

Introduction: Filling or falling between the cracks? Law's potential

JEREMY FARRALL AND KIM RUBENSTEIN

1. Introduction

Between 1990 and 2003 the United Nations applied comprehensive economic sanctions against Saddam Hussein's Iraqi regime. The sanctions aimed to prevent the flow to and from Iraq of all but the most basic of food and medical supplies.¹ They were heavily criticised for the impact they had on Iraqi civilians. Some critics went so far as to describe the Iraq sanctions as 'the UN's weapon of mass destruction',² as 'a genocidal tool'³ and as 'modern siege warfare'.⁴ Stung by this kind of criticism, the UN Security Council created the Oil-for-Food Programme (OFFP).⁵ The OFFP was designed to permit the closely regulated export of Iraqi oil to finance the purchase of humanitarian supplies.

To a large extent the OFFP did channel essential supplies to a population in desperate need. However, as the Volcker Independent Inquiry Committee concluded, the programme was exploited by the Hussein regime.⁶ A number of foreign companies were exposed as having made illegal side payments to the Hussein regime in the course of providing humanitarian supplies to Iraq under the umbrella of the OFFP. One of the worst offenders was AWB Limited (AWB Ltd) and its subsidiary AWB International Limited (AWB(1)).

The abuse of the OFFP by AWB company, which came to be known in Australia as the 'Wheat-for-Weapons scandal', raised a number of interesting legal questions. The UN sanctions regime imposed against Iraq created a web of legal obligations for UN member states. These obligations were created at the global level, by a global political body (the UN Security Council) whose decisions have global legal effect. Yet the task of implementing those obligations fell upon domestic authorities. In order to prevent the export to or import from Iraq of goods and commodities, action had to be taken by public authorities within the

domestic jurisdictions of all UN member states. The actors targeted were primarily those engaged in international trade, including both public and private actors. The attempt by the UN Security Council to take coercive action against Iraq thus initiated a chain reaction of complex legal interactions, between international law and domestic law, between public and private law, between public authorities and private actors.

This collection explores these issues and other fascinating questions that arise when legal regimes collide. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically.⁷ While there is some scholarship developing in the area of global administrative law,⁸ and some scholars have touched upon the principles relevant to both disciplines,⁹ the publications to date contain only a subset of the concept underpinning this book.

This book aims to broaden understanding of how public and international law intersect. It is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship. What can public lawyers bring to international law and what can international lawyers bring to public law? What are the common interests? Which legal principles cross the international law/domestic public law divide and which principles are not transferable? What tensions emerge from bringing the disciplines together? Are these tensions inherent in law as a discipline as a whole or are they peculiar to law's sub-disciplines? Can we ultimately only fill in or fall between the cracks, or is there some greater potential for law in the engagement? It is part of a series that brings together a range of established and up-and-coming scholars from a variety of fields, including international relations, political science and public administration as well as public law and international law. The diverse contributions to this volume, from distinct yet intertwining disciplines, also provide a launching pad for subsequent conversations on broader linkages between domestic public law and policy on the one hand and international law on the other.

This book grapples with the questions outlined above primarily by thinking about accountability and governance in a globalised world, and in particular through the framework of sanctions. The impetus for using sanctions as a starting point to develop the thinking around these issues evolved from the particularly 'Australian' example introduced above and discussed further below.

On 21 April 2004, following allegations of fraud and misconduct in relation to the administration of the OFFP, the UN Secretary-General appointed an Independent Inquiry Committee (the IIC) to investigate

the administration and management of the Programme. In September 2005, the Final Report of the Independent Inquiry Committee into the UN OFFP (the Volcker Report) concluded that there had been a number of violations of Security Council Resolutions 661 (1990) and 986 (1995).

In Australia, in response to the Volcker Report, a Royal Commission was established on 10 November 2005. The Honourable Terence Cole, AO RFD QC, was appointed¹⁰ to inquire and report on whether decisions, actions, conduct or payments by Australian companies mentioned in the Volcker Report breached any federal, state or territory law.

The Cole Commission's Final Report¹¹ recommended that twelve people, including eleven former AWB managers, should be subject to possible criminal charges. It concluded that AWB Ltd, AWB (I) and certain individuals had been involved in activities that constituted possible breaches of the Australian Crimes Act 1914 (Cth), the Criminal Code 1995 (Cth), the Crimes Act 1958 (Vic), the Banking (Foreign Exchange) Regulations 1959 (Cth) and the Corporations Act 2001 (Cth). Commissioner Cole found that eleven former AWB employees may have breached the Corporations Act 2001 (Cth). Moreover, ten former AWB employees were cited for further investigation over possible breaches of the Crimes Act 1914 (Cth), the Criminal Code 1995 (Cth), the Crimes Act 1958 (Vic) and the Banking (Foreign Exchange) Regulations 1959 (Cth).

However, the report cleared the then federal government of any wrongdoing, including the now former Prime Minister, John Howard, and senior ministers Alexander Downer, Mark Vaile and Warren Truss. Commissioner Cole's findings also exonerated the Australian Department of Foreign Affairs and Trade (DFAT) of any knowledge of the relevant activities of AWB. The report found that AWB had deliberately misled and deceived DFAT as well as the UN. The report concluded that 'at no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq'.^{11a}

Commissioner Cole outlined significant findings as to AWB's 'culture of closed superiority and impregnability, of dominance and self-importance'.^{11b} He found that AWB had failed to create, instil or maintain a culture of ethical dealing, which was the responsibility of the board and management of AWB. He stated that no one at AWB had asked the required question, 'What is the right thing to do?' Instead, business efforts were focused on determining if arrangements could be formulated in such a manner as to avoid the impression of breaching laws or sanctions. Commissioner Cole found that the Australian Wheat Export

Authority (WEA) had not had knowledge of AWB's illicit payments to the Government of Iraq. The WEA had nevertheless failed in its duty to supervise AWB's activities.

This Australian example highlights the ways in which the national and the international intersect. It does so in the 'traditional way' of thinking about public law and international law, by looking at the way sanctions applied by the UN Security Council are incorporated into domestic jurisdiction through the promulgation of national laws. The shortcomings of these domestic legal frameworks and the domestic governance and accountability structures that should have ensured the domestic implementation of the Iraq sanctions are one focus of this book. But the Wheat-for-Weapons scandal also revealed weaknesses in public governance and accountability structures at the global level. Moreover, it also raised questions about the application of UN sanctions to *individuals*, wherever those individuals may be situated.¹²

The structure of this introduction follows the structure of the book itself. It begins by laying the foundations for the questions being asked. It then moves on to analyse the concept of internationalising public law and how that is particularly useful in the sanctions context, before looking specifically at implementing Security Council sanctions. Its attention then turns to both corporations and lawyers who straddle the public and international law fields in navigating sanctions, before returning to the public sphere to home in on public law and public policy in the AWB affair in Australia. The value of linking international lawyers and public lawyers together is further extended by concluding with two further scenarios that draw out and emphasise ideas canvassed in the context of sanctions, again emphasising the project's broader value.

2. Setting the foundations

The first two chapters ground the project within a contestable theoretical frame. Peter Danchin asks: whose law do we have in mind, and to which public are we referring, when we use the term 'public' in both public law and public international law? Domestic public law is concerned with governments and the government's relationship with its membership. In international law,¹³ we move beyond the domestic relationship between the individual and the state to the law governing those nations in their relationships with one another. Both spheres are ultimately concerned with governance and the links between individuals and governments. But whose law indeed? Can we talk about law as a singular notion? In

highlighting the disciplines of public and international law we are reminding ourselves of a basic idea: that law is not a singular notion.

By contrast, Charles Sampford predicts a development towards a more unified notion of law, believing in a future of convergence between public and international law, where '[t]he actual limitations on state power caused by globalisation and the increasing domestic reach of treaties will mean that international doctrine and methodology will infuse domestic law in all forms'.¹⁴

However, if one believes that law is contextual then the contexts of public and international law may continue to be different in many ways. Whether one is inclined to a Sampford or Danchin starting point in thinking about the issues, as Danchin explains in his contribution, all of the chapters in this collection in some way address different aspects of the same underlying dilemma: how to understand the conceptual relationship between the rights of states on one hand and the rights of individuals on the other?

In the classic Westphalian view of the relationship, it is a relatively clear picture: '[t]he fundamental rights and duties of states, regardless of their "private" belief systems ... are to be determined by that body of customary and consensual norms known as "public" international law; the fundamental rights and duties of individuals, regardless of their "private" belief systems, are to be determined by that body of constitutional, administrative and criminal norms known as "public law"'.¹⁵ In this highlighting of public/private and internal/external we see the beginnings of dichotomies that flow throughout the collection. Boundaries and contrasts amplify the questions and contexts for thinking through these issues.

The early link to sanctions can be seen too in Danchin's following statement; 'it is critical to realise at the outset, however, that the underlying rationale of the move to "public law" whether domestic or international is to establish the conditions necessary for community and social order, by *limiting* the freedom of legal subjects'. Herein lies a common bond in the legal project; of restricting, ordering and limiting people in their actions. By drawing together public lawyers and international lawyers to think through the limiting of legal subjects in the domestic and international arenas, this volume examines whether there are common ideas and problems that each can shed light on for the other.

But Danchin, too, cautions us against thinking about these 'different' jurisdictions in an overly idealised and static conception of the divide between international law and public domestic law. International law no

longer only regulates relations between states, but has extended to regulate individuals *within* states, challenging the Westphalian accounts of the public/private divide and the sovereignty of states. While liberal internationalists, such as Charles Sampford, see this erosion of sovereignty as leading to a 'post-Westphalian convergence', Danchin's objective is to challenge and problematise this convergence thesis between sovereignty and human rights and in so doing he reminds us of the different understandings of foundational concepts such as nation states and sovereignty.

Throughout Danchin's energetic chapter examining Rawls's 'admirable attempt to grapple with the difficulties of value pluralism in international law'¹⁶ he draws the reader into the different issues at stake. We are reminded that a project that brings together different disciplines should not be necessarily about convergence and congruence, but rather an appreciation of divergence and dissonance and that in talking to one another and sharing our own perspectives we can identify sites of struggle: between internal and external frameworks, between descending and ascending claims to rights, between public and private modes of justification, rather than necessarily seeking sites of harmonisation and unity, as does Sampford.

3. Internationalising public law

One framework in which scholarship has already begun linking public and international law is 'global administrative law'. The second part of the book begins with Simon Chesterman's chapter, which draws upon the global administrative law project. Chesterman defines global administrative law as 'encompass[ing] procedures and normative standards for regulatory decision-making that fall outside domestic legal structures and yet are not properly covered by existing international law'.¹⁷

A central project of domestic administrative law is to regulate accountability and governance *within* the nation. This is the focus of later chapters in the collection, such as those of Stephen Tully and Daniel Stewart. Chesterman's gaze covers many different international bodies and the fragmented nature of international regulatory decision-making to date. He reminds us of the tensions and values inherent in the global administrative law project. "The term "global administrative law" does not presume that the normative response to these questions is uniform – or that it should be. But as an emerging area of practice, the concept of a

global administrative law can help frame questions of accountability and sketch some appropriate responses.¹⁸

Indeed the UN Security Council's sanctions committees 'routinely make decisions with major impacts on countries and individuals': a point that is explored further by Devika Hovell and Erika de Wet in this section, along with its ramifications for questions of accountability. The UN Security Council's decisions have an impact on countries' 'rights' vis-à-vis each other, and more pointedly on individual rights within and beyond the state. Chesterman questions '[w]hether it makes sense for these activities to be thought of as a coherent whole' and adds a further, complicating factor: in the process of importing administrative law principles to global administration, one needs to be conscious of different structures of authority.^{18a} In domestic frameworks, there is a clear hierarchical order in reviewing governmental decisions. At the global level, however, the 'horizontal organisation of certain forms of global administration' is more complicated.^{18b}

Chesterman draws upon Ruth W. Grant and Robert O. Keohane's seven different structures of accountability across the spectrum of legal and political remedies to explore the different ways in which the UN Security Council could become more accountable; a project that Richard Mulgan also takes up enthusiastically in Part IV of this book. Importantly, Chesterman concludes that the goals of administrative law 'go beyond constraining decision-makers ... to providing input legitimacy to decision-making processes, broadening participations, shining light on deliberations and providing the possibility of revisiting bad or unfair choices'.^{18c} This is a more elaborate aim common to public and international law than the one identified by Danchin of '*limiting* the freedom of legal subjects'. It aims to reform the frameworks within which decision-making occurs, so as to improve not just the outcomes but the processes themselves.

In this same vein, Devika Hovell's piece extends the domestic public law project in a very specific way, by looking at transparency and access to information in the UN framework of decision-making. Hovell examines the role of legal standards in ensuring transparency and explores the reasonable limits of the principle of transparency in the context of the Security Council's decision-making on sanctions. In particular, she examines 'whether there are sufficient points of connection between the domestic laws' around transparency and freedom of information legislation 'to be able to identify a "general principle" of international law that might be applied to the Security Council'. As she rightly states, it 'is an

analysis that also lends itself to broader academic debate about the recognition of a body of “global administrative law” or “international public law”. The focus on sanctions is also particularly significant in this respect. As Hovell explains:

[s]ome fifty states have complained about the lack of transparency in the present sanctions system. Concerns about information-sharing and the lack of transparency in the sanctions regime were present during the three multilateral reform processes that contributed to the development of targeted sanctions. Given the seriousness of the consequences for those targeted by sanctions, including the freezing of global assets, and the denial of educational, employment and international travel opportunities, it is unsurprising that affected entities have applied pressure on the Security Council to explain the basis for their decisions.¹⁹

While Hovell does identify five common themes around transparency in a cross-section of legal systems, she reminds us that this is not sufficient in itself to establish a general principle. As she explains by taking us through international law’s approach to establishing general principles, ‘it is necessary also to determine whether the principle can be said to be integral to the nature of law and legal systems’. She comes to the conclusion that it is

too early to refer to a general principle of international law recognising a right of access to information ... because many of the relevant enactments are too recent in origin to be able to reflect principles that can be said to be integral to any legal system, if certain of those enactments can even be said to have achieved the status of law at all.²⁰

That being said, she does show how the common themes identified could play out in the sanctions framework of the UN Security Council to ‘encourage public understanding, scrutiny and trust’; public law values that would serve to legitimate and strengthen the sanctions framework.

Hitoshi Nasu’s contribution to internationalising public law is also directed at the UN Security Council and its Chapter VII powers. Nasu concentrates upon the concept of the rule of law and introduces to the international framework the public law concept of ‘dialogue’. He wants to progress the idea that ‘the supremacy of the rule of law can be sustained over the Security Council acting under Chapter VII of the UN Charter’. He argues that ‘[r]ecent developments in the Council’s activity have seen a legislature-like endeavour to address threats posed by non-state actors, and more complex and technical administrative operations imposing sanctions against non-state actors’.²¹ In his view, this

necessitates, 'some form of mechanism whereby the legality and validity of the Council's decision is subject to public scrutiny'. Nasu examines conventional review mechanisms – political accountability and judicial review – and highlights their constraints. He then considers an 'alternative mechanism' with a view to fostering communities of dialogue based on the concept of 'regulatory conversation'. In doing so he seeks to complement the two conventional methods of control by filling the gap with the development of legal accountability. He draws upon the work of Julia Black, also used later in the collection by Linda Botterill and Anne McNaughton in their chapter, to suggest creative ways of dealing with governance and accountability issues within the international framework. This is a prime example of pushing public law into the international domain in ways that may assist in improving common problems of accountability.

Professor de Wet's concern also lies with the UN Security Council. de Wet's chapter builds upon her earlier work on the Security Council's Chapter VII powers and the potential for judicial review of the Council's exercise of those powers, which has argued that 'due to the absence of a centralised international judiciary with the (mandatory) competence to review the legality of Security Council decisions, domestic and regional courts will increasingly be confronted with this task, in an era where international organs frequently take decisions with direct consequences for the rights of individuals'.²² In this chapter, however, de Wet helpfully extends this argument into the terrain of UN sanctions. Here we return to Danchin's starting-point directly, with a reminder of the impact of decisions on individuals and placing those decisions and accountability within a legal context.

de Wet's chapter analyses recent regional and domestic judgments in Europe, where courts were reviewing the legality of Security Council resolutions. Central to the analysis are the two decisions of the Court of First Instance of the European Communities (CFI) of *Yusuf and Al Barakaat International Foundation v. Council and Commission*²³ and *Kadi v. Council and Commission*.²⁴ These cases evolve from Security Council Resolutions 1267 of 15 October 1999 and 1333 of 19 December 2000 and the measures subsequently adopted within the European Union in order to implement them in a uniform manner throughout all member states.²⁵

de Wet's chapter focuses on the extent to which the UN Security Council is bound by human rights; the particular implications of *ius cogens* norms; and the potential role of regional and national courts in

making the UN Security Council accountable for human rights violations. She therefore examines how human rights concepts, which straddle both public and international frameworks, might regulate and restrain an international body. At the same time, her analysis also returns us to the traditional way in which we see the linking of public and international law – the implementation of international law in a domestic setting.

In de Wet's view, the cases have strengthened the notion of a hierarchy in international law that also constitutes an outer limit for Security Council action. They have also confirmed a (limited) role for domestic and regional courts in enforcing this hierarchy. However, closer scrutiny reveals that this seemingly progressive development has not yet resulted in meaningful human rights protection when human rights infringements are likely to result from binding Security Council resolutions. Equating the outer limits of Security Council action with the very small number of *ius cogens* obligations currently acknowledged under international law counterproductively makes these limits ring hollow in the ears of those concerned about the Security Council's increasing encroachment on individual freedoms. It is also likely to spark attempts to elevate all human rights to the level of *ius cogens* obligations in order to curb the Security Council's powers, which may lead to equally counterproductive consequences.

4. Implementing Security Council sanctions

This next part extends de Wet's focus further on the Security Council further by examining the way sanctions operate: both in a theoretical sense, and in a very practical sense.

Kevin Boreham's chapter takes us directly to the AWB affair, examining it within the international legal framework. The 'delicate' nature of sanctions implementation together with the fact that relevant Charter and customary norms may be asserted but not proven, and the fact that the standards of compliance that resound in the texts of the relevant Security Council resolutions were not reflected in effective guidance to member states, leads him to argue that, while Australia did not violate its obligations under the UN Charter and customary international law as a result of the kickbacks by AWB to the former Iraqi regime under the UN Oil-for-Food Programme, conformity with 'conveniently minimal requirements of international law does not equal competent governance'.²⁶ In this sense he is effectively arguing that the law on sanctions

is not strong enough in 'restricting, ordering and limiting people in their actions', which is an underlying mission of public and international law.

In Jeremy Farrall's contribution we see further limitations on the UN Security Council in the area of sanctions monitoring. As Farrall explains, while the task of sanctions monitoring was traditionally undertaken by the Security Council's sanctions committees, it has been increasingly delegated to independent bodies of experts. So, over the past decade the Council has established a variety of sanctions monitoring expert bodies. The role of these bodies is to provide independent analysis of particular sanctions regimes in order to make recommendations to strengthen sanctions implementation.

Mirroring the UN sanctions system more broadly, he shows how the expert bodies, evolution has been 'ad hoc and reactive, rather than systematic and strategic'. While Farrall acknowledges 'this approach has allowed the Security Council to be flexible and inventive at times', he reminds us that 'it has had the consequence that principles of governance and accountability have developed in an equally ad hoc manner'.²⁷ So, for instance, he shows us how the Security Council's 'practice of outsourcing sanctions monitoring to independent actors raises a number of questions'. These include:

1. Are there any limits on the Council's ability to delegate its responsibilities for the maintenance of international peace and security?
2. When the Council creates independent bodies to monitor sanctions implementation, how closely should it supervise those bodies?
3. How does the Council regulate governance and accountability within the independent expert bodies?

Farrall's chapter reminds us of the global administrative law project, arguing 'that while there is no shortage of global norms and doctrines purporting to regulate global behaviour, there are few practical mechanisms to enforce those norms'. Indeed, 'UN sanctions form one of the most visible examples of a global enforcement mechanism, yet they are often criticised for being ineffective'. Constructively, Farrall takes us through the UN Security Council framework and the evolution of sanctions expert bodies, identifying the 'multi-layered governance structure for sanctions monitoring'. In his view, this governance structure suggests that there should be a similarly multi-layered system of accountability. Ultimately, he comes to the view that the 'Security Council should give serious consideration to establishing a permanent, well-resourced sanctions monitoring body within the UN Secretariat'. In suggesting this, he

argues '[t]he staffing model should be flexible, enabling the monitoring body to respond to surges and lulls in sanctions activity' and that it 'should contain experts who focus on cross-cutting issues that affect multiple sanctions regimes' with a '[p]rovision ... to hire country-specialists on a short-term basis, in order to conduct fact-finding field missions'.²⁸

The themes of multiple layers and the complicating framework of the public/private divide in Farrall's chapter are further developed in the next section, which explores the place of corporations.

5. The Place of Corporations

This part emphasises the range of actors involved in the way international and domestic law operate. Justine Nolan's piece brings corporations directly into the picture. By focusing on the nexus between human rights and business, Nolan reminds us that states are not the only entities that we should think about when considering human rights principles, highlighting that there are 'actors' who operate transnationally in a way that undermines traditional boundaries, both geographically and conceptually.

Beginning with the appointment of a Special Representative on the issue of business and human rights, Nolan highlights the conceptual imprecision of the 'attempts to apply human rights standards to corporations and the implicit difficulties this exactness imposes on both the corporation and those seeking to hold it accountable'. This theme of accountability resonates with de Wet's and Nasu's concerns about the Security Council and is picked up more directly by Richard Mulgan's contribution. Nolan argues that 'consistency and guidance from the UN, including input from treaty bodies and the Human Rights Council on the apportionment of responsibility between states and companies, is part of the process required to assist in clarifying the borders of corporate responsibility for human rights'.²⁹

In reviewing the emergence and acknowledgment of the relationship between human rights and business, she acknowledges that both the 'UN General Assembly and the Security Council have, at times, recognised the need for the cooperation of business in ensuring the efficacy of sanctions'. As a perfect segue into the following chapter, Nolan affirms that the 'recent AWB scandal in Australia is illustrative of the accountability gap between the standard of conduct espoused (required) by constitutive sanctions instruments and the complex realities posed by

the multijurisdictional nature of business operations'. Here we see the state's significance in enforcing the effectiveness of sanctions upon business. To that she argues that states should 'devise or adapt mechanisms to ensure that corporations understand, respond and participate in the protection of human rights ... [which] may require states to step outside of their comfort zone and protect human rights from corporate abuses even when occurring outside of their territory'.³⁰

Botterill and McNaughton's chapter examines these issues in the very scenario that gave rise to this collection: the Wheat-for-Weapons scandal involving AWB. They remind us that the case demonstrates the problems of achieving compliance with legal obligations that cross borders. Picking up on the recurring theme of dichotomies, they concentrate upon the public/international dichotomy in relation to ensuring 'appropriate compliance by and accountability of those on whom these obligations are imposed'. In other words, '[i]f a legal obligation is imposed in one legal system, for example under international law, but must be enforced under another legal system, for example, a domestic legal system, then regulating the compliance of the "obligee" with their obligation must be undertaken by an entity that can bridge this apparent gap between these legal systems'.^{30a}

Botterill and McNaughton directly pursue this collection's underlying project of bringing public law together with international law. They argue for 'an alternative to persisting with an analysis that tries to reconcile both international and national, public and private, with the state as the norm and the non-state as "other" ... [by considering] both public and private, domestic and international as part of a single legal system'.^{30b} Drawing upon Peter Cane's analysis of Dicey as a starting point, they argue for a broader concept of 'regulation' as a way of bridging a divide and viewing it all within one framework. This is where they, like Nasu earlier, draw upon the work of Julia Black on 'decentred regulation'. They also draw on discussions of regulation in the area of competition law in which the boundaries of national and international intersect.

Botterill and McNaughton suggest that in taking Black's preferred definition of regulation and applying it to the Oil-for-Food arrangement they are 'better able to identify who would be best placed to monitor compliance, *at a municipal level* with obligations that have in fact been imposed at an *international level*'.^{30c} The actual body, the Wheat Export Authority, examined in their chapter is also analysed by Daniel Stewart, drawing out further links between domestic public policy and domestic

public law. The reforms introduced to Australian legislation after the Cole Inquiry are also surveyed. In Botterill and McNaughton's analysis we see the complexities of ensuring that international obligations are regulated by the appropriate body under domestic law, particularly when such obligations fall on non-state actors.

6. The Role of Lawyers

Picking up on the analysis of non-state actors, the next section considers the role of lawyers in the accountability spectrum of the intersections of public and international law. This is done from two different vantage points raising particularly valuable questions. Vivien Holmes examines the role AWB in-house lawyers played in the AWB-Iraq story, exploring how 'lawyers who are too closely identified with the perceived interests of the client can step over the ethical (even if not the criminal) line, and work against both the client's best interests and the public interest'.³¹ In this section then, the term public is situated in the domestic public separation of powers context of lawyers advising government as well as in the public interest, which in Holmes's view extends beyond the domestic public to the international public. Stephen Tully examines the position of the lawyers who worked for government, exploring several questions in the AWB context, particularly the relationship between government legal advisers and the executive branch.

In her chapter, Holmes reflects on the international reach of legal practice, demonstrating the global ramifications of the role of the lawyers in the AWB affair who were implicated in unethical actions. This was partly because AWB, as a global corporation, acted globally, but she also raises the point that lawyers in a globalised world practice on an international sphere, blurring the lines between public and international law. With AWB lawyers identifying too closely with the perceived interests of the client, they undermined the wider ethical considerations involving the rule of law, and the public interest.

Drawing upon Simon Longstaff's work on 'thin' and 'thick' conceptions of ethics, Holmes focuses attention on the fact that while the actions of AWB lawyers were not illegal within domestic law (with the exception of AWB's General Counsel), they nevertheless demonstrated a thin conception of ethics. With these distinctions in mind, Holmes argues that as legal practice is increasingly globalised, the ramifications of legal practice become broader and we need to rethink professional ethical horizons. While Commissioner Cole did not address possible

breaches by AWB lawyers of professional ethical standards, Holmes argues that AWB lawyers stepped over the ethical line to breach their duties to the law, the client and the public interest.

Holmes's chapter goes further and addresses the effects of globalisation on the legal profession more generally. She reminds us that domestic lawyers increasingly offer legal services around the globe, and global law firms are becoming major players. Holmes draws out the themes of this collection by looking at the intersection between public and international law in the legal profession. In the future, lawyers will increasingly be called on to play a vital role in developing local, regional and international law, both public and private, as well as to work at the intersections between the two. Those lawyers, however, are not always grounded in any domestic ethical or professional regulatory context. Due to their global nature, they have often lost touch with their ethical commitment to the law and the public interest.

Another pertinent issue is that global law firms service predominantly corporate and commercial clients. Commercialism amongst lawyers, which often results in the maximisation of profit without adequate regard to ethical professionalism, is inconsistent with the role of the lawyer, and was at the heart of AWB's downfall. Holmes places her arguments squarely at the intersection of public law and international law. She makes us realise that the pursuit of profits at all costs by AWB's lawyers allowed them to ignore the global public interest and the crucial international issue: that UN sanctions were designed to place severe restrictions on Saddam Hussein's regime. Their actions had worldwide ramifications when seen in this context.

Holmes, therefore, argues that ethically isolated lawyers require an external reference group or network outside their workplace. In other words, they need professional bodies and external colleagues who can espouse the core values of the profession, particularly the public interest. The AWB lawyers identified too closely with the perceived interests of their client by facilitating the payment of 'kickbacks'. By failing to see the bigger picture, they overstepped the ethical line.

On a positive note, Holmes reminds us that if lawyers take a global perspective of their ethical duties, the law can go far in redressing the challenges facing humanity, challenges such as international conflict, corruption and worldwide poverty. She concludes by arguing that the expanding horizons of the twenty-first century legal practice, like those of public law and international law, call for a civic professionalism capable of meeting new ethical challenges.

In his chapter, Stephen Tully moves our focus from private lawyers to public lawyers; the legal advisers employed by DFAT. He asks several questions about the role of international lawyers in advising corporations on sanctions compliance, the regulatory framework Australia employed to implement sanctions against Iraq under the OFFP and the extent to which administrative law principles could apply to the circumstances raised by DFAT's involvement in the AWB affair. In doing so, Tully scrutinises the relationship between government legal advisers and the executive branch.

The issues raised in Tully's piece reflect the key questions asked by this edited volume. At the national level, he examines the application of considerations of participation, transparency and information access as a means of enhancing public and private sector accountability to the provision of legal advice to corporations by Foreign Ministries. At the international level, he considers how these principles can be applied to corporate engagement with UN sanctions committees. In doing so, Tully's chapter analyses the concept of internationalising public law, and how this is particularly useful in the context of sanctions. Tully argues that it is only when the disparities in the accountability of transnational actors relative to public institutions are appreciated that administrative law measures in both spheres will emerge.

On both the domestic and international fronts, Tully finds that opportunities and risks exist for government agencies when advisory roles become blurred with regulatory responsibilities. Internationally, administrative law considerations remain peripheral. In the domestic sphere, corporate responsibilities must be appreciated in full.

The multiplicity of actors and jurisdictions discussed in this section illuminate the value and importance of the establishment of global norms across diverse jurisdictions. However, there is a clear need for context and jurisdiction to influence those global norms in differing ways. This will ensure accountability and governance play out in ways that meet the needs of the specific institutional frameworks they are operating in, at any given time and place.

7. Public Law and Public Policy

The use of the term public law in black-letter law terms refers to constitutional and administrative law, which have been discussed throughout this collection. In the domestic sense, very clear examples of legal accountability emerge both through legislative frameworks and

judicial mechanisms. Indeed, Hitoshi Nasu's paper seeks to transfer some of those concepts to the international domain.

In this part there are further reflections on how concepts of accountability play out in the domestic public law framework, and, in particular, how notions of legal and political accountability intersected in the AWB affair. In this sense we see public law broadly encompassing both the 'letter' of the law and the essence that lies behind it.

Daniel Stewart extends some of the common themes of the public and private distinctions in the national/international framework by examining the implications of the private nature of AWB and its international obligations within a domestic administrative law framework. Stewart examines several Australian High Court decisions of relevance to the discussion. Complicated questions about the role of the courts in these decisions are drawn out. Indeed, the initial questions raised in this introduction in the context of the first part of the book re-emerge – we are again examining 'the conditions necessary for community and social order' by looking at the 'limiting' of the freedom of legal subjects, both when they act within their jurisdiction and beyond it. As Stewart argues, 'the basis of the implication of public law standards is ... dependent on ... external, objective source[s] of *limits* on authority'.³² Moving then to consider explicitly how domestic courts treat international obligations, Stewart again examines the Australian cases. Allocating responsibility is a key theme of his chapter – both in terms of the actual decision-making of those bound by the sanctions, and also in terms of determining the legal validity of the implementation of those decisions by the judicial/legal framework.

The allocation of responsibility is a key aspect of accountability, and Richard Mulgan squarely addresses this question, examining issues of accountability in the AWB affair and its placement in the OFFP. As Mulgan states, '[w]hile the understanding of accountability differs significantly between the domestic and international spheres, largely because of the comparative weakness of international political and legal institutions, underlying continuities in both the theory and the practice of accountability provide a basis for fruitful comparison'.³³ Mulgan affirms that the 'AWB affair also illustrates the complex and multifarious nature of accountability structures, whereby being able to hold a particular agent to account for a particular action is often the product of a series of accountability processes by a variety of different individuals and institutions with different powers and incentives'.³⁴ Mulgan's message is not entirely damning, however. Although he notes that '[t]he domestic

Australian Cole Inquiry and its international predecessor, the Volcker Inquiry, undoubtedly revealed serious accountability deficiencies in the administration and monitoring of the Iraq sanctions regime in general and the OFFP in particular', he also reminds us that 'these inquiries themselves and the political pressures that gave rise to them provide an accountability success story'. This is because '[t]hey helped to bring the facts to light and so provided impetus for establishing a more effective accountability structure'.³⁵

In Mulgan's chapter, the focus, (in contrast to Botterill and McNaughton's chapter looking at the corporation) is on the government agencies responsible for monitoring companies such as AWB (I) and holding them to account. The main agencies he considers are the UN Secretariat, the Australian Department of Foreign Affairs and Trade and the Australian Wheat Export Authority. In an engaging journey through the facts, examined through the lens of a theoretical work on accountability, Mulgan finds that a 'number of accountability failures by government agencies can be identified in the AWB affair, both internationally by the UN Secretariat and domestically in DFAT and the WEA'. In his assessment, '[a]ll fell short in their obligations to monitor the activities of companies trading with Iraq under the OFFP'. Moreover, '[t]hese failures, in turn, illustrate certain structural weaknesses in the mechanisms by which the government agencies themselves were accountable for performing their accountability functions'.³⁶ Most poignantly for this collection, he reminds us that

[t]he general effectiveness of accountability regimes depends critically on the extent to which agencies charged with holding others to account are themselves held to account. Through such chains or cycles of *compounded accountability*, every institution should be accountable to at least one other body and no institution or office-holder should be beyond scrutiny. Ideally, no guardian should be left unguarded.³⁷

However, it is the positive outcomes of the AWB affair that in his view 'exemplify the complexity and multiplicity of accountability relationships faced by all organisations. Any organisation, whether public or private, whether operating democratically or internationally, is subject to a wide range of accountability obligations from different accountability agencies and channels'.³⁸ The case giving rise to this collection 'provides a good example of how multiple accountability channels can complement and assist each other in bringing an organisation to account'. Moreover, returning to the aim of linking public jurisdictions with

international frameworks, he reminds us that '[w]hile each of the institutional players, including the UN, the US Congress, the Australian government, the WEA and the Cole Inquiry, was constitutionally anchored in a particular jurisdiction, their actions responded to information and pressure which ignored jurisdictional boundaries.' This makes the following point vitally important regarding the value of this book's inquiry – for it illustrates 'how informal cross-jurisdictional networks of communication help to globalise the accountability structure, even though no single, formal institution has a global accountability warrant'.³⁹

Indeed, Mulgan reminds us that these 'pluralist framework[s], with different institutions making different, complementary contributions to an eventual accountability outcome, ... [are] not unique to cross-national activities, such as AWB's trading with Iraq. [They are] ... also familiar in domestic politics.' Mulgan suggests that the 'international dimension simply provides further complexity by adding yet another level of government'.⁴⁰ His examination of the affair through the accountability lens is a valuable pointer to how best to move forward from this experience in international public policy terms.

Parallel Case Studies

In the final two chapters we are reminded how the broad project of linking public law and international law can play out in so many different contexts.⁴¹ However, both chapters also link back to the underlying concept of sanctions by highlighting how particular conditions, established by laws that *limit* the freedom of legal subjects, can cause significant human rights consequences.

Simon Rice's chapter places the spotlight on the US International Traffic in Arms Regulations (the ITAR), which require foreign importers of US defence technology to engage in discrimination by singling out members of their workforce on the ground of nationality and treating them less favourably. An Australian business therefore had to ask a local anti-discrimination tribunal for permission to meet a US requirement that it unlawfully discriminate against its workers. As Rice reminds us, this required the tribunal to untangle 'the national from the international and the public from the private'. The Australian tribunal was confronted by the dilemma of reconciling 'the competing claims of the US's security interests, the private conduct of Australian companies, the integrity of Australia's anti-discrimination laws and, by extension, Australia's obligation to comply with international human rights treaties'.⁴²

Indeed, the ITAR defence export regime, like the sanctions regimes described throughout the collection, is an illustration of the complex interplay among private conduct, public laws and international concerns. For while the Australian tribunals appear to be resolving Australian domestic issues, in fact they are reconciling the competing concerns of US national security and fundamental human rights principles of non-discrimination.

In another example of nation states extending their jurisdiction beyond their territory, Angus Francis illustrates how borders can be 'exported' through the extraterritorial application of immigration controls. He focuses in particular on the role of private carriers within that context, as a means of denying asylum seekers access to refugee status determinations. Linking the public and private as well as the domestic and international, Francis's chapter highlights the significance of immigration control trends for the relationship between external and internal restraints on sovereign and governmental authority, the extraterritorial jurisdiction of states at the exported border, and the responsibility of states for the activities of 'parastatal' entities. These issues highlight that the theme of 'movement of people' is another topic around which an entire collection of public and international lawyers can speak with and learn from one another in the pursuit of extending law's potential. This chapter and the broader section again emphasise the project's continuing value in promoting further exploration of the synergies and differences between public and international law on a range of different topics.

Conclusion

In addition to raising timely, serious issues about accountability and governance in a globalised world, particularly through the lens of sanctions in international and domestic frameworks, and by contributing to the development of domestic and international law; this collection highlights the fruits of the project through the insights gained in considering the 'other'.

By bringing together public and international lawyers to engage in a common inquiry, the conflicts and problems in both frameworks are better understood; the similarities and contradictions within both frameworks become clearer, and through this we are all (public and international lawyers) better able to implement and progressively develop the law.

Notes

1. SC Res 661 (6 August 1990), [3]-[4].
2. Denis Halliday, 'Iraq and the UN's Weapon of Mass Destruction' (1999) 98 *Current History* 65; John Mueller and Karl Mueller, 'Sanctions of Mass Destruction' (1999) 78(3) *Foreign Affairs* 43.
3. Geoffrey Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (1999); George Bisharat, 'Sanctions as Genocide' (2001) 11 *Transnational Law and Contemporary Problems* 379.
4. Joy Gordon, 'Sanctions as Siege Warfare' *The Nation* (22 March 1999).
5. The UNSC first tried to establish an OFFP as early as August 1991, but Iraq did not cooperate with the scheme. See SC Res 706 (15 August 1991), [1]-[2]. In April 1995, it finally succeeded in launching the OFFP. SC Res 986 (14 April 1995), [1]-[2], [7]-[10].
6. See United Nations, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Manipulation of the Oil-for-Food Programme* (2005).
7. See, e.g., Hilary Charlesworth *et al.* (eds.), *The Fluid State: International Law and National Legal Systems* (2005); André Nollkaemper and Erika de Wet, *International Law in Domestic Courts* online service www.chr.up.ac.za/centre_projects/ildc/ at 4 December 2008; Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (2007).
8. See, e.g., the New York University School of Law's Global Administrative Law Project www.iilj.org/GAL/default.asp at 4 December 2008.
9. David Dyzenhaus, *The Unity of Public Law* (2004).
10. By Letters Patent as a Commissioner under the Royal Commissions Act 1902 (Cth).
11. On 24 November 2006, Commissioner Cole presented the report of his inquiry to the Governor-General: Commonwealth of Australia, *The Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme, Final Report* (2006) (The Cole Report).
- 11a. *Ibid.*, vol 1, p xii.
- 11b. *Ibid.*
12. The second volume in this project is called *Incentives for Global Health: Patent Law and Access to Essential Medicines*.
13. Throughout we use the term international law to represent public international law predominantly as opposed to private international law.
14. Charles Sampford, 'Potential for a Post-Westphalian Convergence of "Public Law" and "Public International Law"' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00.
15. Peter Danchin, 'Whose Public? Which Law? Mapping the Internal/External Distinction in International Law' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00.
16. *Ibid.* 00.
17. Simon Chesterman, 'Globalisation and Public Law: A Global Administrative Law?' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00.
18. *Ibid.* 00.

22 SANCTIONS, ACCOUNTABILITY AND GOVERNANCE

- 18a. Ibid. 00
- 18b. Ibid. 00
- 18c. Ibid. 00
19. Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00 (footnotes omitted).
20. Ibid. 00.
21. Hitoshi Nasu, 'Who Guards the Guardian?: Towards Regulation of the UN Security Council's Chapter VII Powers through Dialogue' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00, referring to SC Res 1373 (28 September 2001); SC Res 1540 (28 April 2004).
22. Erika de Wet and André Nollkaemper, 'Review of the Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 184.
23. *Yusuf and Al Barakaat International Foundation v. Council and Commission* (T-306/01) [2005] ECR II-3353.
24. *Kadi v. Council and Commission* (T-315/01) [2005] ECR II-3649.
25. See Erika de Wet, Holding the United Nations Security Council Accountable for Human Rights Violations through Domestic and Regional Courts: A Case of 'Be Careful What You Wish For?' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000 citing Common Position 2002/402 of 27 May 2002 concerning Restrictive Measures Against Usama Bin Laden, Members of the Al-Qaida Organisation and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them and Repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP [2002] OJ L 139/4; Regulation (EC) 881/2002 of 27 May 2002 imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama Bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan [2002] OJ L 139/9.
26. Kevin Boreham, "'A Delicate Business': Did AWB's Kickbacks to Iraq under the United Nations Oil-for-Food Programme Constitute a Violation of Australia's International Obligations?' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 00, 00.
27. Jeremy Farrall, 'Should the United Nations Security Council Leave it to the Experts?: The Governance and Accountability of UN Sanctions Monitoring' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000.
28. Ibid. 000.
29. Justine Nolan, 'The Nexus between Human Rights and Business: Defining the Sphere of Corporate Responsibility' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000.
30. Ibid. 000.
- 30a. Linda Botterill and Anne McNaughton, 'At the Intersection of International and Municipal Law: The Case of Commission are Cole and the Wheat Export

- Authority' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 0000.
- 30b. Ibid. 000.
- 30c. Ibid. 000.
31. Vivien Holmes, 'What is the Right Thing to Do?: Reflections on the AWB Scandal and Legal Ethics' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000 (footnotes omitted).
32. Daniel Stewart, 'Who's Responsible? Justiciability of Private and Political Decisions' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000 (emphasis added).
33. Richard Mulgan, 'AWB and Oil for Food: Some Issues of Accountability' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000.
34. Ibid.
35. Ibid. 000.
36. Ibid. 000.
37. Ibid. 000 (emphasis original).
38. Ibid. 000.
39. Ibid. 000.
40. Ibid. 000.
41. The second volume in this series, edited by Thomas Pogge, Matthew Rimmer and Kim Rubenstein, is titled *Incentives for Global Health: Patent Law and Access to Essential Medicines* (2009, forthcoming).
42. Simon Rice, 'Discriminating for World Peace' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 000, 000.

