edged sword. On the one hand,

[82] Tamanaha, *On the Rule of Law*, pp. 1–2.
[83] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137–164 at 137–138.
[84] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467–487 at 487.
[85] Sir Arthur Watts, 'The International Rule of Law' (1993) 36 *German YBIL* 15–45 at 15.
[86] Waldron, 'Is the Rule of Law an Essentially Contested Concept?', 158.
[87] George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), p. 11.
[88] Sir Anthony Mason, 'The Rule of Law and International Economic Transactions', in Spencer Zifcak (ed.), *Globalisation and the Rule of Law* (London: Routledge, 2004), pp. 121–139 at 125.
[89] Timothy A. O. Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1–18.
[90] Judith N. Shklar, 'Political Theory and the Rule of Law', in Allan C. Hutchinson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), pp. 1–16 at 1.
[91] Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University LR* 781–819 at 781.
[92] Hilary Charlesworth, 'Whose Rule? Women and the International Rule of Law', in Zifcak (ed.), *Globalisation and the Rule of Law*, pp. 83–95 at 83 (noting that others have described the concept thus).
[93] Cheryl Saunders and Katherine Le Roy (eds.), *The Rule of Law* (Annandale: Federation Press, 2003), p. 3.
[94] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept?'
[95] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *TLQR* 195–211 at 196.

the Security Council's increasing emphasis upon the rule of law suggests that the Council should treat seriously the recommendations that emerge from a rule of law-based analysis of its sanctions practice. On the other hand, however, the contested nature of the rule of law requires that the task of constructing a model of the rule of law for UN sanctions should be approached with the utmost caution.

2.1 The scholarly crisis concerning the rule of law

Philosophers and theorists have pondered the notion of the rule of law since at least the days of the ancient Greek philosophers.[96] It is not surprising, therefore, that there should be multiple interpretations of what the rule of law means. Like other political philosophical constructs, such as democracy, liberalism and socialism, the rule of law has attracted, inspired and perplexed countless scholars. The multiplicity of possible interpretations of the rule of law has led one commentator to bemoan that: 'There are almost as many conceptions of the rule of law as there are people defending it . . . The effect is that defenders and opponents alike end up talking at cross-purposes.'[97]

Differences in approach to the rule of law can be attributed to variations in the context in which the concept is being examined, as well as differences in the particular theoretical perspective being employed by an analyst. In terms of context, an exploration of the rule of law in an eighteenth-century penal colony is likely to differ substantially in complexity and scope from a study of the rule of law in a sophisticated, stable, twenty-first century liberal democratic constitutional system.[98] The rule of law, as with law itself, is 'deeply contextual and . . . cannot be detached from its social and political environment'.[99] A model of the rule of law developed in one politico-legal context will not necessarily translate or adapt well to another context. Indeed, even models developed in similar contexts, with the same underlying philosophy concerning the nature of both law and the rule of law, sometimes differ

[96] For a good survey of the history of the rule of law, see Tamanaha, *On the Rule of Law*, pp. 7–90.

[97] Olufemi Taiwo, 'The Rule of Law: The New Leviathan?' (1999) 12 *Canadian Journal of Law and Jurisprudence* 151–168 at 154.

[98] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, Cambridge University Press, 1991), p. 64.

[99] Frank Upham, 'Mythmaking in Rule of Law Orthodoxy', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad* (Washington, DC: Carnegie Endowment for International Peace, 2006), 75–104 at 75.

in emphasis.[100] On the whole, theories developed with complex politico-legal systems in mind tend to focus on finer details concerning the separation of constitutional powers in the state sphere. They have the luxury of being able to promote or criticise functioning legal, constitutional and parliamentary processes. Consequently, these theories tend to construct sophisticated rule of law models consisting of multiple, interrelated principles designed to ensure an effective balance of powers in which the exercise of political power is tempered by judicial controls.[101] In less complex politico-legal contexts, however, where sophisticated legal checks and balances have not yet evolved, the critical rule of law question becomes how to constrain the arbitrary exercise of political power.

In terms of theoretical perspective, differences in approach can often be traced to divergences in the understanding of law underpinning a particular approach to the rule of law. One major fault-line has emerged between legal theorists who maintain that the rule of law is a question of form, who are often classified as 'positivists', and those who maintain that it is a question of substance.[102] This dispute between opposing conceptions of the rule of law that are referred to as formal/thin/positivist, on the one hand, and those that are termed substantive/thick/moralist on the other, concerns whether law, and hence the rule of law, inherently promotes a notion of the good, the moral or the just.[103]

Formal theories deny the existence of any necessary link between law and morality.[104] Law is conceived as autonomous from morality and therefore as not susceptible to manipulation according to conflicting notions of what is moral or good. Formal approaches often locate the source of law's legitimacy in the law-making process, rather than in the inherent or ideal nature of law itself. The benefit of this approach is said to be the ability to analyse law as an objective, scientific phenomenon – as

[100] See, e.g., Waldron, 'Essentially Contested Concept', pp. 154–155 (tracing the similar rule of law 'laundry lists' drawn up by Fuller, Rawls, Raz, Radin and Finnis).

[101] See, e.g., Raz, 'The Rule of Law and its Virtue', 198–202; Lon L. Fuller, *The Morality of Law*, 2nd edn (New Haven: Yale University Press, 1969), ch. 2; Raz, 'The Rule of Law and its Virtue', 198–201.

[102] For general discussion of this major fault-line, see Craig, 'Formal and Substantive Conceptions'; Tamanaha, *On the Rule of Law*, pp. 91–113.

[103] For further discussion of the differences between formal and substantive conceptions of the rule of law, see Craig, 'Formal and Substantive Conceptions'.

[104] See, e.g., Hans Kelsen, *General Theory of Law and State* (New York: Russell, 1961), p. 113; H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593–629; Raz, 'The Rule of Law and its Virtue', 207.

something that 'is' rather than something which is contingent upon values and notions of what 'ought to be'.[105] However, when pursued to its extreme logical conclusion, the formal approach can result in the view that law is valid if made through valid legal processes, even if it is created by detestable regimes, such as the Nazis, or employed for a detestable purpose, such as the promotion of genocide or apartheid.[106] Formalists defend this extreme consequence of the separation between law and morals by arguing that if no such separation is made, there is a danger that citizens might consider compliance with detestable law to be a moral requirement.[107] But the potential for law to be misused deeply troubles those who instinctively expect the rule of law to prevent the emergence of detestable regimes or the promotion of detestable purposes.

Substantive approaches to the rule of law, by contrast, understand law to be an inherently good phenomenon, which by its nature promotes a broader purpose. Many substantive theorists openly claim that there is a moral element to law.[108] In medieval times, theologians such as Thomas Aquinas developed the 'just war' doctrine, according to which the resort to war in certain situations was justified by the authority of God.[109] Natural law approaches suggest that a set of ideal normative principles exist, independent of society, which can be deduced and applied to concrete situations through the use of 'right reason'[110] or 'practical reasonableness'.[111] Substantive approaches thus tie their conceptions of the rule of law to the promotion of major societal goals, such as 'justice'[112] or 'rights'.[113] The benefit of substantive approaches is that

[105] David Hume, *A Treatise of Human Nature* (Harmondsworth: Penguin, 1969), p. 521.
[106] Hart, 'Positivism and the Separation of Law and Morals', 615–621.
[107] Anthony Clark Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999), p. 20.
[108] Fuller, *The Morality of Law*; Craig, 'Formal and Substantive Conceptions', 467, 477–484.
[109] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd edn (New York: Macmillan, 1954), pp. 35–38; Tamanaha, *On the Rule of Law*, pp. 18–19.
[110] Cicero, *De Re Publica* (London: William Heineman, 1970), book III, p. xxi.
[111] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 21, 88–89, 100–127.
[112] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); Robin L. West, *Re-imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Aldershot: Ashgate, 2003).
[113] See, e.g., the UN Secretary-General's conception of the rule of law (explored below), which is articulated in S/2004/616 (23 August 2004): *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, para. 6.

they give law a purpose that is aligned with objectives that are deemed to benefit the community as a whole. By imbuing law with a teleological, public interest component, law becomes a transformative tool for pursuing society's most important goals. The weakness of substantive approaches, however, is that although they purport to provide an authoritative, external, universal basis for the legitimacy of law, they can in fact privilege particular conceptions of truth, validity and what is morally desirable.[114] People from different backgrounds may thus reach contradictory conclusions concerning the legitimate substance of the law. The process of identifying the content of law is therefore contingent upon subjective notions of what the law should be.

Another, deeper theoretical fault-line has evolved in response to the assumption underpinning both formal and substantive approaches, namely that the rule of law can be differentiated from politics and can therefore lead to neutral, objective outcomes. Debate surrounding this second fault-line has been particularly heated in US academic legal circles, where discussion of the rule of law has focused upon the role of judicial decision-making. The key question has been whether it is possible for judges to decide cases objectively, on the basis of an ideal model of the rule of law. Proponents of the view that courts guarantee the rule of law argue that the role of judges is to find and apply, rather than create, law.[115] By being loyal to existing rules, judges can reach decisions that accord with objective notions of the rule of law.[116] If the law is unclear, judges must exercise their discretion responsibly in the search for a 'correct result'.[117] According to this view, diligent judges can ensure that disputes are resolved objectively, in accordance with the rule of law.

Critical scholars have countered that it is a fiction to conceptualise law, and thus the rule of law, as possessing objective, determinate content.[118] As a human construct built upon aspiration and argumentation, law is by its very nature historically contingent.[119] Feminist scholars have demonstrated how 'legal rules and doctrines often

[114] Thomas Hobbes, *Leviathan* (1651) (J. C. A. Gaskin (ed.) (Oxford: Oxford University Press, 1998), ch. 4, p. 26); Hume, *A Treatise of Human Nature* (1740) (D. F. Norton (ed.) (2000), book 2, part 3, section 3, p. 266.

[115] West, *Re-imagining Justice*, 15.

[116] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *U Chicago LR* 1175–1188.

[117] Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624–638 at 636.

[118] Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale LJ* 1515–1544 at 1518.

[119] Morton J. Horwitz, 'The Historical Contingency of the Role of History' (1981) 90 *Yale LJ* 1057–1059 at 1057.

contain ingrained, unseen biases against women'.[120] The rule of law can thus 'mask and even exacerbate the injustices to women'.[121] The choice to conceptualise the rule of law in formal or substantive terms will make little relevance to the outcome, for no rule of law model can live up to its promise of bringing principled, objective, impartial order to unprincipled, subjective, partial chaos.

2.2 Salvaging the rule of law from scholarly crisis

When one becomes mired in the theoretical debate concerning the rule of law, it is difficult to imagine how the concept might form a useful analytical tool for scrutinising any aspect of public policy, let alone the application of UN sanctions. There is no escaping the fact that the rule of law's portrait has been painted and criticised in almost infinite ways. Yet the chameleon-like nature of the rule of law represents both a weakness and a strength. A simple abstract political idea with strong rhetorical appeal is bound to resonate in different ways as it is employed by different actors located in different political, legal and social contexts. Ironically, the elusiveness of the rule of law strengthens its ability to endure as a magnetic political ideal. For an idea which can be reconceived,[122] recrafted,[123] reconsidered,[124] revived[125] or revisited[126] is unlikely to be condemned for long to history's dustbin.

Despite the inherent tensions in the concept of the rule of law so deftly revealed by theorists of different stripes, valid reasons remain for pursuing a rule of law-based analysis of UN sanctions. The primary reason lies in the potential of the notion of the rule of law to exert genuine influence upon practical developments in the real world. In practice, the goal of strengthening the rule of law underpins a range of concrete interventions around the globe.[127] Indeed, this objective is

[120] Charlesworth, 'Whose Rule? Women and the International Rule of Law', 83.
[121] *Ibid*., 93.
[122] Charles Sampford, 'Reconceiving the Rule of Law for a Globalizing World', in Zifcak (ed.), *Globalisation and the Rule of Law*, pp. 9–31.
[123] David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999).
[124] Radin, 'Reconsidering the Rule of Law'.
[125] Thomas Carothers, 'The Rule-of-Law Revival', in Carothers (ed.), *Promoting the Rule of Law Abroad*, pp. 3–13.
[126] Allan C. Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' in Dyzenhaus (ed.), *Recrafting the Rule of Law*, pp. 196–224.
[127] For a valuable survey of global rule of law interventions, see Carothers, *Promoting the Rule of Law Abroad*.