

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

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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(I)).

The abuse of the OFFP by AWB Ltd, 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'.¹²

Commissioner Cole outlined significant findings as to AWB's 'culture of closed superiority and impregnability, of dominance and self-importance'.¹³ 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.¹⁴

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,¹⁵ 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'.¹⁶

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"'.¹⁷ 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'¹⁸ 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'.¹⁹

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'.²⁰

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.²¹ 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.²²

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 participation, shining light on deliberations and providing the possibility of revisiting bad or unfair choices'.²³ 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 framework of UN 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.²⁴

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.²⁵

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’.²⁶ 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'.²⁷ 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*²⁸ and *Kadi v. Council and Commission*.²⁹ 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.³⁰

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 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'.³¹ In this sense he is effectively arguing that the law on sanctions