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# Sanctions Accountability and Governance in a Globalised World

Edited by  
Jeremy Farrall and  
Kim Rubenstein

CAMBRIDGE

# SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD

This book is the first in a series examining how public law and international law intersect in five thematic areas of global significance: sanctions, global health, environment, movement of people and security. Until recently, international and public law have mainly overlapped in discussions on how international law is implemented domestically. This series explores the complex interactions that occur when legal regimes intersect, merge or collide.

*Sanctions, Accountability and Governance in a Globalised World* discusses legal principles which cross the international law / domestic public law divide. What tensions emerge from efforts to apply and enforce law across diverse jurisdictions? Can we ultimately only fill in or fall between the cracks or is there some greater potential for law in the engagement? This book provides insights into international, constitutional and administrative law, indicating the way these intersect, creating a valuable resource for students, academics and practitioners in the field.



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This series is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

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## SERIES EDITORS' PREFACE

The idea for this series began in June 2005, when Kim Rubenstein applied for the position of Professor and Director of the Centre for International and Public law at the ANU College of Law. The Centre is recognised as the leading Australian academic centre bringing together public lawyers (constitutional and administrative law broadly, but also specific areas of government regulation) and international lawyers from around the world. Established in 1990 with its inaugural director Professor Philip Alston, the impact of the Centre and its work can be seen further at [www.law.anu.edu.au/cipl/](http://www.law.anu.edu.au/cipl/).

In discussing with the law faculty ideas for the Centre's direction, Kim raised the concept which underpins this series. Each volume flows from workshops bringing public and international lawyers and public and international policy makers together for interdisciplinary discussion on selected topics and themes. The workshops attract both established scholars and outstanding early scholars. At each of the workshops participants address specific questions and issues, developing each other's understandings and knowledge about public and international law and policy and the links between the disciplines as they intersect with the chosen subject. These papers are discussed and reviewed at the workshop collaboratively, then after the workshop the papers are peer-reviewed and revised for the final editing phase of the overall manuscript.

The series seeks to promote a deeper understanding of how public and international law intersect, both in theory and in practice. Until now, international and public law have mainly overlapped in discussions on how international law is implemented domestically. While there is scholarship developing in the area of global administrative law, and some scholars have touched upon the principles relevant to both disciplines, the publications to date contain only a subset of the concept underpinning this series. This series is unique in consciously bringing together public and international lawyers to consider and engage in each other's scholarship.

Beyond the first topic of sanctions, the other four topics in the series (including the second on health), draw from the research themes underpinning the International Alliance of Research Universities which is made up of ANU, Berkeley, Cambridge, University of Copenhagen, ETH Zurich, National University of Singapore, Oxford, Peking University, The University of Tokyo and Yale. The remaining three topics and volumes will be in the fields of the environment, movement of people and security.

The Alliance has also supported the funding of participants from the IARU in some instances so that they can attend in person at ANU. This does not preclude non-IARU academics from participating as will be seen in the rich array of participants in the first two volumes.

After the first successful workshop was complete, Professor Rubenstein contacted Professor Thomas Pogge to co-host the second workshop and in addition to doing that, he has enthusiastically joined with Professor Rubenstein as a joint series editor. His contributions to each volume are an expression of his cosmopolitan outlook, which is a theme engaged with throughout the series.

Scholars interested in involvement in the forthcoming themes of the environment, movement of people and security are encouraged to contact the series editors.

Kim Rubenstein and Thomas Pogge  
December 2008

## EDITORS' PREFACE

As explained in the Series Editors' Preface, this series is a result of workshops bringing together public and international lawyers. At the time of determining the first topic, significant attention was being paid to the question of sanctions in the UN framework and how they were being played out in the domestic context.

This first workshop's working title was: 'Untangling the National from the International and the Public from the Private: The Complexities of Accountability and Governance in a Globalised World'. In particular, coinciding with the release of the final report of the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme, the workshop explored governance and accountability issues through the specific example of the Iraqi sanctions regime and the subsequent findings of illicit 'kickback' payments. The report, both in what it said and did not say, provided a valuable reference point for engaging with these issues.

This workshop was held on 2–4 July 2007 at The Australian National University. The sixteen paper presenters and a further four participants, who had read all the papers, enjoyed vigorous discussion, engaging fully with each other and the material. We thank Professor Simon Bronitt, Director of ANU's National Europe Centre, for providing us with a dynamic venue. We thank those further participants, Ernst Willheim, Gabriele Porretto, Peter Scott and Trevor Moses, for their valuable contributions to the workshop and for providing feedback on the papers. Trevor was working as a CIPL intern at that time and continued to work as our research assistant on the book. He provided outstanding support, particularly in the final stages of bringing the entire volume together. We thank him immensely! We also thank Jennifer Braid from the ANU College of Law for her assistance in bringing the whole collection together, as well as the staff at Cambridge University Press, in particular Finola O'Sullivan for her enthusiasm in getting this volume and series off the ground.

The call for abstracts was sent out to the Law Deans of the International Association of Research Universities (IARU) and we thank the respective Universities for their support to their participants, and to the ANU, IARU secretariat for its support. This was in addition to other financial support from the ANU and the Centre for International and Public Law for several contributors' participation.

Finally, we would like to thank our colleagues in the ANU College of Law and the Regulatory Institutions Network and our respective families for their support and inspiration in all that we do. Jeremy thanks Lyn and Jemma and Kim thanks Garry, Cohava and Eliezer.

December 2008

# 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.<sup>1</sup> 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',<sup>2</sup> as 'a genocidal tool'<sup>3</sup> and as 'modern siege warfare'.<sup>4</sup> Stung by this kind of criticism, the UN Security Council created the Oil-for-Food Programme (OFFP).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> While there is some scholarship developing in the area of global administrative law,<sup>8</sup> and some scholars have touched upon the principles relevant to both disciplines,<sup>9</sup> 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 appointed<sup>10</sup> 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 Report<sup>11</sup> 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'.<sup>12</sup>

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

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,<sup>15</sup> 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'.<sup>16</sup>

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"'.<sup>17</sup> 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'<sup>18</sup> 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'.<sup>19</sup>

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'.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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'.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup>

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’.<sup>26</sup> 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'.<sup>27</sup> 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*<sup>28</sup> and *Kadi v. Council and Commission*.<sup>29</sup> 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.<sup>30</sup>

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'.<sup>31</sup> 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’.<sup>32</sup> 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'.<sup>33</sup>

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'.<sup>34</sup>

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'.<sup>35</sup>

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'.<sup>36</sup>

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'.<sup>37</sup> 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*'.<sup>38</sup> 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'.<sup>39</sup> 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 chapter 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'.<sup>40</sup> 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'.<sup>41</sup> 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'.<sup>42</sup> 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'.<sup>43</sup>

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'.<sup>44</sup> 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.<sup>45</sup>

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'.<sup>46</sup> 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'.<sup>47</sup>

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'.<sup>48</sup> 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.

## 8. 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.<sup>49</sup> 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'.<sup>50</sup>



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.

## 9. 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/](http://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](http://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).
12. *Ibid.*, vol 1, p xii.
13. *Ibid.*
14. The second volume in this project is called *Incentives for Global Health: Patent Law and Access to Essential Medicines*.
15. Throughout we use the term international law to represent public international law predominantly as opposed to private international law.
16. 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* 53, 54.
17. 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* 27, 27.
18. *Ibid.* 30.
19. 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* 75, 76.
20. *Ibid.* 77.

21. Ibid. 79–80.
22. Ibid. 80.
23. Ibid. 88.
24. 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* 92, 94 (footnotes omitted).
25. Ibid. 112.
26. 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* 123, 123, referring to SC Res 1373 (28 September 2001); SC Res 1540 (28 April 2004).
27. Erika de Wet and André Nollkaemper, ‘Review of the Security Council Decisions by National Courts’ (2002) 45 *German Yearbook of International Law* 166, 184.
28. *Yusuf and Al Barakaat International Foundation v. Council and Commission* (T-306/01) [2005] ECR II-3353.
29. *Kadi v. Council and Commission* (T-315/01) [2005] ECR II-3649.
30. 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* 143, 145 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.
31. 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* 171, 184.
32. 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* 191, 192.
33. Ibid. 210.
34. 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* 217, 233.
35. Ibid.
36. Linda Botterill and Anne McNaughton, ‘At the Intersection of International and Municipal Law: The Case of Commissioner Cole and the Wheat Export

- Authority' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 239, 240.
37. Ibid. 242.
  38. Ibid. 245.
  39. 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* 289, 289 (footnotes omitted).
  40. 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* 313, 318 (emphasis added).
  41. 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* 334.
  42. Ibid.
  43. Ibid.
  44. Ibid. 345.
  45. Ibid. 346 (emphasis original).
  46. Ibid.
  47. Ibid. 348.
  48. Ibid. 348–9.
  49. 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).
  50. Simon Rice, 'Discriminating for World Peace' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 355, 355.



# PART I

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## Setting down the foundations



# Whose public? Which law? Mapping the internal/external distinction in international law

PETER G. DANCHIN

- a. A violent order is a disorder; and
- b. A great disorder is an order. These  
Two things are one.

– Wallace Stevens<sup>1</sup>

## 1. Introduction

The chapters in this volume address different aspects of the same basic dilemma: how to understand the conceptual relationship between the rights of states and the rights of individuals. Classic Westphalianism offers a relatively clear picture. The fundamental rights and duties of states, regardless of their ‘private’ belief systems, forms of political organisation or cultures, 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’ comprehensive religious, philosophical or moral doctrines, are to be determined by that body of constitutional, administrative and criminal norms known as ‘public’ law. The former defines the ‘sovereignty’ of states as subjects of an international community; the latter defines the ‘liberty’ of individuals as subjects of a national community in the form of a state.

In each case a particular distinction between ‘public’ and ‘private’ spheres, and a particular conception of fundamental rights, is advanced. These approaches in turn generate the distinctive internal/external dichotomies and contradictions that characterise both fields of law. 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.<sup>2</sup> In other words, ideas of public law and public reason are invoked to answer the normative question: how are individuals (whether persons or states) divided over comprehensive conceptions of the good to live together in a just social order? Conversely, the rationale underlying the move to notions of a putative public–private divide and fundamental rights is to *limit* the demands of social order itself by *protecting* the (pre-existing) liberty of the subjects of that order. In other words, in response to the constraints on pluralism and diversity imposed by public law and public reason, notions of a public–private divide and fundamental rights are invoked to answer the normative question: what limits should exist on the demands that a just social order may impose on its subjects? This is what we may term the ‘double-bind’, the controlling paradox of the liberal project.

The difficulty today is that an overly idealised and static conception of the divide between a public *international* law and a public *domestic* law is both descriptively and normatively unconvincing. As a descriptive matter, the increasing effects of globalisation and integration between state and non-state actors in all areas of economic, social and political life is today leading scholars to advance more sophisticated accounts of ‘transnational’, ‘supranational’, and ‘global’ law.<sup>3</sup> As a normative matter, the Westphalian picture has been radically disrupted over the last half-century by the rise of cosmopolitan norms of universal justice and human rights.<sup>4</sup> Public international law no longer regulates relations between states only, but has extended its reach to regulate the rights and duties of individuals *within* states. This has both challenged and undermined Westphalian accounts of the public–private divide and the sovereignty of states.

For liberal internationalists such as Charles Sampford, this ‘erosion’ of sovereignty is seen to be driving us towards a ‘post-Westphalian convergence’: ‘[a]s the walls between states break down so will the walls between public law and public international law’.<sup>5</sup> Central to this argument is a particular view of the Enlightenment,<sup>6</sup> and the fact that ‘[i]nternational law is still based on an idea of sovereignty arising out of the century preceding the Enlightenment’.<sup>7</sup> This has created a disjunction between the international and domestic bases of legitimacy. On the grounds that the ‘shift within domestic constitutional theory to the consent of the governed reverses the direction of power, authority and accountability’,<sup>8</sup> Sampford argues for an ‘international enlightenment’ capable of generating a new jurisprudence and political philosophy in

international law. With the basis of international legitimacy reconceptualised, any conflict between sovereignty and the protection of human rights is said (and hoped) to disappear as sovereignty – now defined as ‘the collective right of a people to participate in, and benefit from, an independent political community’ – *becomes* a human right.<sup>9</sup>

My purpose in this chapter is to challenge and problematise this convergence thesis between sovereignty and human rights. I believe it to rest on a partial understanding of the liberal tradition in international law, commonly referred to as ‘liberal anti-pluralism’.<sup>10</sup> While relying on a contingent and thus contestable conception of individual autonomy, liberal anti-pluralist accounts do not in fact seek to challenge the *rationale* for public law or public reason itself. On the contrary, such accounts advance a vision of ‘universal’ or ‘global’ social order governed by a ‘neutral’ public law that limits the freedom of its subjects pursuant to the single ‘trumping’ or ‘covering’ value of individual freedom itself. This understanding, I believe, is at the heart of the project that Sampford anticipates over time will ‘erode the distinction between (domestic) public law and public international law’.

The difficulty with such a conception of social order, however, is that it now *itself* poses a danger to freedom and diversity by threatening to eviscerate the law’s existing *limits* on the demands placed by international social order on the liberty of its subjects. It does so by effectively eliminating the public–private distinction and by redefining fundamental rights to mean only, or ultimately, the rights of autonomous individuals. On this view, the very idea of sovereignty as a mediating device between a wide diversity of ‘private’ or ‘national’ political communities and ways of life and a ‘public’ or ‘inter-national’ community dissolves ultimately to be replaced by a universal or global law. Similarly, the idea of collective subjects as rights-holders – whether ‘peoples’, ‘nations’ or ‘minorities’ asserting various claims to self-determination – is rejected, or at least premised on the notion that the rights of groups are derivative of or contingent on the rights of their members.<sup>11</sup> On this view, sovereignty *becomes* a human right and thereby loses its traditional intersubjective and value-pluralist function in international law: that is, to maintain the conditions necessary for peaceful coexistence *between* different ways of life as opposed to their merging *into* that single form of life we have known since at least the late nineteenth century as ‘civilization’.

Paradoxically, human rights have exposed not only injustices carried out in the name of sovereignty but also the limits of liberal theory itself

and its prescription for a universal regime. We can see this, for example, in John Rawls's surprising rejection of cosmopolitan accounts of human rights in his *The Law of Peoples* (*Law of Peoples*). In the discussion that follows, I argue that both of these issues – state sovereignty and individual human rights – are sites of struggle between certain 'internal' and 'external' forms of rationality, and between certain 'private' and 'public' modes of justification. The chapter considers how to make sense of these distinctions and asks whether the problem may be that, in order to justify and maintain these oppositions, we need to qualify liberal theory by something other than itself. If so, what are the implications of this insight for both national and international public law?

There are three parts to the argument. Section 2 first sets out the two main contradictory philosophies of liberal toleration in international law. Section 3 illustrates this tension by considering John Rawls's admirable attempt in *Law of Peoples* to grapple with the difficulties of value pluralism in international law and by seeking to explain why Rawls ultimately rejected any possibility of a global conception of liberal cosmopolitan justice. Finally, Section 4 raises three issues concerning the nature and justification of human rights in international law to illustrate the extraordinary difficulties confronting the convergence thesis. The chapter concludes by positing some thoughts on the implications of value pluralism for the relationship between national and international public law.

## 2. The two faces of international law

At the heart of international law is a double-bind. Liberal theory assumes the separateness of individuals (whether persons or states) from each other and denies the existence of a natural, objective social order that pre-exists man's entry into it. In the absence of a controlling natural order that establishes a firm hierarchy of values, interests and ultimate ends, it logically follows that individuals are both free and equal in some essential sense. But as Martti Koskenniemi has famously argued, a 'fully formal idea of "freedom" is incapable of constructing a determinate, bounded conception of statehood as well as giving any content to an international order'.<sup>12</sup> This is the controlling contradiction of the liberal project:

Just like individuality can exist only in relation to community – and becomes, in that sense, dependent on how it is viewed from a non-individual perspective – a State's sphere of liberty, likewise, seem[s] capable of being determined only by taking a position *beyond* liberty.<sup>13</sup>

As soon as we seek to describe what it means for a state to be 'free' within social order, that is, as soon as we ascribe determinate content to the attributes of sovereignty – a state's competences, set of 'fundamental rights' and legitimate spheres of action – we thereby delimit state freedom and construct an argument that stands in tension with our initial premise of state freedom. As indicated in the introduction, this is the basic paradox of the liberal structure of international law: 'to preserve freedom, order must be created to restrict it'.<sup>14</sup>

The international legal project is driven by this dialectic, which creates a dynamic of contradiction and oscillation between 'ascending' and 'descending' patterns of argument seeking to legitimate social order against individual freedom.

How to guarantee that States are not coerced by law imposed 'from above'? How to maintain the objectivity of law-application? How to delimit off a 'private' realm of sovereignty or domestic jurisdiction while allowing international action to enforce collective preferences or human rights? How to guarantee State 'freedom' while providing the conditions for international 'order'?<sup>15</sup>

To imagine such a project as feasible and coherent, one must first assume the idea of a 'harmony of interests', the presence or attainability of 'an underlying convergence between apparently conflicting State interests'.<sup>16</sup> In a widely pluralistic world of different peoples, religions, cultures, languages, ideologies and ways of life, this is quite an assumption. What if, for example, the interests and ends of states are not finally compatible? What if the true nature of international politics is (as the Realists have long contended) conflict rather than harmony? How is a political community defined by the rule of law premised on some notion of shared interests and values beyond the state to be imagined or realised in such circumstances?

### *2.1 Formalism and instrumentalism*

The traditional response to this dilemma has been to employ the technique of legal formalism. First, the subject of the law is defined in formal terms as 'the state'. Second, the liberty of states is described and given material content in terms of 'sovereignty'. The function of the law is to secure both liberty and order: to provide for the mutual coexistence of states in such a way that their sovereignty is equally respected and ensured (to use the Dworkinian term). The basic axiom of the system

is sovereign equality. International law provides the “flat substanceless surface” [which] expresses the universalist principle of inclusion at the outset and makes possible the regulative ideal of a pluralistic international world.<sup>17</sup> This is absolutely critical as the form of the law

constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.<sup>18</sup>

In any decision to attach meaning to legal norms, sovereign equality means that states can articulate their interpretations as subjects that share equal standing. They are thus included in the ‘normative universe as subjects of rights and duties or carriers of distinct identities’. It is only because the regime comprises non-instrumental rules (i.e., ‘understood to be authoritative independent of particular beliefs or purposes’) that the freedom of its subjects to be different becomes possible.<sup>19</sup> This is what Anne Orford has aptly called the ‘gift of formalism’.<sup>20</sup>

On this view, international law can be understood as a project to reach political settlements and forms of reconciliation between the conflicting claims to freedom of differently situated subjects and the divergent assertions of right and justice to which they continually give rise. International law, in other words, is an ineliminably intersubjective undertaking. If political power is to be exercised in the name of some common social end – say to protect international peace or security, or justice – such that the sovereignty of a particular state or states is to be limited, then that exercise of power must be justified to the state or states so affected. This remains the case even though, and especially because, states differ greatly in their comprehensive views about the good and true way of life.

This is an attractive picture so far as it goes. The problem, however, is that any argument for such a formal view is highly ambiguous and open to criticism. For one thing, any formal doctrine of sources of law will be unable to exclude political considerations.<sup>21</sup> For another, any notion of a ‘pure’ or ‘complete’ theory of public law is vulnerable to familiar charges levelled against doctrinal utopianism and its disconnectedness from actual state interests, values and practice.<sup>22</sup> What if, for example, a state asserts that its sovereignty derives not from some imagined, pre-social liberty but ultimately from God? Or, conversely, a state asserts that its sovereignty is subject to no external limit other than that to which it expressly consents?

Questions such as these compel us to look *behind* the ‘formal validity’ or ‘binding force’ of legal norms. They ask us to consider the *purpose of or reasons justifying* such norms, their capacity to further social goals.<sup>23</sup> This generates an ‘anti-formal’ mode of reasoning that defines itself in response to the criticisms of formalism. On this view, the traditional attributes of sovereignty – political independence, autonomy, dignity, territorial integrity etc. – are merely legal forms. What really counts is whether they help or hinder certain (as yet unspecified) objectives, values or ends. Do these formal rules stand in the way of protecting basic norms of democracy and human rights? Do they shield undemocratic states that lack a system of government based on free periodic elections in which government is elected by the citizens of the state? Do they shield *illiberal* states that fail to offer their citizens a range of individual rights? These are the questions that trouble Sampford and justify his attempt to redefine the notion of sovereignty.

But these examples also reveal the dangers of instrumentalist reasoning. If international law is judged only in terms of its instrumental effectiveness, it becomes no more than an apology for the (contested) interests or ends of certain powerful states.<sup>24</sup> Moreover, by emphasising concreteness in this fashion the law risks losing its binding force and normativity altogether. To offset these dangers, instrumentalist reasoning resorts to tacit naturalistic or ‘objective’ ideas of justice. The fundamental norms of democracy and human rights are not just American or Western values, they are ‘universal’ values arrived at by rational consensus and expressing ideals that either are, or should be, embedded in international law as an expression of ‘international right’.<sup>25</sup>

In this way, anti-formalist reasoning paradoxically returns to the initial problem it had sought to overcome as it tacitly invokes the basis on which it first criticised formalism. There is no escape from the double-bind of this argumentative structure. States are free and unfree at the same time. In this respect, it is important to realise that the structure of international law reflects a theory of liberal toleration. At issue in the tension and oscillation between formal and anti-formal modes of reasoning is the scope and limits of that regime. Here we return to the issue of the ‘state’ as the primary subject of international law.

## 2.2 *Dualism and the modern structure of international law*

The demanding idea of equal concern and respect for the rights of the individual in Western political philosophy has historically been associated with two closely related modifications. The first is the idea that

conceptions of religious and moral value are ‘private’ matters to be excluded from the sphere of public reason. On this view, religion is ‘private’ – the domain of irrationality and charismatic authority – while the law is ‘public’ – the realm of reason and universal authority.<sup>26</sup> The second idea is that, on the basis of this public–private divide, the demands of equal freedom have been understood to apply only within the public sphere. This is the double-bind again in a uniquely static and historically contingent form.

The reasons underlying these two modifications are what animate the Rawlsian shift from ‘comprehensive’ to ‘political’ liberalism. Because democratic societies are characterised by a pluralism of ‘incompatible but reasonable’ comprehensive religious, philosophical and moral doctrines, the aim of political liberalism for Rawls was ‘to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions’.<sup>27</sup> This requires the development of impartial and neutral means by which to separate and justify ‘public’ reason from the many non-public or ‘private’ conceptions of reasonable comprehensive doctrines. By distinguishing moral from political philosophy, Rawls sought to justify a strictly *political* conception of justice in contrast to a moral doctrine of justice general in scope and applicable to all areas of life. In this sense, the two views have been seen to express a disagreement as to the fundamental value of liberalism: the former favouring the idea of toleration, the latter the idea of individual autonomy.

The move from comprehensive to political liberalism arises from the need to resolve the problem that the account of stability advanced in *A Theory of Justice* is unrealistic and inconsistent with realising its own principles of a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible comprehensive doctrines.<sup>28</sup> Comprehensive liberalism of the Millian variety is plausible only if liberty is first understood in ‘eighteenth century North Atlantic Enlightenment’ terms as a matter of ‘private’ conscience and belief as opposed to protecting the ‘public’ manifestation of a religion or comprehensive way of life. Similarly, political liberalism of the Rawlsian variety is plausible only if the specific form of separation between public and private spheres that is advanced allows for the members of that society to pursue their ends and ‘reasonable’ comprehensive conceptions of the good. I return to these issues in Section 4.

Adapting the domestic analogy, that is the view of liberal internationalists since at least the sixteenth century of states-as-individuals in a putative state of nature, I want to suggest that a similar set of assumptions shapes modern

international law. This is the case both in terms of the definition of the legal subject (the state) and in terms of working out the rights and duties of legal subjects so identified (sovereignty). In each case, the internal/external tension of the double-bind is evident: the state, it turns out, is the 'nation state' reflecting a people's right to self-determination; sovereignty, it turns out, defines a right to act *externally* to protect the state's anterior liberty; at the same time, it protects from external interference a certain *internal* autonomy for a people freely to conduct its own affairs and pursue its own conception of the good. The former is the international equivalent of the liberal notion of natural or 'fundamental' rights; the latter is the mirror image of the public-private distinction. Sovereignty in this way mediates between the claims of legal subjects *inter se* in a 'public' international community while at the same time defining a 'private' national sphere.

My concern here is the first issue regarding the *internal identity* of the state. This issue has traditionally been regarded as settled. Since the end of World War II, the 'flat substanceless surface' of international law as embodied in article 2(1) of the UN Charter has been understood in strongly pluralistic terms. The sovereign equality of states has extended to republics, centrally planned socialist states, theocracies, kleptocracies and modernising post-colonial territories. In more recent times, however, and especially since the end of the Cold War, Western states and the international institutions they control have advanced various anti-pluralist arguments that seek to give greater moral substance to the criteria for recognition as full, independent and equal subjects of international society. Gerry Simpson defines such criteria as constituting a 'liberal democratic regime'.<sup>29</sup> The criteria for inclusion and exclusion in this regime turn not on the *external* behaviour of or conduct between states (which would raise familiar issues concerning the scope and shape of the attributes of sovereignty) but rather on the *internal* identity of the legal subject itself.<sup>30</sup> The case study discussed in ensuing chapters of UN sanctions regimes applied against Iraq after 1990 and culminating in the second Gulf War in 2003 is a powerful illustration of this thesis. This, of course, is precisely the issue which formalism, and its underlying rationale of liberal toleration and political inclusion, had hoped to avoid.

### 3. The question of human rights in Rawls's Law of Peoples

What are the implications of these two views of liberal theory for the relationship between sovereignty and human rights? On this point, the literature is sharply divided. The first view is characterised by the work of



Rawls who in his final work, *Law of Peoples*,<sup>31</sup> sought to apply the central ideas of his theory of political liberalism to international law. The second is characterised by cosmopolitan theorists such as Brian Barry, Charles Beitz and Thomas Pogge<sup>32</sup> who have argued for a fully-fledged and unapologetic account of egalitarian liberalism in international law (of the kind earlier developed by Rawls in his seminal *A Theory of Justice*).<sup>33</sup> These two liberal views have variously been described as Reformation versus Enlightenment liberalism, or as *modus vivendi* versus Kantian or Millian liberalism.<sup>34</sup>

Irrespective of their points of disagreement, both schools of thought have sought to project and apply liberal theory beyond questions of political philosophy to the global context of international legal discourse and relations between states and peoples. Rawls accordingly defines his task in *Law of Peoples* as formulating a 'particular conception of right and justice that applies to the principles and norms of international law and practice', the content of which is to be 'developed out of a liberal idea of justice similar to, but more general than, the idea ... called *justice as fairness* in *A Theory of Justice* (1971)'.<sup>35</sup>

The extension of political liberalism to international law necessarily includes the doctrine's foundational ideas of social contract and toleration of non-liberal comprehensive doctrines, and these are accordingly central features of the Law of Peoples:

[I]t is important to see that the Law of Peoples is developed within political liberalism and is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples. I emphasize that, in developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles of the *foreign policy* of a reasonably just *liberal* people ... we go on to consider the point of view of decent peoples ... not to prescribe principles of justice for *them*, but to assure ourselves that the ideals and principles of the foreign policy of a liberal people are also reasonable from a decent nonliberal point of view. The need for such assurance is a feature inherent in the liberal conception. The Law of Peoples holds that decent nonliberal points of view exist, and that the question of how far nonliberal people are to be tolerated is an essential question of liberal foreign policy.<sup>36</sup>

This emphasis on the idea of toleration does not, however, represent the quest for a mere *modus vivendi* in the face of global religious and cultural diversity. Rather, the Law of Peoples seeks to achieve a genuine overlapping consensus between 'liberal peoples' and non-liberal but 'decent peoples', societies that together Rawls terms 'well-ordered peoples'.<sup>37</sup>

In order to achieve such a consensus, Rawls envisages a two-stage process employing his famous device of an 'original position'. In the first stage, the liberal idea of the social contract is extended to the Law of Peoples. This involves two levels, each using the original position with a veil of ignorance as a model of representation for liberal societies only. At the first (domestic) level, citizens of the same liberal democratic society work out a political conception of justice in the manner described by Rawls in his *Political Liberalism*. At the second (international) level, the original position is used again, but this time by representatives of citizens of different liberal societies who, guided by appropriate reasons, are to specify the ideals, principles and standards of the Law of Peoples and how these apply to relations among peoples.<sup>38</sup> Rawls identifies eight principles of political justice that free and democratic peoples are prepared to recognise as the basic charter of the Law of Peoples.

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defence but no right to instigate war for reasons other than self-defence.
6. Peoples are to honour human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.<sup>39</sup>

In the second stage, the Law of Peoples thus conceived is extended to non-liberal peoples. Here, Rawls would have us ask, in an international 'original position' with a veil of ignorance, whether the representatives of nonliberal peoples would freely assent to the same principles.<sup>40</sup> In this way the Law of Peoples marks the limits of toleration in international relations. Liberal peoples are not only to refrain from exercising political sanctions to make a people change its ways but further to *recognise* and *respect* non-liberal societies as 'equal participating members in good standing of the Society of Peoples'.<sup>41</sup> The need for such an idea of toleration in international law is premised on analogous reasoning to Rawls's move from comprehensive to political liberalism in the domestic case:

If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways ... provided a nonliberal society's basic institutions meet certain specified conditions of political right and justice and lead its people to honor a reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society.<sup>42</sup>

This distinctive conception of toleration has important and controversial implications for Rawls's sixth principle of political justice in the *Law of Peoples* – the role of human rights. The need for liberal peoples to tolerate non-liberal but decent societies leads Rawls to formulate an account of human rights that he claims cannot be rejected as 'peculiarly liberal or special to the Western tradition'. He defines human rights as expressing a 'special class of urgent rights' that include:

the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).<sup>43</sup>

Understood in this way, human rights are those norms that belong to both a liberal constitutional democracy and to what Rawls terms an 'associationist social form'.<sup>44</sup> They do not depend on any comprehensive religious doctrine or any philosophical doctrine of human nature. Rather, they represent those norms upon which *both* liberal and non-liberal societies may build an overlapping consensus in line with their own deeper and broader conceptions of the good.<sup>45</sup>

It is this distinctive contention in the *Law of Peoples* that I wish to focus on for the remainder of this chapter. What does it mean to speak of a 'sufficient measure of liberty of conscience to ensure freedom of religion and thought'? Sufficient for what? More broadly, what are the implications of employing political liberalism as the theoretical basis for human rights in international law? Is it coherent and defensible to distinguish between a 'special class of urgent rights' on the one hand, and 'liberal' rights on the other?

An opposing liberal school of thought provides one set of answers to these questions. For cosmopolitans, Rawls's *Law of Peoples* is insufficiently liberal because it tolerates the denial by nonliberal peoples of human rights held by citizens in a reasonable constitutional democratic regime. In the cosmopolitan view, the liberal idea that persons are citizens first and have equal basic rights should apply universally. The

problem with the two-stage social contract envisaged in the *Law of Peoples* is that it denies *individual* persons in non-liberal societies an original position, whether at the domestic or global levels.<sup>46</sup> Cosmopolitans believe that any liberal conception of international law should begin by taking up the question of global justice for all persons.<sup>47</sup>

On this approach there is no distinction between 'urgent' or 'fundamental' rights and 'liberal' rights. All persons have the equal rights of citizens in a constitutional democracy. The difficulty with non-liberal societies is that they 'fail to treat persons who possess all the powers of reason, intellect, and moral feeling as truly free and equal'.<sup>48</sup> The idea that liberty of conscience may not be 'as extensive nor as equal for all members of society', is seen as unjust and impermissibly tolerant of intolerance.<sup>49</sup>

Rawls acknowledges that, at least judged by liberal principles, the Society of Peoples is not fully just. But for him the logic of extending a liberal conception of political justice to the international sphere rules out the possibility of a global conception of liberal cosmopolitan justice. In the second (international) original position, the 'parties are the representatives of equal peoples, and equal peoples will want to maintain this equality with each other'.<sup>50</sup> Thus, even as between liberal societies, no 'people will be willing to count the losses to itself as outweighed by gains to other peoples; and therefore the principle of utility, and other moral principles discussed in moral philosophy, are not even candidates for a Law of Peoples'.<sup>51</sup> The same reasons that necessitate the move from comprehensive to political liberalism in the domestic case thus make the purported application of the former in international relations, where the pluralism of comprehensive doctrines is far greater, even more problematic and unjustified.

In this respect, the extension of the Law of Peoples to decent peoples is premised on parallel reasoning to Rawls's idea of the 'reasonable' in political liberalism. The notion of 'decency' is said to be a normative idea of the same kind as reasonableness, though 'weaker' (in the sense of 'covering less'). To be regarded as 'decent,' hierarchical societies must meet two criteria. First, they must honour the laws of peace by renouncing aggressive aims in foreign policy and respecting the independence of other societies. Second, their system of law must respect human rights and impose duties and obligations on all persons in their territory, and there must be a sincere and not unreasonable belief on the part of judges and other officials that the law is guided by a common good idea of justice.<sup>52</sup>

Rawls adds a further reason for rejecting the cosmopolitan position in international law. Liberal peoples should not require all societies to be liberal, nor subject those that are not to political sanctions, because to do so would deny *mutual respect* between peoples. This lack of respect is likely to 'wound the self-respect of decent nonliberal peoples as peoples, as well as their individual members, and may lead to great bitterness and resentment'. The denial of respect to other peoples requires strong reasons to be justified and, on the basis of the criteria discussed previously, these are unavailable under the Law of Peoples.<sup>53</sup> According to Rawls, liberal peoples should 'try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal'.<sup>54</sup>

For these reasons, Rawls concludes that political liberalism requires a conception of toleration that rejects the comprehensive liberal notion of global cosmopolitan justice in international law. If a post-Westphalian convergence is indeed possible, for Rawls this would not mean 'collapsing the walls' between public law and public international law. Liberal and non-liberal societies alike should continue to develop their national systems of public law, and public international law should both set limits to and recognise this pluralism within the society of peoples.

#### 4. The implications of value pluralism for public law

The argument in *Law of Peoples* has both surprised and disappointed scholars.<sup>55</sup> One deep misgiving about the book is how Rawls's unusual conception of the nature and interests of 'peoples' as the subject of international law led him to reject global egalitarianism and important liberal rights such as *equal* political representation and *equal* liberty of conscience. As Wenar notes, '[c]osmopolitan egalitarian views are concerned with the *well-being of individuals* ... while [Rawls's] law of peoples is concerned with *the justice of societies*'.<sup>56</sup> Why does Rawls, himself the doyen of egalitarian liberalism, make this perplexing move at the international level? It is to this puzzle that I now turn.

##### 4.1 *The logic of Westphalian sovereignty*

In order to answer this question, we must return to first principles and recall the rationale underlying the project of public law itself. Here, a critical distinction is to be made between public *domestic* law and public *international* law. As Sampford rightly notes, the emergence of the classical Westphalian notion of state sovereignty *preceded* the 'Enlightenment'

of the eighteenth century by at least a century. But what was it exactly that happened so dramatically in 1648? I have discussed this issue elsewhere,<sup>57</sup> but for present purposes I wish to make two observations. First, international law in the early modern (i.e., pre-Westphalian) era was shaped by a purely descending argument from divine law. Thus, the liberal distinctions that we today draw between freedom and order and public and private were non-existent in medieval thought.<sup>58</sup> To speak of a 'personal right' to or 'private realm' of liberty with independent legitimacy as against the world at large was meaningless within such a conception of social order. The result of this structure was an apparently unitary, communitarian conception of a universal, normative code derived from God, which drew no distinction between the domestic and the international, the moral and the legal, or the public and the private. The *ius gentium* was therefore a universal inter-*individual* rather than inter-*national* law. This did not mean of course that all law was regarded as 'divine' or 'natural', and indeed all the early writers developed complex distinctions between divine, natural, human and international law. Rather, they held that while the *content* of the law may be found in different sources, its *authority* derived from a relevant descending strand of justification.<sup>59</sup>

Second, seventeenth-century jurist Hugo Grotius was the transitional figure between the descending, non-liberal order of medieval thought and the ascending-descending order of the classical liberal period. The underlying struggle here was to deal with the unfolding consequences of a loss of faith in a *singular* concept of the just and the difficulty of reconciling the 'Christian conception of the unity of the human race with the historical fact of the distribution of power among sovereign States'.<sup>60</sup> If previously conflict between a sovereign's freedom and the normative order had been impossible – the resolution of actual conflicts being achieved by the exercise of either revelation or reason to determine what the normative order *required* – in the wake of the bloodshed of the Thirty Years War the latent conflict between sovereign freedoms or sovereignty and the normative order began to surface. While Grotius himself did not do so, we see in his work the early signs of the need to recognise war as a conflict between formally equal sovereigns and to confront the question of how to 'balance' the freedoms of sovereigns. To do this, however, required rethinking the primacy of the normative order (now perceived as subjective and hence utopian) and to start international legal discourse from the sovereign's assumed *subjective* authority. Such a move from a descending to an ascending initial strand of justification would only follow in the post-Grotian classical scholarship of Locke and Vattel and their followers.

This is the story of the modern birth of the ‘secularised’ law of nations – the idea of positing a ‘public’ law between separate nation states each with their own ‘sovereignty’. This moment in history is said to mark the ‘great epistemological break’ when religious medieval ‘unity’ gave way to a secular system of ‘plural’ territorially-limited sovereign states. Between the sixteenth and eighteenth centuries, this led to the emergence of what Koskenniemi has termed the ‘liberal doctrine of politics,’ the driving force of which was the attempt to ‘escape the anarchical conclusions to which loss of faith in an overriding theologico-moral world order otherwise seemed to lead.’<sup>61</sup> The basic point here is that once the historical and doctrinal shift has been made from moral unity to moral pluralism, the idea of a *single* universal morality becomes fraught with difficulty. We can see the nature and extent of these difficulties in three main areas: first, the problem of incommensurability of values; second, the complex conceptual problems associated with rights foundationalism; and third, the intrinsic value of communal goods and their relationship to personal autonomy. I consider each of these arguments briefly in turn as they relate to the distinctive logic of Rawls’s *Law of Peoples*.

#### 4.2 *Conflicts of rights and the problem of incommensurability*

Jeremy Waldron has observed that the ‘liberal algebra’ of rights seeks to secure public order in a way that is fair to the aims and activities of all. This aim is Kantian in inspiration: ‘Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.’<sup>62</sup> The difficulty is that in any pluralistic society this aim is unachievable. While the formality of rights discourse may obscure this, there is no principled way to resolve conflicts, not only between rights but also *internal* to rights themselves, other than by seeking a form of reconciliation between the particular conceptions of the good of different groups in the historical context of particular political communities. To do so, however, undermines the rationale for human rights in the first place, that is, the idea that rights are independent of the good (and thus not subject to the potentially unjust demands of public order). The underlying problem, as John Gray has argued, is that the freedoms that liberal rights protect are not necessarily compatible and may in fact be rivals:

[I]f such conflicts can be resolved only by invoking judgements of the good on which reasonable people may differ; if, in the absence of such

judgements, liberal principles are devoid of content; if, that is to say, applying liberal principles necessarily involves resolving conflicts among incommensurable values – then liberal principles have nothing of the simplicity of which Rawls speaks. Liberal regimes are no different from others in having to make choices between rival freedoms; but liberal principles cannot tell them how to make them.<sup>63</sup>

Let me illustrate this proposition by considering Waldron's example of an entrepreneurial pornographer (P) who enjoys the public sale and display of his pornographic wares and the devout Muslim (Q) who abhors pornography and, according to the dictates of his religious beliefs, wishes to live and raise his family in a society free of the public displays of P. Waldron has argued that this example poses severe difficulties for Kantian liberalism and the two liberal requirements of compatibility and adequacy. The fundamental Rawlsian concept of 'reasonableness' is unable to resolve the dilemma that P and Q are unable to live together in a liberal arrangement. The reasons for this are as follows.

The first meaning of Rawlsian reasonableness – that persons accept the subjection of the good to the right – cannot tell us which of P or Q has a conception of the good that is incompatible with liberal principles.<sup>64</sup> The second meaning of Rawlsian reasonableness – that persons have conceptions of the good whose divergence from other conceptions is intelligible in light of the so-called 'burdens of judgment' – is similarly unable to tell us which of P's or Q's conceptions of the good is 'unreasonable'.<sup>65</sup> Waldron then asks whether the late Rawlsian strategy of the need to state one's conception of the good in 'publicly accessible terms' will not reveal that the problem with Q's conception of a certain public moral environment free of pornography and blasphemy is that 'it depends on premises that are internal to his religious faith, and that might seem perhaps arbitrary from an external point of view'.<sup>66</sup> But for Waldron this approach will not work either:

I don't think there is any way of saying that a set of permissions is adequate for the practice of a religion except by paying attention to how that set of restrictions seems from the internal point of view of the religion. To abandon any interest in that would be, in effect, to abandon any real concern for adequacy. An externally stated adequacy condition – which was quite at odds with internal conceptions – would be arbitrary and unmotivated.<sup>67</sup>

Finally, imagining someone in the classic Rawlsian original position who is unsure whether he will turn out to be P or Q, we again face a predicament. By viewing religion a priori in Protestant, Enlightenment



terms as private ‘conscience’ – and thus restricting the ‘field of aims’ among which compossibility is to be sought – the real dilemmas involving religion in terms of its public role in shaping a communal set of practices and collective way of life are not resolved, but simply avoided.<sup>68</sup> In relation to P and Q then, Waldron concludes that there is ‘no determinate solution to the problem’ of compatibility of rights, with the result that:

we can no longer confront issues like the case of Salman Rushdie with the conviction that there is a perfectly good solution of live-and-let-live, if only people would restrain themselves sufficiently to adopt it. There is no such accommodating solution. It means that we can no longer organize liberal aspirations around the formula of the kingdom of ends. The algebra intimated in Rawls’s principle of an adequate liberty for each, compatible with a similar liberty for all, is insoluble.<sup>69</sup>

The problems of incommensurability and incompatibility raise a critical challenge to the notion of a liberal algebra based on a fixed structure of rights. We are left to ask whether the liberal premise rests on a misunderstanding – because it fails to take seriously the incommensurability of values – or on an impossibility – because not everyone’s individual freedom can be respected and ensured consistently with the freedom of everyone else.<sup>70</sup> Liberal theory can resolve such conflicts only by (tacitly) positing a hierarchy of values – or perhaps a single, trumping, ‘covering value’ – or by drawing ‘domain restrictions’ between spheres of incommensurable values (e.g., between a putative public ‘secular’ and private ‘religious’ sphere) and by then developing theories of toleration based on open-textured principles such as ‘reasonableness’ (in liberal political philosophy) or ‘decency’ (in Rawls’s *Law of Peoples*).

### 4.3 *From foundationalism to intersubjectivity*

We have strong reasons to be sceptical regarding any agent-neutral political morality that claims to rest not on particularistic loyalties or conceptions of the good, but rather on deontological universal principles of justice or rights. It was the evident failure of this notion in the pre-modern period that led to the ascending–descending structure of modern international legal argument and its twin features of a public–private divide and fundamental rights. This suggests that the search for a definitive list of basic liberties is itself misconceived and any structure or scheme of rights that claims to promote and protect different human interests will necessarily be indeterminate and significantly variable.

This humbling conclusion does not necessarily leave us mired in a hopeless nihilism of ethical and moral relativism. Rather, by acknowledging the historicity of understanding and meaning, it points us toward dialogic and intersubjective approaches to rights discourse that seek to transcend the Cartesian anxiety generated by the dichotomy between subject and object and seek to recover, rather than deny, the indispensability of prejudice and tradition to any defensible conception of understanding and meaning. Rawls himself sought to address this problem in his later work by advancing the notion of an ‘overlapping consensus’ by which persons (or peoples) adhering to different comprehensive religious, philosophical and moral doctrines may affirm the same conception of justice on different moral and political grounds. But as Waldron has argued, this manoeuvre does not resolve the dilemma of ‘justice–pluralism’ and ‘disagreement about rights’. Waldron identifies two models for thinking about the relation between disagreements about justice and disagreements about the good. On the first model, ‘each conception of the good is associated with or generates a particular vision of the just society’. On the second model, ‘particular theories of justice are not seen as tied to or generated by particular conceptions of the good’ but instead ‘are viewed as rival attempts to specify a quite separate set of principles for the basic structure of a society whose members disagree about the good’.<sup>71</sup>

The problems of rights foundationalism within the social contractarian tradition are therefore irresolvable. There is no single, objective foundation for human rights, whether in a putative state of nature, in a psychological conception of human nature, or in any unimpeachable theory of the relationship between individual autonomy and political order. As Gray suggests, ‘human rights have neither substantive content nor moral weight until their impact on human interests, their contribution to human well-being, has been specified’.<sup>72</sup> This dilemma can only meaningfully be addressed by recognising that human rights are not fixed entities to be arrived at either by abstract deontological deduction or (tacit) consensual agreement alone, but rather are sites of contestation and tension straddling opposing spheres – mediating between consent and justice, autonomy and community, freedom and order, passion and rationality. Critical legal scholars have thus suggested that human rights are best understood as *mediators* between the domains of factual and value judgments. The difficulty for liberal theory is that, on its own assumptions, it cannot consistently justify the normative, objective character of rights without resorting to concrete principles that, in turn, it is then unable to justify. The practical consequence for the politics of justice, as Waldron suggests, is the ‘problem

of selecting a substantive principle of justice to act on (together) when we disagree about which principles are true or reasonable and which not'.<sup>73</sup>

The role of human rights as a mediating concept has important implications for legal theory and our understanding of human rights in international law. The indeterminacy of rights discourse in political philosophy is unavoidable whether at the domestic or international level. Once liberal accounts of human rights are transposed to the international sphere, they suffer from the same conflicts and incommensurabilities. They claim the two sides – objectivity and formality – of law in contrast to the subjectivity of politics in either its utopian or apologist forms. But they fail to provide a convincing argument or theoretical basis for their favoured set of 'fundamental' or 'basic' liberty norms. Indeed, these are the very questions that rights discourse seeks to refer away from itself, preferring to maintain the illusion of the objectivity and compatibility of rights while seeking to hide their deeper incommensurability. We see this difficulty clearly in Rawls's conception of human rights in *Law of Peoples*. In the absence of a practical philosophy of critical praxis, rights discourse remains unable to reconcile the contradictory demands of individual freedom and social order.<sup>74</sup>

#### 4.4 *Individuals and peoples*

I have argued that the essential logic of the Westphalian conception of international law is one of toleration. In this respect, the concept of 'sovereignty' as a mediating device between the 'public' sphere of a community of states and a 'private' sphere of domestic jurisdiction has its historical origins in the Reformation concept of liberal toleration between competing religious traditions (the ethical *modus vivendi* of *cuius regio, eius religio*). State sovereignty is therefore the 'group rights' solution of the early liberal tradition to the problem of religious and cultural pluralism. By recognising that *communitarian* freedom and autonomy (i.e., the sovereignty of states) is necessary for the flourishing and co-existence of different religious and cultural values and ways of life, international legal theory is in this respect premised on a theory of group-differentiated rights. As already noted, however, according to the logic of a community of autonomous and equal legal subjects, the source and authority of the *meaning* of that sovereignty must be intersubjective. It is this understanding that underlies Rawls's distinctive conception of peoples rather than individuals as the proper subjects of international law.

If this is correct, then we need to pay more careful attention to the normative consequences of the shift from the *ius gentium* of the *respublica*

*christiana* to the *ius inter gentes* of the *ius publicum europaeum*. Following the Peace of Westphalia, no longer did the law govern a religiously-based, homogenous Christian *nomos* that received its validity from God as mediated by the right ecclesiastic and secular authorities claiming universal jurisdiction. It now regulated the relationship between European territorial states realising a sharp separation between secular and Church jurisdiction. This, I suggest, had two interrelated jurisgenerative dimensions – one as between European states *inter se* (i.e., as between the newly recognised political subjects of the former unified Christian *nomos*), and the other as between European states taken as a whole and non-European peoples and territory (i.e., as between European states separated as political subjects but united by their background identity and culture and those peoples and territories lying outside of Western Christendom).

In the case of the former, culturally European and religiously Christian background conditions underlay – and perhaps made possible – the Enlightenment idea of a ‘universal’ rational consensus on cross-cultural moral judgments and principles of international justice. Whether justified as secular abstractions from older Christian theologies or as deontologically independent ‘natural law’ principles, classical liberal claims of the priority of universal right and the neutrality of the good are thus premised on a deeper collective religious and cultural particularity.

Indeed, the most notable feature of the early modern societies from which liberal theories of rights emerged was their religious and cultural homogeneity.<sup>75</sup> Sampford’s suggestion that the more recent history and philosophy of liberal thought – eighteenth-century Enlightenment ideas of the rights of man and democracy – led to the ascent of modern, tolerant, inclusive liberal states is deeply mistaken. The European state was a *nation* state first that emerged in the early modern era following massive religious conflict, intolerance and exclusion.<sup>76</sup> As contemporary liberal-nationalists remind us, it is the assumption of membership in a *nation* state coextensive with a single national culture that underlies accounts of rights and obligation in the *liberal* state.<sup>77</sup> This assumption is evident in *Law of Peoples* and has been criticised accordingly.<sup>78</sup> Respect for individual freedom is sure to be an easier proposition in a state *already* comprised of a dominant majority that shares the same understanding of the public-private divide and conception of the good!

This has two direct consequences: first, assertions of ‘natural’ or ‘universal’ right in liberal rights discourse are the products of a distinctly *particular* historical and cultural *nomian* sphere of normative meaning and struggle; and second, such assertions either ignore or are insensitive to

the plurality of assertions of right that have existed, and continue to exist, outside of struggles within Western Christianity. Modern international law constitutes in this respect the projection of the doctrines and norms of the *ius publicum europaeum* into a wider globalising world of both non-European and late modern societies in which there exists a deeper pluralism of ways of life and diversity of values and beliefs. We should expect, therefore, that any (unforced) claims of liberal neutrality and principles of right and justice that portend to stand aloof from conflicts over the good will be strongly contested in those states and societies with their own comprehensive culturally and religiously derived normative systems.

In the case of the latter, Enlightenment commitments to purportedly ahistorical, rational and universal moral norms – conceived as independent of any particular way of life or religious and cultural differences – in combination with a ‘civilising’ imperial mission premised on a doctrine of historical progress, were used to justify the subjugation of non-European peoples. Here, the structure of legal argument discussed above helps to explain an enduring paradox: how is it possible that a moral and political doctrine premised on the universal and equal moral status of human beings could not only exclude certain peoples from such norms, but actually also be deployed to justify cruel acts of slavery, dispossession and even genocide? The reasons are tied, in part, to the Enlightenment’s severing of the connection between the human self and cultural diversity – what Sankar Muthu describes as the uniquely rational ideal that cultural difference is not *integral* to the universal human subject.<sup>79</sup> Not only was this proposition in denial of the cultural and religious sources of and authority for (European) ‘universal’ moral norms, it rendered impossible the relevance of non-European ‘culture-specific designs of particularistic meaning’ as sources of and authority for such norms.<sup>80</sup>

In this respect, the logic of the argument I have advanced is similar to the critiques of formal equality advanced by critical legal scholars. Consider again Waldron’s two-subject case of P and Q above where:

the rights claimed by P, as necessary for the pursuit of his aims, may be different from the rights claimed by Q, as necessary for the pursuit of hers. Of course, the rights claimed by P will be correlative to the duties imposed on Q and vice versa. But although P’s rights are correlative to Q’s duties, and P’s duties correlative to Q’s rights, P cannot simply take the set of rights he has and the set of duties he has and, replacing proper names with variables, regard them as correlative. He is therefore no longer able to work out what duties he has simply by considering what would be correlative to the rights he claims. He must really pay attention to the *situation* and *needs*

of the other person, Q, because these may *differ significantly from anything he can extrapolate from his own case, or any understanding of what he would demand if we were standing in their shoes.*<sup>81</sup>

If we substitute ‘European states’ for P and ‘non-European peoples’ for Q, the argument is the same. An abstract conception of universal liberty (i.e., the ‘universal proposition that everyone is to have whatever is necessary for the pursuit of his or her own good’) will not entail equal or uniform rights of differently situated subjects at a more concrete level. As difference theorists have argued, this requires a conception of justice that pays great attention to the concrete and the particular and emphasises context-sensitive judgments regarding claims of culture and identity arising from different conceptions of the good.

## 5. Conclusion

This chapter has advanced two arguments. The first is that any descending conception of ‘external’ public reason must recognise the limits of its own rationality and inevitable subjectivity. This requires a theory of ‘reasonable’ toleration as we see evidenced in the distinction between certain public and private spheres and a notion of fundamental rights making these essential and permanent features of both international and domestic public law. At the same time, legal subjects – whether states or individuals – holding their own ‘internal’ comprehensive conceptions of the good must recognise others as reason-giving and reason-receiving subjects in need of mutual justification. This creates the impetus for an ascending convergence toward and search for overlapping consensus on shared objective norms. Each argument has potentially far-reaching implications for the central themes of this volume – sanctions, accountability and governance. Failure to recognise the former will result in the violence of domination while any (unforced) attempt to achieve the latter will result in a shifting patchwork of normative dispensations. These two things, as Wallace Stephens says, are one.

## Notes

1. Wallace Stevens, ‘Connoisseur of Chaos’ in Wallace Stevens, *Collected Poems* (1954).
2. Recall Grotius’s statement that ‘maintenance of the social order ... which is consonant with human intelligence, is the source of [international] law properly so called’. Hugo Grotius, *De Jure Belli ac Pacis, Libri Tres, Volume 1* (trans. Francis Kelsey, first published 1625, 1925 edn) 12–13.
3. See Christopher Whytock, ‘Thinking Beyond the Domestic–International Divide: Toward a Unified Concept of Public Law’ (2004) 36 *Georgetown Journal of*

- International Law* 155; Daniela Caruso, 'Private Law and State-Making in the Age of Globalization' (2006) 39 *New York University Journal of International Law and Politics* 1.
4. See Noah Feldman, 'Cosmopolitan Law?' (2007) 116 *Yale Law Journal* 1122.
  5. Charles Sampford, 'The 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* 53, 54.
  6. Sampford invokes the 'eighteenth century North Atlantic Enlightenment' which 'sought to civilize ... authoritarian states by holding them to a set of more refined and ambitious liberal democratic values – notably liberty, equality, citizenship, human rights, democracy and the rule of law.' *Ibid.*
  7. *Ibid.* 57.
  8. *Ibid.* 56.
  9. *Ibid.* 63–4 (emphasis original).
  10. See, e.g., Gerry Simpson, 'Two Liberalisms' (2001) 12 *European Journal of International Law* 537–71 juxtaposing an historically situated *Charter liberalism* with an ahistorical *liberal anti-pluralism* in international law.
  11. Sampford defines sovereignty as the 'collective right of a people to participate in, and benefit from, an independent community, participating as an equal in the community of nations'. But for him collective rights are most attractive if conceived as 'individual rights to the benefits of group life': Sampford, 'The Four Dimensions of Rights' in Galligan and Sampford (eds.), *Rethinking Human Rights* (1997) 50, 63.
  12. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 192 (*Apology to Utopia*).
  13. *Ibid.*
  14. Immanuel Kant, *Critique of Pure Reason* (trans. Norman Smith, 1933) 601–2.
  15. Koskenniemi, above n 12, xvii.
  16. Martti Koskenniemi, 'What is International Law For?' in Malcolm Evans (ed.), *International Law* (2003) 89, 92.
  17. *Ibid.*
  18. *Ibid.* 102–3.
  19. Terry Nardin, 'Legal Positivism as a Theory of International Society' in David Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (1998) 17, 31.
  20. Anne Orford, 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.
  21. Koskenniemi, above n 12, 29.
  22. *Ibid.* 28.
  23. Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 10–11.
  24. As discussed by various chapters in this volume, the instrumental use by powerful states of comprehensive economic and political sanctions both within and beyond the UN Charter legal framework has potentially far-reaching and deleterious consequences for human rights and the rule of law.
  25. Thomas Paine, *Common Sense* (1776).
  26. See David Kennedy, 'Losing Faith in the Secular: Law, Religion and the Culture of International Governance' in Mark Evans and Carolyn Evans (eds.), *Religion and International Law* (1999) 312, 312–13.

27. John Rawls, *Political Liberalism* (1993) xxi.
28. *Ibid.* xviii–xx.
29. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2003) esp. ch. 10.
30. See, e.g., Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599, 2633; Anne-Marie Burley, ‘Toward an Age of Liberal Nations’ (1992) 33 *Harvard International Law Journal* 393; Anne-Marie Slaughter, ‘International Law in a World of Liberal States,’ (1995) 6 *European Journal of International Law* 503.
31. John Rawls, *The Law of Peoples* (1999).
32. Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (2001); Charles Beitz, *Political Theory and International Relations* (1979); Charles Beitz, ‘Rawls’s Law of Peoples’ (2000) 110 *Ethics* 669; Thomas Pogge, *Realizing Rawls* (1989); Thomas Pogge, ‘An Egalitarian Law of Peoples’ (1994) 23 *Philosophy and Public Affairs* 195.
33. John Rawls, *A Theory of Justice* (1971).
34. See, e.g., William Galston, ‘Two Concepts of Liberalism’ (1995) 105 *Ethics* 516; Kok-Chor Tan, *Tolerance, Diversity, and Global Justice* (2000) 3.
35. Rawls, above n 31, 3–4. Rawls derives the term ‘law of peoples’ from the ancient *ius gentium* and notes that the phrase *ius gentium intra se* refers to ‘what the laws of all peoples have in common’. He uses the term ‘law of peoples’ to mean the ‘particular political principles for regulating the mutual political relations between peoples’ (emphasis original).
36. *Ibid.* 9–10 (emphasis original).
37. *Ibid.* 4.
38. *Ibid.* 32, 40.
39. *Ibid.* 37.
40. *Ibid.* 70.
41. *Ibid.*
42. *Ibid.* 59–60.
43. *Ibid.* 65 (footnotes omitted).
44. *Ibid.* 64.
45. *Ibid.* 79–80.
46. Beitz, *Rawls’s Law of Peoples*, above n 32, 673–4.
47. See, e.g., Brian Barry, *Theories of Justice* (1989); Charles Beitz, *Political Theory and International Relations*, above n 32, part III; Pogge, *Realizing Rawls* above n 32, part 3.
48. Rawls, above n 31, 60.
49. *Ibid.* 65.
50. *Ibid.* 60.
51. *Ibid.*
52. *Ibid.* 65–7.
53. *Ibid.* 61.
54. *Ibid.* 61–2 (footnotes omitted).
55. See, e.g., Rex Martin and David Reidy (eds.), *Rawl’s Law of Peoples: A Realistic Utopia?* (2006).
56. Leif Wenar, ‘Why Rawls is Not a Cosmopolitan Egalitarian’ in Rex Martin and David Reidy (eds.), *Rawl’s Law of Peoples: A Realistic Utopia?* (2006) 95, 100 (emphasis original).



57. Peter Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2008) 23 *Journal of Law and Religion* 455, 471.
58. Koskenniemi, above n 12, at 56–7.
59. *Ibid.* 76–7.
60. Charles de Visscher, *Theory and Reality in Public International Law* (1957)13.
61. Koskenniemi, above n 12, 52.
62. Jeremy Waldron, 'Toleration and Reasonableness' in Catriona McKinnon and Dario Castiglione (eds.), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (2003) 13, 14–15.
63. John Gray, *Two Faces of Liberalism* (2000) 69.
64. Waldron, above n 62, 22.
65. *Ibid.* 22.
66. *Ibid.*
67. *Ibid.* 23.
68. *Ibid.* 18.
69. *Ibid.* 33.
70. See Iris Marion Young, *Justice and the Politics of Difference* (1990) 103.
71. Jeremy Waldron, *Law and Disagreement* (1999) 149–50.
72. John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1995) 72.
73. Waldron, above n 71, 161.
74. For a recent attempt to respond to the failure of rights foundationalism in international law, see Joseph Raz, *Human Rights Without Foundations* (2007) (unpublished manuscript) (advancing an antifoundational 'political conception' of human rights setting limits on the sovereignty of states).
75. This is not to say, of course, that such states were *entirely* religiously and culturally homogenous. The more general point is that this diversity, to the extent that it existed, did so *within* the context of broadly *Christian* emergent European nation states.
76. For a detailed argument on this point, see Danchin, above n 57, part III.
77. Some commentators draw a connection between individual liberty and the need for a collective cultural life which is said to be possible only in a nation state. See Yael Tamir, *Liberal Nationalism* (1993); Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 *Journal of Philosophy* 439. Others link democratic consent theory to national self-determination. See Harry Beran, 'Self-Determination: A Philosophical Perspective' in W. J. Macartney (ed.), *Self-Determination in the Commonwealth* (1988). Yet others view national self-determination within a communitarian conception. See Michael Walzer, 'The Communitarian Critique of Liberalism' (1990) 18 *Political Theory* 21.
78. See Allen Buchanan, 'Rawls's Law of Peoples' (2000) 110 *Ethics* 716.
79. Here I follow Muthu's call to 'pluralise' the Enlightenment through exploration of the anti-imperial political thought of philosophers such as Diderot, Kant and Herder. See Sankar Muthu, *Enlightenment Against Empire* (2003).
80. Robert M. Cover, 'Foreword: *Nomos* and Narrative' (1983–1984) 97 *Harvard Law Review* 4, 12
81. Waldron, above n 62, 35 fn 10 (emphasis added).

# The potential for a post-Westphalian convergence of ‘public law’ and ‘public international law’

CHARLES SAMPFORD

## 1. Introduction

I have previously argued that the separation of ‘public law’ and ‘public international law’ is dependent on Westphalian notions of sovereignty, and that the erosion of sovereignty would blur the boundaries between the two – with potentially far-reaching consequences for the way we view both.<sup>1</sup> It is the jurisdictional walls erected along the boundaries of nation states that distinguish public international law and domestic public law. International public law recognises states, their boundaries, the rules under which they interact, the role of multilateral bodies and the place, if any, of individuals and non-state actors. Domestic public law is set by processes internal to sovereign states that have traditionally been completely independent of international law. The extent to which international law has applicability within a sovereign state has generally been a matter for those states themselves.

Sovereignty is under challenge on a number of fronts:

1. The potential conflict between state sovereignty and universal human rights where the failure of states to respect and/or protect the basic human rights of their citizens may trigger a ‘responsibility to protect’ that is borne by other nations.
2. The domestic reach of treaties is increasing.
3. The US has increasingly sought to enforce its laws and executive orders extraterritorially.<sup>2</sup>
4. The US has sought to exercise its Military power (though its ‘hyper power’ status is hyped).<sup>3</sup>
5. The forces of globalisation are weakening the integrity and strength of sovereign states. In so doing they are fundamentally changing the

institutional context of 'strong states' based on independent political communities, which has provided the assumptions on which constitutional and international law as well as the territorial limitations of Enlightenment political values have been based.<sup>4</sup>

6. Finally, there has been a fundamental shift in the basis of political legitimacy within the majority of nation states – from efficacy (or, as I prefer to call it: 'the prior successful use of force') to the consent and active choice of the governed.

I have previously suggested that the 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. As the walls between states break down so will the walls between domestic public law and public international law.

However, the biggest change will occur with the paradigm shift involved in the last challenge to state sovereignty listed above. This shift in the basis of political legitimacy is the primary concern of this chapter.

## 2. 'Strong states' and 'Enlightenment values'

Strong sovereign nation states emerged in seventeenth-century Europe, gradually replacing the patchwork of feudal cities, principalities and empires that, together with guilds and the church, had governed European life for a millennium. After the Treaty of Westphalia<sup>5</sup> the emerging nation state was welcomed as a solution to the chaos that followed the break-up of the mediaeval order when trade and religious schisms overflowed across traditional boundaries and submerged them. With few exceptions, such nation states were highly authoritarian and were justified as such. When life was 'poor, nasty, brutish and short'<sup>6</sup> due to civil war, banditry or religious zealotry, a rational person would happily submit without complaint to a government strong enough to keep the peace by whatever means necessary.

Once life and civil peace were secure, citizens began to expect more from their states. The eighteenth-century North Atlantic Enlightenment<sup>7</sup> sought to civilize these authoritarian states by holding them to a set of more refined and ambitious liberal democratic values – notably liberty, equality, citizenship, human rights, democracy and the rule of law. These values were necessary, not for bare survival, but for comfortable, civilized and dignified existence. Enlightenment thinkers recognised that values were not self-

implementing and that institutions needed to be reformed or replaced to realise them. After some naive suggestions from the French *philosophes* (to introduce the English system as they misunderstood it or to persuade despots to be enlightened despots), the American revolution and the English response produced critical institutional innovations that enabled the partial realisation of Enlightenment political values (i.e., checks and balances and a return to a stronger form of responsible government after George III's failed constitutional experiment).

Nineteenth-century thinkers extended the range of rights championed, for example, adding concern for the environment and for practical and social equality. By the mid-twentieth century, disputes within liberal democracies had moved on to the interpretation and ranking of those rights – especially between civil and political rights on the one hand and social and economic rights on the other. Internationally, rights have been introduced in global and regional Charters and Conventions, with a widely shared goal of encouraging states to respect and institutionalise universally declared rights.

One of the most important insights provided by Enlightenment political philosophy was a Feurbachian reversal of the relationship between sovereigns and subjects. According to Enlightenment thinking, it is not for subjects to prove their loyalty to their sovereigns but for states to justify themselves, and be accountable, to their citizens on the basis of their capacity to benefit their citizens (whether through the furthering of inalienable rights to life, liberty and the pursuit of happiness or otherwise). The Enlightenment placed the individual at the centre of legal and political philosophy and insisted that institutions should serve individuals, rather than the other way around. This does not mean that institutions should be abandoned, but that the manner of their justification should be reconceived – as means of protecting, realising and furthering individual human rights. State institutions now had to be accountable to their citizens. The mechanisms for such accountability were initially crude – Locke's right to revolution, for instance. However, they evolved to include democratic legislatures and administrative law and eventually the creation of what Transparency International has called national integrity systems.<sup>8</sup>

### 2.1 *Globalisation and universal values*

The forces of globalisation increasingly transfer people, cash, goods and ideas across national boundaries. While this process is neither

unidirectional nor uniform, it does have profound consequences for the way we think about states, citizens, the interactions between them and the entire ideological context within which such debates are conducted. This includes a fundamental challenge to liberal democratic values referred to above.

These values were conceived in and for the strong sovereign states that emerged after the Treaty of Westphalia through the 'North Atlantic Enlightenment', and it was through their adoption that those highly authoritarian states were civilised. However, these values were largely conceived for individual states and the institutions designed to realise them have been almost exclusively state-based. Thus, the declining relevance of states and the declining capacity of state institutions have generated scepticism about whether liberal democratic values like democracy, citizenship, community and welfare remain realistic. I argue that this is not a reason for abandoning those values, but it is a reason for reconceiving those values for a world without strong states, and for reintroducing these values into a new set of institutions that are not confined to discrete sovereign states. This would constitute a new 'global enlightenment'. This process involves many challenges, some of which are addressed in the *Challenge of Globalisation* series.<sup>9</sup> The one I want to focus on here is the extension of democratic notions of constitutional legitimacy to the international sphere contemporaneously with the rise in self-identifying democratic nation states.

### 3. A paradigm shift in the basis of constitutional legitimacy

As an essentially Westphalian construct, modern ideas of sovereignty predate the Enlightenment by one hundred years. Domestically and internationally, the sovereign was the person who could effectively control the territory based on the *prior successful use of force*.

In domestic law and political theory, there has been a fundamental shift in the basis of political legitimacy to the consent of the governed (a shift that was fundamental to the North Atlantic Enlightenment). That shift occurred first in the US and France but has occurred in all democracies and is claimed by most non-democracies. The shift within domestic constitutional theory to the consent of the governed reverses the direction of power, authority and accountability. Power is no longer seen as emanating from the omnipotent 'sovereign' but, instead from the consent of the people. Domestically, this puts the people at the centre of constitutional jurisprudence. Instead of asking the traditional

question: 'what power do the people habitually obey', the question becomes: 'who have the people chosen to obey?'

International law, however, continues to recognise states and governments on the basis of an effective exercise of political control over discrete territories. Even when a democratically elected government is overturned by a coup d'état, the ambassadors of the new regime are accredited by foreign powers and permitted to take that country's seat at the United Nations and other international fora.

This inconsistency reflects the fact that the Enlightenment was essentially about the internal workings of states, not their external relations. It was addressed to the *domestic* aspects of sovereignty, not its *international* dimensions. International law is still based on an idea of sovereignty arising out of the century preceding the Enlightenment. In a fundamental sense, Enlightenment values were not directed towards international law and the external elements of sovereignty. When Enlightenment values were imposed, this was done either:

1. in defiance of international law or through a refusal to apply international law to the supposedly uncivilised world (e.g., the abolition of the slave trade), or
2. as part of a peace imposed on defeated nations (e.g., the provision of self-determination to the peoples of the Austrian and Turkish Empires after World War I and the imposition of liberal democracy on the German people after World War II).

There were many reasons for this limited role of Enlightenment values in international law. Initially, democratic nations sought the *protection* of sovereignty against autocratic states that might intervene to crush their fledgling democracies. Their inclination was to keep domestic political values out of international law lest the views of a majority of non-democratic states be imposed on them. It is only recently that the majority of nation states have come to enjoy any real measure of democracy and it has become possible to think that international law might come to reflect liberal democratic ideals.

The glaring inconsistency (or, perhaps, disjunction) between the bases of constitutional legitimacy in domestic and international law has been sustained by a number of factors:

1. The idea that international law is a law for all states, the majority of which have been, until very recently, authoritarian.
2. Cultural relativist notions that different cultures have different approaches to governance.

3. The understanding that it is necessary to 'do business' in both commercial and political terms with a particular territory and that the only way to do this is through the group which exercises effective power in that territory.
4. A lack of alternatives to recognising the authoritarian rulers. In some cases, this may be because it is a state which has never had a democratic government that can speak for the people. In other cases, it may be because recognising an ousted democratic regime is seen as futile, and intervention to restore the democratic regime is unlikely to succeed and will impose unacceptable costs to the intervener and/or the country in which intervention occurs.
5. Interventions to protect human rights or to establish democracy have historically been ill-fated.
6. Respect for international law and a desire to promote the rule of law in international affairs is seen as precluding intervention to protect a democratically elected regime.

These factors are gradually weakening. As more and more nations formally embrace democratic ideals, the first two factors listed above are losing much of their force. The same is true of the third, as autocratic regimes discover that they need bilateral trade more than the economically interconnected democracies. The problems referred to in the fourth factor are not as insurmountable as they might once have seemed (e.g., acceptance of the African National Congress in some international fora as the legitimate voice of the black majority). The final factor remains an important one and the resolution of this inconsistency depends on the development of constitutional theory and the development of new institutions, the reform of old institutions and/or the increased utilisation of existing institutions.

The penultimate factor, the ill-fated history of interventions, remains a poignant issue. The Iraq intervention reaffirms the author's view that 'democracy can never be given, it can only be taken'.<sup>10</sup> However, once a people have taken charge of their own sovereignty, there is a growing view that other democracies can and should help them defend it. Kofi Anan put the principle very elegantly at the first ministerial meeting of the Community of Democracies held in Warsaw in 2000: 'wherever democracy has taken root, it will not be reversed'.<sup>11</sup> This bold statement raised the question of the means by which such reversal might be legitimately and effectively resisted. To answer that question the Council of Foreign Relations created a Task Force co-chaired by

Madeleine Albright and Bronislaw Geremek (former Secretary of State and Foreign Minister for the US and Poland respectively) and comprising an international panel of experts, including the author, who drafted the core papers setting out how democracies might better protect themselves and how other democracies could legitimately and effectively assist them in this goal.<sup>12</sup> These considerations were, in turn, incorporated into the Task Force Report which was adopted by the second meeting of the Community of Democracies held in Seoul. Three points contained in that report should be emphasised. Number one, the first line of defence is by the sovereign state itself and international efforts should concentrate on helping weak states to build their defences against coups/erosions and provide support if those defences falter. Second, this 'one way door' approach to democracy can be justified in ways that the Concert of Europe (which protected European monarchies from republican challenge between 1815 and 1848) and the Brezhnev doctrine (which sought to prevent 'socialist' countries in Eastern Europe from reversion to capitalism) could not. Finally, in a globalising world, the recognition of a regime based upon its 'effectiveness' (that is, the successful prior use of force) is not only normatively offensive but circular – no regime is effective/successful until it is recognised.

While I argue that most means by which democracies might defend each other against coups and erosions do not involve the use of force, the ultimate availability of such force is a very useful deterrent if legally available.

The disjunction between the international basis of legitimacy and the domestic basis of legitimacy in a growing majority of countries remains. Nonetheless, I would like to reiterate a 'rash prediction' made in 1988 that, within 50 years, the prior successful use of force would be as contemptible a claim to recognition in international law as it was and is within the domestic law of existing democracies.<sup>13</sup> I argued then that, within that timeframe, it would become impracticable for authoritarian regimes to overthrow democratic regimes because of the consequent denial of recognition and, to a lesser extent, because the intervention of others will be unequivocally sanctioned. During that period, the justification for what we would now call 'intervention' would be properly worked out as part of the emerging international constitutional jurisprudence.

While the timeline of 50 years was arbitrary, and the prediction viewed by some international lawyers as rash, this period was chosen to give a sense that the long march of history was about to take a turn as a



300-year-old tradition would be forced to give way in the face of a 200-year-old tradition. This occurrence would not be overnight but it would be rapid in historical terms. The progress has been remarkable with a clear majority of nations becoming democracies and ruling an even clearer majority of peoples. In South America, for example, there was only one or two democracies in 1982, but by 1999 all but one or two countries have become democracies. History is never unidirectional and there will be many setbacks. Nevertheless, 2038 remains realistic bearing in mind that, like 1648, a date will be chosen to reflect a gradual process.

While my rash prediction may be vindicated in my lifetime, no one should be so injudicious as to predict the path the world will take should it achieve that milestone. The ‘tipping point’ will be when China becomes a democracy – an event that many expect to occur within the next 30 years. As Hendrik Spruyt<sup>14</sup> rightly points out, the international system is deeply affected by the nature of its members and its members are deeply affected by the nature of the international system. As more and more countries become democracies, these states will be able to defend each other against threats to democracy (to the point of making democracy a one-way door and justifying the change).

### 3.1 *The paradigm shift and the global enlightenment*

Professor Danchin, in his chapter in this volume, is critical of what he sees as my ‘anti-pluralist liberalism’. Danchin understands my position to start from an uncritical assumption that there is a “universal” or “global” social order governed by a “neutral” public law which limits the freedom of its subjects pursuant to the single “trumping” or “covering” value of individual freedom itself.<sup>15</sup> Danchin is right to point out that such a view would have troubling consequences. This, however, is not my position. Indeed, I am a long-term critic of the idea of social contract (‘human beings are social animals descended from social primates without interruption’); I reject the idea of any one value ‘trumping’ others and have argued that the public–private divide is fundamentally misconceived.<sup>16</sup> My views on what can be learnt from the Enlightenment (the West’s ‘great leap forward’) and applied to the challenges of globalisation are briefly summarised above and are set out in great detail elsewhere.<sup>17</sup> One insight of the Enlightenment that I consider particularly important is the Feurbachian reversal of the relationship between sovereigns and subjects discussed above. It is also my opinion that such

convergences can be used to guide normative theorising. This cautious privileging of the norm is not the position that Danchin attacks.

The paradigm shift that I identify will have fundamental consequences for the nature, content and practice of international law and international affairs more generally. It heralds a whole new jurisprudence and political philosophy whose details cannot reliably be predicted. In the next section I want to make a modest contribution towards the project of understanding the implications of this paradigm shift, suggesting a range of principles and practices for reconsideration in light of this predicted new order. I consider the issues of international representation, legal personality, intervention, protection of human rights, sovereign debt, constitutional recognition and the rule of law. This catalogue of potential sites of change is intended to provide the reader with an idea of the ramifications of the predicted paradigm shift, not to exhaust the possibilities of change, nor to be taken as individual certainties.

### 3.1.1 Who speaks for whom?

As argued above, grounding sovereign legitimacy in the choice of the governed changes the domestic question from ‘whom do the people habitually obey?’ to ‘whom have they chosen?’ Where a group has not been chosen but is still exercising power, the question might be asked: ‘whom do they represent?’ If duplicated internationally, this shift would also affect the units that are recognised. Instead of recognising regimes on the basis of who habitually obeys them, regimes will be recognised on the basis of those to whom they are accountable.

The full acceptance of this principle would mean that a government only represents internationally those whose consent it has sought and gained. This would involve little change for democratic regimes. For undemocratic regimes, however, it would mean that the government would be seen as representing only those whose consent it has sought, be it a party, an ethnic group or a restricted franchise. Thus non-democratic regimes would be viewed as representatives of one or more groups within the geographical area of the relevant state who have a current capacity to dominate and control other groups. In short, a government that has not sought and gained a mandate from a group of people would not be seen as speaking for those so excluded.

Cheating to obtain that mandate will not count. Election-riggers will not gain the consent that is the condition precedent of representing a people in the international community. If you fail to gain the support of the people, then you have forfeited the claim to speak for them and others

may claim that right. There is a clear parallel in contract law. If you have obtained the consent of the other party by fraud and deception, the contract is void. By contrast, should the other side win the election despite rigging, interference or intimidation they are entitled to count on the election result. Again, this has a parallel in contract law in which the victim can still enforce a contract against the party engaging in misleading and deceptive conduct.

### 3.1.2 International legal personality

Once the group in power is only seen as representing those whose consent it has sought and to whom it is accountable, huge consequences follow for international legal personality. Initially, only states had international legal personality. The above paradigm shift changes the nature of the international legal personality of states. The excluded groups whose consent is not sought and to whom the group in power is not accountable have a right to demand full participation in the processes by which consent is sought and accountability delivered. If that right is denied, then the group in power does not have the right to represent before the international community those so excluded. This provides a lacuna that the excluded people have a right to fill and gives those who represent the excluded a particularly important right to be heard. A form of international legal personality would then need to be extended to such representatives. If the group in power has ousted a democratic government, the answer would be easy – the ousted government would continue to be recognised. If an authoritarian government prevents the emergence of representative groups, the right to be heard is not extinguished; the individual members of the excluded group retain it.

Where coups have ousted democratically elected governments, it will be easy to determine who speaks for a majority. In non-democracies, it will be harder to determine who will have the right to speak for those whose consent the government has not sought. One suspects that the international community will seek the clearest cases for representation initially and will work out the principles based on those cases. It is reasonable to assume that the recognition of the representatives of excluded groups who have never been in power will not occur as quickly as the continued recognition of ousted governments and the limited recognition of coup leaders.

### 3.1.3 Legitimizing intervention in some cases

If governments represent only those whose consent they have sought, action to prevent them from oppressing those whose consent they have

not sought ceases to be seen as 'intervention' in the traditional sense. Those who try to protect the oppressed would not be interfering in the internal workings of a sovereign territory or trying to break down the walls around a sovereign state. They would be assisting in a conflict between international legal persons. 'Intervention' will take on a different character, similar to action taken to assist the self-defence of a sovereign government.

Of course, this does not mean that all such 'interventions' will be justified. The International Commission on Intervention and State Sovereignty<sup>18</sup> has advanced debate by turning traditional questions about the 'right to intervene' on their head, posing the issue not as when do states have a *right* to intervene in the domestic affairs of other states but when do they have a *responsibility* to protect the rights of foreign citizens. This reflects the Feurbachian reversal of relationships between sovereign/state and subject/citizen. Much more normative debate is required and the general principles need to be developed and applied by the UN Security Council and the International Court of Justice.

### 3.1.4 Elimination of the conflict between sovereignty and human rights

This reconceptualisation of the basis of international constitutional legitimacy largely eliminates most of the conflict between sovereignty and the protection of human rights. Conflict of this kind is always possible when the international community recognises, as the sovereign power, any group which has gained effective political control through the 'prior successful use of force'. This formula does not deny the possibility that such force will be exercised to deny the human rights of the excluded groups. If anything, it actively encourages human rights abuses by rewarding the successful exercise of force to secure dominion over a particular territory. It rewards those who mount anti-democratic coups. It rewards those who rig elections. It rewards those who intimidate the population or who rule through and for one ethnic or social group against others.

If sovereignty covers only those to whom the sovereign power is democratically accountable, then this principle provides members of any group over which that sovereign power purports to extend a right to democratic participation. It also accords a right to those who have been excluded from democratic participation in that or another state. Sovereignty would cease to be power over a people but the collective right

of a people to participate in, and benefit from, an independent political community, participating as an equal in the community of nations. To put it another way, sovereignty *becomes* a human right.

### 3.1.5 Liability for sovereign debt

At present, international legal personality involves the right of those in power to contract on behalf of the state and the people within its territory. Even if the contract is beyond the legal powers of the government that signed it or is corruptly entered into with the benefits corruptly appropriated, its provisions bind the successors to those rulers. Sovereign debt is incurred by corrupt regimes and the proceeds spirited away to bank accounts in the developed world. When a democratic regime replaces the former rulers, it is forced to pay back the debt to the lenders – while the corrupt former leaders often enjoy the loan funds from the comfort and security of their first world exile.

If international law were to treat these transactions in the same way as domestic public law (or, for that matter, corporate law), the power of leaders to contract and the circumstances under which they contract are highly relevant. Domestic analogies to coups are even starker. If hoodlums take over a house and hold the lawful owners in terror, they commit serious offences. If they seek to borrow from a bank on the security of the house, the loan is not only unenforceable against the owners but the bank could be subject to conspiracy charges, especially if they knew that the money was being used to buy new guns to terrorise the occupants. If the same approach were taken in international law, successors to authoritarian regimes would be under no obligation to repay loans to the latter. If so, loan funds would dry up for all but democracies, rendering dictatorial regimes economically non-viable.

If the above-mentioned paradigm shift were to be completed, it would fundamentally change the dynamics of such arrangements. If a government is not accountable to all of its citizens, then the people are not accountable for the actions of the government. When the international debt collectors call, the people can legitimately cite the Latin maxim *non est factum* – ‘it is not my deed’. They should be able to say: ‘You did not contract with us, you contracted with them. Look to recover your funds from those to whom you lent them and seize their assets – especially those held in Western countries.’

However, as in so many complex developments, new treatments of sovereign debt may help generate rather than merely follow the paradigm shift. Much lending to third world tyrants has been supported by first

world governments and first world banks who have been involved and who have known the nature and likely uses to which the loans have been put. One could imagine a particularly egregious example, pushed by a 'vulture fund', generating a public backlash that deters major banks from further such loans because the financial and reputational risk is too great. They may seek to rescue public reputation by joining with NGOs and some states and international organisations to publicly repudiate such loans. Once these changes were implemented, most authoritarian regimes would collapse – though some would seek autarky first.

### 3.1.6 Treatment of coup leaders

To the domestic lawyer, one of the most bizarre elements of international law is the way that those who seize power in coups are treated. When an individual or junta seizes power, they claim the right to a seat in the United Nations, the keys to the embassies and a series of rights for themselves and their regime, ranging from diplomatic immunity to the right to borrow on the sovereign credit of their state. Why do they claim this? Fundamentally, it is because they have either murdered or threatened to murder anyone who has done, or has threatened to do, their constitutional duty. In addition to these crimes they have generally committed a large number of lesser ones – from criminal trespass and armed robbery of the federal treasury to the occasional hijacking.<sup>19</sup> However, because international law and other states recognise the representatives of states on the basis of their effective control, and the successful completion of these crimes is evidence of effective control, international law does in effect reward them for their publicly admitted criminality.<sup>20</sup>

### 3.1.7 Taking constitutions seriously

Once governments are seen as representatives of those whose consent they have obtained, an entirely new question arises: what powers have the people consented to delegate to their representatives? To a constitutional lawyer, this issue is strangely absent from much international law. One of the core elements of constitutionalism is that there must be constitutional authority for every action by a public body. This is reinforced by the 'closure rule' in public law – 'whatever is not permitted is prohibited'. Domestically, this principle is sometimes reconciled with sovereignty by seeing the people as sovereign: the only power a public body has is that which has been specifically authorised by the constitution which has been agreed (or at least accepted) by the sovereign people.

Raising such questions means that the international community would have to take domestic constitutions seriously. A state's international representatives would be seen as just that: representatives, with only the power they have been given.

In domestic law, the constitution is the central defining document from which all power flows. Every actor is expected to take the constitution seriously. Indeed, political leaders can only point to the power they have from the constitution if they want their actions legally recognised. In legal terms, acting outside the constitution is self-defeating. The action is a legal and constitutional nullity. Its only potential legal effect is if it triggers dismissal, impeachment or criminal prosecution in the case of deliberate and egregious breaches.

If international law and the international community took constitutions seriously, then they would only deal with those whom the relevant domestic laws endorsed. Presidents or generals who sought unconstitutionally to seize or to extend their power (temporally or substantively) would lack the power they assert from an international as well as domestic perspective; and any such attempted exercises of that power would be treated as nullities by other countries. Of course, there would still be arguments about the validity of purported exercises of power.

Respect for the constitution also entails respect for those bodies who the constitution establishes to settle such questions. We do not expect other countries to second guess the decisions of, for example, an independent ultimate appellate court. However, if the relevant 'general' or 'president'<sup>21</sup> seeks to 'noble' the court by intimidation, unconstitutional sackings etc., other countries have to act on their own legal advice – taking note that the very action taken by the general/president to 'noble' the court creates a presumption of invalidity. This would (and should) put the general/president in an even worse position as other countries would no longer wait for the court hearing to come to the conclusion that their tenure had come to an end. Unconstitutional activity would be self-defeating – as it should be in a community subject to the rule of law.

In this, as in other matters, courts should not be seen merely in negative terms – as institutions that can declare a particular action by a government invalid. Ultimately, they are the only institutions that can establish that an action is legally recognised rather than void *ab initio*.

Sadly, such thoughts presently remain idle fantasies because international law and the international community have not taken constitutions seriously. International actors are still prepared to deal with those who

violate their constitution and use force to impose their will without constitutional warrant. However, there are growing demands that domestic actors avoid unconstitutional actions, and pressure is growing for states to accept the decisions of relevant appellate courts.

### 3.1.8 The rule of law

Taking constitutions seriously and respecting the actual delegations of power they establish is, of course, central to the idea of the rule of law. While I do not want to take this opportunity to re-enter<sup>22</sup> the debates about the interpretation of that ideal in domestic and international jurisprudence, a central concept is that official power comes from law and is exercised under conditions and limitations established by law. To do that, we need to take constitutions seriously and see power as determined by laws not men. I would argue that the domestic and international rule of law are not only linked conceptually but practically in that they are mutually reinforcing and, at least partially, mutually interdependent.

Some might consider this discussion utopian and indicative of too much soft-left liberal internationalism – not least because the US will supposedly never agree. To such realist pessimism, I recall the words of President Dwight Eisenhower 50 years ago:

[A] world of swift economic transformation and growth must also be a world of law ... The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone ... Plainly one foundation stone of this structure is the International Court of Justice [he goes on to emphasise the importance of the obligatory jurisdiction of that Court]. ... One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But here is another thought: nations can endure and accept an adverse decision, rendered by competent and impartial tribunals. This is so, I believe, for one good reason: if an international controversy leads to armed conflict, everyone loses; there is no winner. If armed conflict is avoided, therefore, everyone wins. It is better to lose a point now and then in an international tribunal, and gain a world in which everyone lives at peace under a rule of law.<sup>23</sup>

This approach may be more attractive now that it could be argued that the Bush presidency's contempt for the rule of law at domestic and international levels has undermined US influence almost as rapidly as it has exhausted US coffers.



### 3.1.9 Towards the unification of public law and public international law

Once the issues outlined above are taken seriously in international law, public law (that is, constitutional and administrative law) and public international law will begin to fuse methodologically and doctrinally.

Methodologically, the question of what powers public bodies exercise will become a matter of international as well as domestic constitutional law. This concordance will automatically introduce critical elements of domestic constitutional content and doctrine into international law. Other chapters in this volume address these issues – from the rise of global administrative law discussed by Chesterman to the requirement of procedural standards discussed by Farrall and Hovell. Much of the interchange will be from domestic public law to public international law as the former is much more developed, at least in long-standing jurisdictions. However, there will still be considerable traffic in the other direction. The 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. While human rights norms emerged within domestic jurisdictions, they have been internationalised and globalised through the international charter and conventions on human rights; it is likely that this international and global form of human rights norms will feed back into domestic law. One of the most profound changes may come if the recognition of the limits of international law, long remarked upon by international lawyers and international courts, assists domestic courts to recognise the real if not theoretical limits of domestic sovereignty.

## 4. Conclusions

Westphalian sovereignty was based on regime effectiveness – essentially the prior successful use of force. It provided a simple answer to the jurisprudential question that asks the difference between a state and an armed band of thugs – success. The democratic revolutions of the following century emphatically rejected that approach to domestic sovereignty and engendered a paradigm shift that substituted the prior successful use of force with the choice of the governed. These changes also reversed the lines of accountability – making states justify themselves to their citizens rather than subjects having to prove their loyalty to their sovereigns. As the number of democracies subject to the rule of law

increased, the disconnect between the basis of sovereignty in domestic and international law grew ever starker.

My prediction in 1988 that this disconnect would disappear within 50 years may not seem as rash as it did then. The globalising movement of people, goods and ideas that constantly flood over the walls between sovereign states – walls that are still being lowered in most countries, 9/11 notwithstanding – will tend to erode the distinction between (domestic) public law and public international law. More crucially, the changes have shown the effectiveness/success test to be problematic and possibly circular. In an increasingly interdependent world, effectiveness and success depend on being able to trade and interact with others. Recognition cannot be based on success because success is dependent on recognition.

This chapter has anticipated some of the consequences of re-uniting the criteria of sovereignty in domestic and international law in favour of the active choice of the governed. Consequences would include changes to international legal personality, legitimating interventions in some cases, elimination of the conflict between sovereignty and human rights, liability for sovereign debt and the treatment of coup leaders. Furthermore, domestic constitutions would be taken more seriously by the international community. Thus, the rule of law in domestic and international affairs would become increasingly linked and mutually supportive.

Of course, predictions of this kind are not predictions of solar eclipses or millenarian predictions of the end of the world. It is not a call to go to a mountain top to await the inevitable second coming of the Enlightenment, because it will not come by itself but only through human action. What this ‘prediction’ does is to emphasise a realistic and achievable goal if individuals, and the organisations that are accountable to them, seek to push history in that direction.

### Notes

1. Charles Sampford, ‘Challenges to the Concepts of “Sovereignty” and “Intervention”’ in Tom Campbell and Burton Leiser (eds.), *Human Rights in Philosophy and Practice* (2001) 335.
2. See, eg, Simon Rice, ‘Discriminating for World Peace’ in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 355.
3. Supposed economic preponderance is undercut by dependence on foreign resource deposits of lesser economic powers, and its military preponderance is much less

than that of the strongest powers in the past. Although the US could destroy any fixed object on the face of the globe, previous predominant military powers had the capacity to conquer and control their chief rivals, something which the US cannot do.

4. Sampford, above n 1.
5. The term 'Westphalian states' is liable to engender cries of naivety, theoretical simplicity or historical ignorance. Of course, economic, political, legal and ideological forces had long been at work and the job was not completed with that one pact. However, it is a useful date and time to represent a series of processes that were going on long before 1648 and were never fully theorised let alone fully realised.
6. Thomas Hobbes, *Leviathan* (Richard Tuck ed., 1991).
7. I call this the 'North Atlantic' Enlightenment to emphasise the way philosophical and institutional ideas flowed back and forth across the Atlantic, growing in strength with each passage.
8. These systems include elements of judicial review, freedom of information legislation, merits review tribunals, ombudsmen, investigative media and public interest litigation.
9. Charles Sampford and Haig Patapan, *Challenges of Globalisation* series.
10. Charles Sampford, 'International Responses' (Paper presented to the Council on Foreign Relations Task Force on Threats to Democracy, Washington, 2002).
11. Kofi Anan, 'Closing Remarks' (Speech delivered at the ministerial meeting of the Community of Democracies, Warsaw, Poland, 27 June 2000).
12. Charles Sampford and Margaret Palmer, 'Strengthening Domestic Responses' in Morton Halperin and Mirna Galic, (eds.), *Protecting Democracy: International Responses* (2005) 195; Charles Sampford and Margaret Palmer, 'International Responses', in Morton Halperin and Mirna Galic, (eds.), *Protecting Democracy: International Responses* (2005) 368.
13. Charles Sampford, 'Dare to Call it Treason' (Paper presented at the Australian Law and Society Conference, Latrobe University, December 1988).
14. Hendrick Spruyt, *The Sovereign State and its Competitors* (1994).
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* 27.
16. The first two views were rejected emphatically in Charles Sampford, *John Rawls and the Dimensions of Rights* (Undergraduate Thesis, University of Melbourne, 1975) and have been repeated many times since. See, e.g., Charles Sampford, 'The Four Dimensions of Rights and their Means of Protection' in Brian Galligan and Charles Sampford (eds.), *Rethinking Human Rights* (1997). The third was the subject of my keynote address to the 1990 Australian Law Teachers Association Conference later published as 'Law, Institutions and the Public Private Divide' (1992) 20 *Federal Law Review* 185.
17. See Sampford, above n 1.
18. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001) [www.iciss-ciise.gc.ca](http://www.iciss-ciise.gc.ca) at 14 November 2008.
19. It is hard to otherwise construe General Musharaf's action in requiring the plane he was in to divert from the airfield at which he was to be arrested. See Charles

- Sampford, 'Who Will Rid Us of these Meddlesome Generals' in Charles Sampford *et al.* (eds.), *Asia Pacific Governance: from Crisis to Reform* (2002) 135.
20. Note that the policy of recognising states rather than governments is disingenuous because governments still have to decide whose credentials to accept.
  21. I use inverted commas because an unconstitutional exercise of power may constitute a serious criminal offence that is later found to have disqualified them from office.
  22. My views on this issue can be found in Charles Sampford, 'Reconceiving the Rule of Law for a Globalizing World' in Spencer Zifcak (ed.), *Globalisation and the Rule of Law* (2005) 9; Charles Sampford, *Retrospectivity and the Rule of Law* (2006).
  23. Dwight Eisenhower, (Speech delivered upon receiving an Honorary Degree of Doctor of Laws at Delhi University 11 December 1959).



## PART II

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### Internationalising public law



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## Globalisation and public law: A global administrative law?

SIMON CHESTERMAN\*

In the space of a generation, the term ‘globalisation’ has passed from neologism to cliché. As a commercial phenomenon and political reality, the elision of traditional national borders has opened economies and transformed the context within which political decisions are made. Analysis and critique tend to focus on these two aspects of globalisation: the economic winners and losers, and the distancing of representative government from a great deal of political decision-making. This is understandable since international agencies, expert committees and hybrid interest-driven networks increasingly make decisions that affect large numbers of people. As formerly public responsibilities have been assumed by these new entities, however, there is evidence of an emerging normative context within which such activity takes place, characterised by a demand for accountability in decision-making. Responses to this demand have been piecemeal, sometimes inconsistent, and frequently inadequate. But seen as a whole, those responses have begun to coalesce into an entirely new area of law that may provide a set of rules for accountability in globalisation: a global administrative law.<sup>1</sup>

This phenomenon lies in the interstices of what Peter Danchin describes as the traditional concept of ‘public’ in public international law,<sup>2</sup> and the traditional Westphalian conception of the domestic sphere outlined by Charles Sampford elsewhere in this volume.<sup>3</sup> Whereas Danchin presents a nuanced theoretical critique of the assumptions that underlie ‘internal’ and ‘external’ rationalities, and Sampford exposes tectonic shifts in how legitimacy operates in a post-Westphalian world, this chapter has the more modest task of mapping globalisation as a phenomenon, focusing in particular on the sporadic and at times inconsistent moves towards accountability in this sphere of action. Public international law, traditionally the jurisdiction that mediates disputes



between states while respecting their own jurisdictions, is a particularly interesting vantage point from which to view these developments given the tension between its 'public' and 'international' aspects. For the purposes of this volume, it also represents an important opportunity for international lawyers to learn from public lawyers and, perhaps, vice-versa.<sup>4</sup>

The emerging set of rules referred to here as 'global administrative law' encompass procedures and normative standards for regulatory decision-making that fall outside domestic legal structures and yet are not properly covered by existing international law, which traditionally governs state-to-state relations rather than the exercise of regulatory authority with direct or indirect effects on individuals. The standards that are being imported into this new sphere of regulatory activity draw upon existing administrative law principles common to many jurisdictions, such as transparency, participation and review.<sup>5</sup> As a response to the demand for accountability in globalisation – as distinct from demands that globalisation be made more *democratic* – these developments aim to make decision-making more *reasoned*.<sup>6</sup> Though much of the discussion here is descriptive of existing phenomena, it will be argued that the consolidation of these moves would improve both the quality of decision-making and the ability of those affected by decisions to protect their legitimate rights and interests.

The fragmented nature of activity in this area to date is easily seen. The fora in which regulatory decisions are being made range from formal treaty-based organisations such as the United Nations and the World Trade Organization (WTO) to networks of government officials such as the Basel Committee of national bank regulators. In addition to government representatives, the actors include experts such as the technical committees of the International Organization for Standardization (ISO) and the non-profit Internet Corporation for Assigned Names and Numbers (ICANN). Increasingly, less formal networks of interested parties play a role in developing standards in areas as diverse as 'fair trade' coffee and 'dolphin-friendly' tuna. Participation in these disparate decision-making processes varies widely, but there is rarely a general right for affected parties to challenge a decision; frequently it is not possible even to seek reasons as to why a particular decision was made.

The disparate regimes may overlap – sometimes quite intentionally – as the market comes to be regulated by a market of regulation. In some areas, competing standards may be adopted on a 'voluntary' basis, though the global marketplace quickly leads to standards becoming mandatory as a commercial reality if not a legal requirement.<sup>7</sup> Mechanisms that have

sought to regulate these activities tend to come from traditional governance institutions operating at the limits of or beyond their traditional boundaries. At the national level, courts and legislatures have increasingly asserted a capacity to review domestic implementation of global standards and national officials' participation in global administrative decisions.<sup>8</sup> At the international level, accountability may depend on specific mechanisms established for a particular regime, such as the WTO's inspections panels and Appellate Body,<sup>9</sup> or reactive ad hoc bodies such as the Independent Inquiry Committee into the United Nations Oil-for-Food Programme. For many regimes, there is no formal review procedure at all and no means of calling for one.<sup>10</sup>

Dissatisfaction with these piecemeal and inconsistent regimes is, ironically, one of the reasons why they may be thought of as part of a larger whole. As demands for transparency, participation and review are made across sectors, similar conversations are taking place in discrete communities of practitioners, advocates and academics. 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 these questions of accountability and sketch some appropriate responses.

This chapter discusses the practice of global administration before surveying the forms and structures of accountability that are developing. It then addresses some of the key questions of power disparities that affect both the mechanisms created and how they are implemented. The chapter touches on a range of bodies engaging in what is termed here global administration; significant time, however, is spent on the United Nations as the organisation that is most familiar to non-specialists but also the one whose accountability has been most prominently questioned in recent years.<sup>11</sup> The argument made here is that the whole of these emerging practices may yet make up more than the sum of their parts: global administrative law will not displace calls for greater democratisation in global decision-making processes, but it can address many of the concerns brought under that large and ill-defined tent, while being significantly more likely to find traction with decision-makers themselves.

## 1. Global administration

'Global governance' was originally understood as regulatory in nature. Though international agencies might generate norms through

intergovernmental processes, the execution of these norms was traditionally the purview of states or exceptional entities such as the European Union. This limited view of global governance is no longer tenable. Though most advanced in the economic sphere, areas such as the environment and, increasingly, international security are subject not merely to regulation but to global administrative control.<sup>12</sup>

Much as the European Union began life as an economic idea with political implications, economic regulation and administration has led to the development of global administrative law. Important structures today include the WTO, the Organisation for Economic Co-operation and Development (OECD), the G7 group of major industrial democracies (expanded to include Russia for the annual G8 heads of government meeting), the Financial Action Task Force and the International Monetary Fund. Environmental regulation – sometimes conceived as administration of the global commons or the common heritage of humanity – has also been the subject of far-reaching regimes, most notably the Kyoto Protocol. But the most rapid recent growth in administration has been in international security. In addition to the assertion of expanding powers over post-conflict territory through the 1990s – culminating in the United Nations exercising effective control over East Timor from 1999–2002, and ongoing quasi-sovereign control of Kosovo – the sanctions committees of the UN Security Council routinely make decisions with major impacts on countries and individuals.<sup>13</sup> Since September 11, 2001, the Council has also exercised extensive powers for swift action in the fields of counter-terrorism and counter-proliferation, at times acting as a kind of global legislature.<sup>14</sup>

Though such activities are far from uniform, they mark a paradigm shift in the governance activities of bodies that do not fit neatly into historic categories of national or international law. The former typically controls activities within the jurisdiction of one country; the latter the relations between countries. This schema was never particularly neat – a separate body of law deals just with conflicts of jurisdiction – but the activities considered here frequently operate in the interstices *between* jurisdictions, while encompassing activities that would normally be undertaken by domestic governance authorities.<sup>15</sup> Seeing such activity as global administration reflects those qualities and pointedly raises the legitimacy issues that would follow from a government asserting such powers. A government that determines capital adequacy requirements for banks, runs a trading regime for pollution credits or freezes the assets of a suspected terrorist financier would typically be subject to some

form of administrative law process, perhaps requiring varying degrees of transparency, rights of participation and review of decisions.<sup>16</sup> These procedural remedies do not exist for the Basel Committee, the Kyoto Protocol's Clean Development Mechanism or the UN Security Council's 1267 Al-Qaeda Sanctions Committee respectively.<sup>17</sup>

Whether it makes sense for these activities to be thought of as a coherent whole is an open question. Similarly, analogies between national legal regimes, such as administrative law, and international or transnational law must be drawn carefully. Nevertheless, the increasing demands for accountability are suggestive of the manner in which administrative activity by governments came to be subject to review.<sup>18</sup>

A prominent example of the demand for administrative law-type reforms in recent years has been the accountability deficit at the United Nations. Accusations of mismanagement in the Oil-for-Food Programme led to the establishment of an inquiry headed by former Federal Reserve Chairman, Paul Volcker. Responding to an interim report in February 2005, Deputy Secretary-General Louise Fréchette acknowledged that there were weaknesses in UN management, but averred also to the UN's ill-preparedness for such responsibilities in the first place: 'Personally, I hope to God we never get another oil-for-food program or anything approaching that kind of responsibility,' she said, 'which was tantamount to trying to oversee the entire import-export regime of a country of 24 million people, which was a tall order.'<sup>19</sup> When the UN next oversaw the flow of large amounts of money, in the wake of the 26 December 2004 tsunami, it retained the services of the accounting firm PricewaterhouseCoopers to help with financial tracking.

Lack of capacity to administer is only rarely the reason for a lack of accountability, however. More commonly, a regime is designed with an accountability deficit in place. This is true, for example, of another recent United Nations scandal concerning sexual exploitation and abuse by peacekeepers in the Democratic Republic of the Congo. Though blame is often targeted at the United Nations itself for such crimes, countries contribute forces to peacekeeping operations on the basis that their troops have immunity from local laws and from any UN disciplinary action other than repatriation. In theory, a wrongdoer's home government is obliged to investigate and prosecute abuse; in reality, few governments do, and the United Nations is reluctant even to name and shame recalcitrants for fear that troops might not be sent at all to future peacekeeping operations.<sup>20</sup>

Other global administrative regimes have been established precisely to *avoid* national administrative remedies. Foreign investment treaties, for example, may presume the inadequacy of a developing country's legal regime and allow foreign investors to enforce rights directly before an international tribunal. Allowing a corporation to sue before an international tribunal is itself a departure from classical international law, but a further interesting element is the common inclusion (especially in bilateral investment treaties negotiated by Britain, France and the US) of a requirement for 'fair and equitable treatment in accordance with international law'. The content of this 'international law' is far from clear, but as global administrative law develops over time it may inform the interpretation of such treaties, which have grown in number from around 500 a decade ago to more than 2,300 today.<sup>21</sup>

A more basic challenge to the importation of administrative law principles into global administration is the structure of authority.<sup>22</sup> National institutions of governance tend to be organised hierarchically with power distributed in accordance with constitutional or foundational legal norms. International and transnational institutions of governance, such as they are, frequently operate in a less structured environment driven by negotiation; formally, much authority comes from the countries whose consent gives them legitimacy. The horizontal organisation of certain forms of global administration is most evident in mutual recognition regimes, which provide that a product or service that can be sold lawfully in one jurisdiction may also be sold freely in any other participating jurisdiction. These regimes, which tend to be formulated as treaties, are in turn being overtaken by technology as the Internet and satellite television make it increasingly impractical for one country to opt out of the globalised commercial sphere.<sup>23</sup>

## 2. Accountability deficits

Is it possible, then, to have meaningful accountability in this area?

There are many ways of holding power to account.<sup>24</sup> Mechanisms do exist at the international level, but they tend to be responsive in nature and ad hoc in structure. Accountability should not simply be a reaction to scandal, however. To be effective it should normally exist as of right, which requires the creation of institutions, the elaboration of standards and the potential for sanctions.<sup>25</sup>

This is not, of course, the only way to constrain power. Other means include negotiation constraints, checks and balances, the threat of

unilateral action and so on. Such constraints fall outside 'accountability' as it is used here, but point to an important distinction between legal and political accountability. *Legal* accountability typically requires that a decision-maker have a convincing reason for a decision or act. Compliance with a rule will normally be sufficient reason, though some administrative agencies may be established with a requirement to provide substantive reasons on the merits of a particular decision. *Political* accountability, by contrast, can be entirely arbitrary. In an election, for example, voters are not required to have reasons for their decisions – indeed, the secrecy of the ballot implies the exact opposite: it is generally unlawful even to ask a voter why he or she voted one way or another.<sup>26</sup> These forms of accountability may be seen as lying on a spectrum book-ended by the political and legal respectively, with all manner of variations in between.<sup>27</sup> In a legislature, for example, individual legislators may have specific reasons for voting in favour of or against a piece of legislation, sometimes demonstrated through speeches made before or after it was adopted. But if such reasons are inconsistent, it may be unclear what significance is to be attributed to them.<sup>28</sup>

In the absence of political, or what we might loosely term 'democratic' accountability, is it desirable to provide for legal accountability mechanisms? Two concerns immediately present themselves. First, it is unclear that the objective implementation of standards implied by legal accountability can adequately substitute for a democratic deficit: such an approach presumes that holding power to specified standards is a sufficient form of accountability, but by ignoring the fact that the standards themselves are contestable, it loses the essentially arbitrary character of democratic accountability.<sup>29</sup> Second, the relationship between those making decisions and those affected by them is different in the global administrative sphere from the way it is in national institutions. In a democracy, power is delegated through elections by the same population that is typically affected by decisions; in global administration there is no such corresponding link between those affected and those delegating power. As a result, those with the most leverage to demand and enforce accountability may be those with the least interest in doing so.<sup>30</sup>

It is necessary, therefore, to look more closely at different structures of accountability across the spectrum of legal and political remedies. Ruth W. Grant and Robert O. Keohane have identified seven such structures, reflecting different relationships between those who delegate power, those who make decisions and those who feel the consequences:

1. hierarchical accountability within a bureaucracy, such as the UN Secretariat;
2. supervisory accountability, such as countries on the executive boards of the World Bank and IMF;
3. fiscal accountability, such as through the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of the General Assembly or the unilateral withholding of UN dues by member states;
4. legal accountability, where a disinterested independent third party, such as a court, is vested with decision-making powers, for example arbitral tribunals set up under the International Centre for Settlement of Investment Disputes (ICSID) or the International Criminal Court;
5. market accountability, where decisions are left to the operation of the market, such as pressure on developing economies to adopt standards attractive to global capital markets or consumer pressure against inadequate labour standards on running shoes;
6. peer accountability, such as the desire of diplomats to maintain credibility and influence among their colleagues; and
7. public reputational accountability, which applies to all the preceding categories but also embraces 'soft power' connected with the prestige and esteem of a given country.<sup>31</sup>

The UN Security Council presents an interesting case study. There is no electoral or political accountability, since the Council is composed of both permanent and elected members – and any implicit political accountability of the latter group is undermined by the rule against immediate re-election. Ad hoc measures draw upon a kind of 'expert accountability', such as the recent International Commission of Inquiry on Darfur and the many reports of the Secretary-General and his representatives to the Council, though with limited effectiveness in holding the Council to account when it acts inadequately or fails to act at all. There is a degree of quasi-legal accountability, for example through bodies such as the Volcker Committee, though that inquiry did not examine the legality of Council actions as such. Public reputational accountability of the Council is problematic because of the willingness of countries that play a lead role on the Council nonetheless to call upon 'the Council' or 'the UN' to act. Since any such action depends upon state capacities, such calls are often disingenuous.<sup>32</sup> More generally, the use of the veto – or the threat of a veto – by a permanent member of the Council distorts decision-making processes further, though evidence of this is limited as the vast majority of decisions are made behind closed doors.

There is, then, no simple answer to the question of to whom the Security Council is accountable for its actions and those taken in its name. Since it was traditionally understood as the apotheosis of a purely political body, this was not seen as a major concern at the creation of the United Nations or in the course of much of its subsequent history. That situation may be changing, however, as the Council assumes and delegates administrative powers on a more frequent and a more far-reaching basis. Pressure for change may come from two directions. First, as the Council takes decisions that increasingly affect individuals, such as including them on lists of suspected terrorist financiers whose assets are to be frozen, national courts (notably in Canada and the European Union) have begun to examine whether they themselves can review Council decisions, a question taken up in Erika de Wet's chapter in this volume.<sup>33</sup> Second, and more generally, as the Council moves along the spectrum from being a purely political body to assuming more traditionally administrative responsibilities – including, at its most extreme, the governance of territory in Kosovo and East Timor – a more 'legal' model of accountability, in which the Council is expected to have and give reasons for its decisions, will be demanded by stakeholders more generally, as is happening in response to the Council's counter-terrorist activities.<sup>34</sup>

An important caveat is to note the danger of a body like the Security Council embracing too many rules and too much accountability. The UN General Assembly is a more representative body than the Security Council, but there is a reason why matters of international peace and security were delegated to a smaller body with special rights accorded to the most powerful countries of the day. If the cost of greater accountability was that the capacity of the Security Council to respond to crisis suffered, many would argue that the cost would be too great. In this respect, those who urge the Council to make decisions in a transparent manner, open to a wide range of contesting viewpoints, should be careful what they wish for: the only example of the Council functioning in this manner in recent years is on the handling of the Iraq file from 2002–2003 – the rifts to which this gave rise are the reason why reform is on the agenda today.

Nevertheless, as the Council's role continues to evolve it may be possible to differentiate between appropriately 'political' functions and those where more structured forms of accountability are possible. In the Council's increasingly administrative functions, having and giving reasons for decisions – including, as appropriate, receiving input from



countries and other actors not on the Council prior to decisions and responding to challenges after them – would be a useful first step.<sup>35</sup>

The UN Security Council is unusual for the way in which its powers have expanded over the past decade in particular, but many other bodies are similarly removed from the affected individuals who have the greatest stake in the quality of their decision-making. The International Accounting Standards Board (IASB), for example, is a privately funded body based in London that develops global accounting standards requiring transparent and comparable financial statements. Its members are appointed by the International Accounting Standards Committee Foundation, a non-profit corporation incorporated in the US state of Delaware. In 2002, a European Union regulation required listed companies, including banks and insurance companies, to prepare their consolidated accounts in accordance with the IASB's standards from 2005 onwards – delegating not only adoption of these standards but their interpretation to a private body. An EU Accounting Regulatory Committee was established to oversee incorporation of the standards, but its function was limited to providing an opinion on proposals to endorse IASB standards. The connection between the standards-setter and those required to implement the standards is a chain of broken links.<sup>36</sup>

Whether such connections should be more direct, and whether such standards-setters should be accountable to the end-users of their product, points to a counter-majoritarian problem that frequently arises in economic law and policy. Should such areas of governance be isolated from day-to-day democratic processes?<sup>37</sup> In other words, in times of quiet can a government establish economic policies that will be protected from political pressure in moments of crisis? Human rights are protected in this way by many constitutions, structured to limit the capacity of a state to derogate from that to which it originally consented. It is less clear that this should apply to economic policy. The European Union has gone furthest in submitting control of the economy to intergovernmental processes, including the adoption of a common currency (something achieved *de facto* in a 'dollarised' country such as Panama). Even so, the limits of transferring economic policy to transnational actors were tested when both France and Germany breached the EU Stability and Growth Pact that requires countries using the euro to keep their deficits below 3 per cent of gross domestic product (GDP). A three-year dispute ended in a truce in December 2004, premised on an assumption that both countries would keep their deficits below the ceiling in 2005. Germany, at least,

violated that agreement, and along with Greece and Malta was subject to excessive deficit procedures, similar to those brought against Portugal when it violated the pact in 2001.

Accountability, then, depends not only on the relationship between overseer and overseen, but also on the stability of that relationship. In a developed legal system, the rule of law – meaning subjection to consistent and transparent principles under state institutions exercising a monopoly on coercive power – is intended to avoid arbitrary departures from uniform behaviour. The emerging body of global administrative law has few such protections, and accountability mechanisms have frequently been responsive to the realities of power, not merely in implementation, but in design.<sup>38</sup>

### 3. Some animals are more equal than others

During negotiations on the International Criminal Court in 1998, there was brief consideration of including corporations within its jurisdiction. French negotiators pushed to include legal as well as natural persons in order to make it easier for victims to sue for restitution and compensation. Differences in this form of accountability across jurisdictions – where it exists at all – meant that consensus was impossible and the language was dropped from its square brackets.<sup>39</sup>

Six months after the Rome Statute was adopted, at the 1999 Davos World Economic Forum, the then UN Secretary General Kofi Annan proposed the Global Compact. This is not a regulatory instrument – it does not ‘police’, enforce or measure the behaviour or actions of companies. Rather, the Global Compact claims to rely on ‘public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based’.<sup>40</sup> The emergence of such essentially voluntary codes of conduct is an admission that regulation of labour standards through governments and intergovernmental organisations has failed. Though there are reasons to be hopeful about the impact of these voluntary mechanisms, they shift the burden of compliance in large part from the legal division of a corporation to the marketing division.

It should come as no surprise that norms and institutions are weaker in labour regulation and, say, environmental law than in trade. The largest multinational corporations now dwarf the economies of many countries and frequently mobilise greater political influence: preserving

their freedom of action (while protecting property and contractual rights) is a major reason for the weakness of labour and environmental regimes. At the same time, however, political power has also driven the expansion of global administrative law – most importantly in the export of US regulations and, increasingly, in US support for the judicialisation of international economic institutions such as the WTO. Much of the rhetoric within the US is critical of these developments, but they are frequently encouraged by US regulators and business with a strong interest in the harmonisation of global standards and the consistency and predictability of a legally robust trading environment.<sup>41</sup> Where possible, this is pursued through the extraterritorial application of US regulations, either in law or in fact. A passive example is the adoption of Food and Drug Administration standards by pharmaceutical companies outside the US. A more aggressive approach is evident in the use of certification mechanisms that provide rules for other countries in areas such as abortion, arms control, environmental protection, human rights, narcotics and terrorism. In each of these areas, Congress requires the US President to provide detailed annual reports that may lead to the imposition of sanctions. It was in response to such unilateralism in pursuing violations of US intellectual property law that developing countries eventually agreed to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which came into force in 1995.<sup>42</sup> (Such arguments were later turned on their head to weaken the TRIPS regime as it applied to the use of generic drugs to fight HIV/AIDS.)

If powerful countries such as the US are able to inscribe domestic rules on foreign actors, precisely the opposite happens in the weakest countries. The idea of a social contract was traditionally that a state provides basic goods to its citizens in exchange for authority to raise taxes and exercise power on their behalf. Such a relationship is reinforced by democratic structures and reflects the theory (at least) of most industrialised countries. In the developing world, however, many governments are now engaged in what Barnett Rubin has called an external social contract, complying with foreign standards in order to receive official development assistance and gain entry into the global financial system. This relationship may actively undermine democratic processes.<sup>43</sup>

Inequality of arms may also reduce the effectiveness of regimes intended to allow wider participation in global administrative decision-making. The participation of non-governmental organisations (NGOs) in decision-making fora, for example, ranging from civil society observers at intergovernmental processes to participation as *amicus curiae* in

WTO dispute settlement proceedings, in theory ensures greater access. Such access is rarely reflective of a general 'public interest', however.<sup>44</sup> In reality, participation rights tend to be exercised by those at the extreme ends of a spectrum of views on a given topic. In national structures, democratic processes may serve as a check on extreme views that are filtered through an electoral process.<sup>45</sup> At the international and transnational level, a cacophony of unstructured participation is frequently dominated by the groups that shout the loudest.

#### 4. Conclusion

Global administrative law presently exists as, at most, an idea and a set of questions. Central among these questions are the two highlighted at the start of this chapter: who wins and who loses? And what happens to politics? Put another way, is the goal of developing transparency, participation and review procedures to exclude politics from these activities or to formalise it?

The argument here is that such procedures will improve the quality of decision-making and responsiveness to those affected by decisions. It would be a mistake, however, to assume that all of these problems are technical questions to be resolved by lawyers. Objective implementation of standards is not neutral unless the standards themselves are legitimate. For this reason, purely legal forms of accountability will never be sufficient to bridge the democratic deficit frequently cited in the areas described here.<sup>46</sup>

An alternative critique is that formalising these structures will shape global administrative law according to the interests of the industrialised countries and multinational corporations wielding the greatest influence. It probably will. Nevertheless, law's capacity to restrain power and prevent the co-optation of norms to serve the ends of the powerful has always been questionable. Writing on the development of the rule of law in eighteenth-century England, the historian E. P. Thompson endorsed the Marxist view that law systematised and reified inequality between the classes. Even so, he argued, law also mediated those class relations through legal forms, constraining the actions of the ruling class. For this reason, unusually for a Marxist, he termed the rule of law an 'unqualified human good'.<sup>47</sup> Global administrative law will not bring about a New International Economic Order, but it might enable those most affected by globalisation to hold those with influence to their rhetoric.

The goals of global administrative law go beyond constraining decision-makers, however. In addition to providing ‘input legitimacy’ to decision-making processes, broadening participation, shining light on deliberations and providing the possibility of revisiting bad or unfair choices, global administrative law should improve the decisions themselves. This may be thought of as ‘output legitimacy’.<sup>48</sup>

The vagueness of the term ‘legitimacy’ in this context is one of the reasons why the language of accountability is normally preferred. In national institutions, such questions merge as both legitimacy and accountability are seen as grounded in the principles and practice of democracy. At the global level, the lack of a global demos means that such a link will never be so clear.<sup>49</sup> Instead, legitimacy will have to be negotiated in different ways in different fields, guided by principles that are necessarily contingent, standing or falling by their effectiveness and responsiveness to the demands of the practitioners and protestors of globalisation.

### Notes

- \* This chapter draws on work first published as ‘Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law’ (2008) 14 *Global Governance* 39. Many thanks to directors of the project on Global Administrative Law at NYU School of Law – Benedict Kingsbury, Nico Krisch, Richard Stewart – as well as to Michael Fullilove, Laura Kurlat, Olivia Maloney, Hitoshi Nasu, Kim Rubenstein and Antonios Tzanakopoulos for their contributions to earlier drafts of this text.
1. See generally Benedict Kingsbury, Nico Krisch, and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.
  2. See 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* 27.
  3. See Charles Sampford, ‘The 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* 53.
  4. See Jeremy Farrall and Kim Rubenstein, ‘Introduction: Filling or Falling between the Cracks? Law’s Potential’ in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 1.
  5. Kingsbury, Krisch and Stewart, above n 1, 15–18. For a general discussion of regulation, see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007).
  6. Cf. Hitoshi Nasu, ‘Chapter VII Powers and the Rule of Law: The Jurisdictional Limits’ (2007) 26 *Australian Year Book of International Law* 87.

7. Examples range from functionality concerns such as software compatibility to standardisation by bodies such as ISO, discussed below. See also the discussion of the application of US standards to global markets, in section 3.
8. See, e.g., the European Court of First Instance cases below n 33.
9. See, e.g., Dana Clark, Jonathan Fox and Kay Treacle (eds.), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (2003); David Hunter, 'Using the World Bank Inspection Panel to Defend the Interests of Project-affected People' (2003) 4 *Chicago Journal of International Law* 201.
10. Benedict Kingsbury, 'The Rules and Institutions of Accountability' (Paper presented at the A Rules-Based International Order, seminar convened by the Institute for International Law and Justice and the Permanent Mission of Austria to the United Nations, UN Headquarters, New York, 5 May 2005).
11. See also the chapters by Devika Hovell, Hitoshi Nasu, Erika de Wet, Kevin Boreham and Jeremy Farrall in this volume.
12. Kingsbury, Krisch and Stewart, above n 1, 18–20.
13. See also the chapters by Devika Hovell and Erika de Wet in this volume.
14. Kingsbury, Krisch and Stewart, above n 1, 21. See also Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175.
15. Charles Sabel, 'Rethinking Law and Democracy in an Age of Global Rulemaking' (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005).
16. Cf. 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* 92.
17. On the Basel Committee in particular, see Michael Barr and Geoffrey Miller, *Global Administrative Law: The View From Basel* (2006) 17 *European Journal of International Law* 15.
18. Richard Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63.
19. Transcript of Press Conference by Deputy Secretary-General Louise Fréchette at United Nations Headquarters, UN Doc DSG/SM/246 (15 February 2005) [www.unis.unvienna.org/unis/pressrels/2005/dsgsm246.html](http://www.unis.unvienna.org/unis/pressrels/2005/dsgsm246.html) at 19 November 2008.
20. *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations (Report of Prince Zeid to the Secretary-General)*, UN Doc A/59/710 (24 March 2005), [www.un.org/apps/docs/ws.asp?m=A/59/710](http://www.un.org/apps/docs/ws.asp?m=A/59/710) at 19 November 2008; *Statement by the President of the Security Council*, UN Doc S/2005/21 (31 May 2005).
21. See Rudolf Dolzer, 'The Impact of Investment Treaties on Domestic Administrative Law' (2006) 37 *New York University Journal of International Law and Politics* 953, 955.
22. See Sabino Cassese, 'Global Administrative Law: An Introduction' (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005).
23. Kalypto Nicolaidis and Gregory Shaffer, 'Managed Mutual Recognition Regimes: Governance without Global Government' (Working Paper No 06, Institute for International Law and Justice, 2005) [www.iilj.org/papers](http://www.iilj.org/papers) at 19 November 2008.

24. See, e.g., Richard Mulgan, “‘Accountability’: An Ever-Expanding Concept?” (2000) 78 *Public Administration* 555.
25. Kingsbury, above n 10.
26. John Ferejohn, ‘Comments’ (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005); see further John Ferejohn, ‘Accountability and Authority: Toward a Theory of Political Accountability’, in Adam Przeworski, Susan Stokes and Bernard Manin (eds.), *Democracy, Accountability, and Representation* (1999) 131.
27. Cf. Mulgan, above n 24; 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* 334.
28. Kingsbury, above n 10.
29. Ferejohn, ‘Comments’, above n 26.
30. Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99(1) *American Political Science Review* 29.
31. This categorisation draws upon *ibid.*
32. Kingsbury, above n 10.
33. See, eg, *Yusuf and Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities* (T-306/01) [2005] ECR II-3353; *Kadi v. Council of the European Union and the Commission of the European Communities* (T-315/01) [2005] ECR II-3649. Cf. 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* 143.
34. Kingsbury, above n 10.
35. *Ibid.*
36. Cassese, above n 22.
37. Chantal Thomas, ‘Comments’ (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005).
38. Note, of course, the danger of uncritically transferring concepts such as the rule of law from the national to the international level, where the primary challenge is not the vertical relationship of subjects to a sovereign, but the horizontal relationship of subjects to other subjects. See further Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 101.
39. See further Simon Chesterman, ‘Oil and Water: Regulating the Behavior of Multinational Corporations Through Law’ (2004) 36 *New York University Journal of International Law and Politics* 307.
40. United Nations, *The Global Compact: Overview*, [www.unglobalcompact.org/docs/about\\_the\\_gc/gc\\_brochure\\_final.pdf](http://www.unglobalcompact.org/docs/about_the_gc/gc_brochure_final.pdf) at 19 November 2008.
41. Stewart, above n 18.
42. Nico Krisch, ‘Imperial International Law’ (Global Law Working Paper No 01, New York University School of Law, 2004) 38 [www.nyulawglobal.org](http://www.nyulawglobal.org) at 19 November 2008.
43. Barnett Rubin, *Peace Building, State Building: Constructing Sovereignty for Security* (2005).
44. Martín Böhmer, ‘Who Benefits From Administrative Remedies? Mobilization and Access to Justice in Impoverished Areas’ (Paper presented at the Global

Administrative Law Conference, New York University School of Law, 22–23 April 2005).

45. Richard Pildes, 'Comments' (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005).
46. See section 2.
47. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1977) 264.
48. Böhmer, above n 44.
49. Olivier De Schutter, 'Comments' (Paper presented at the Global Administrative Law Conference, New York University School of Law, 22–23 April 2005).



## The deliberative deficit: Transparency, access to information and UN sanctions

DEVIKA HOVELL

Transparency is commonly recognised as a desirable institutional value. It has been touted as a core attribute of good governance.<sup>1</sup> Yet, while the benefits of transparency in institutional decision-making are clear, unqualified transparency may be less obviously desirable in the case of institutions that rely on a measure of confidentiality to achieve their aims. The UN Security Council, for example, has been described as ‘a body in which confidentiality and informality regarding the decision-taking process are part of the business’.<sup>2</sup> Some have attributed the Council’s effectiveness to a ‘procedure of confidentiality’, which provides a climate for free-ranging and uninhibited debates, and the achievement of consensus.<sup>3</sup> Even so, this has not diminished the chorus of voices calling upon the Council to ensure greater transparency in its working methods and procedure. The call has been particularly strong in the context of decision-making on UN sanctions. With the increasing move to ‘targeted’ sanctions against particular individuals, groups and products, affected entities have a heightened interest in the reasons behind decision-making in sanctions regimes.

This chapter seeks to provide an adjunct to the political debate by examining the role of legal standards in ensuring greater transparency. If the application of unmitigated transparency can be criticised on justifiable grounds by those who would otherwise recognise the merits of a principle of transparency, determining the reasonable limits of such a principle is of crucial importance. Though international law may not often be determinative in the realm of international politics, it can be a helpful means to identify the parameters of fair and reasonable standards.

In legal terms, the notion of transparency is most often represented by a principle of freedom of or access to information. Such a principle is an

increasingly important aspect of contemporary domestic legal systems, with freedom of information laws presently existing in almost seventy countries around the world. The question addressed in this chapter is whether there are sufficient points of connection between domestic laws to be able to identify a 'general principle' of international law that might be applied to the Security Council. 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', a subject pertinent to many of the chapters in this volume. In particular, this chapter explores whether it is possible to determine the existence of a concrete principle of public law or administrative law at the international level, in this case a principle of transparency.

The chapter begins by examining the nature of decision-making on sanctions, and in particular the extent to which the process can be said to be transparent. Section 2 explores whether transparency is a principle appropriately applied to the Security Council, examining the rationale for the legal requirement of access to information across a range of legal systems and assessing whether any such rationale is applicable to the particular context of the Security Council. It pinpoints as a key issue the question of whether there is a link between transparency and legitimate decision-making by the Security Council. The remaining sections focus on determining the content of a legal principle of transparency. The analysis draws upon one of the three primary sources of international law recognised in article 38(1) of the Statute of the International Court of Justice, the 'general principles of civilised nations'. In determining whether the principle of transparency can be said to constitute a 'general principle' under international law, the chapter examines the operation of the principle in eleven legal systems, including the legal systems of each permanent member of the Security Council. The primary focus is to ascertain whether there is sufficient support for a general principle of access to information and, if so, the content of this principle.

### **1. Interrogating Security Council practice: Transparency and Security Council decision-making on sanctions**

As a recent report on the Security Council remarked, while the Security Council's workload has multiplied over the last decade, placing it increasingly at the centre of major world events, it has, at the same time, become significantly less visible.<sup>4</sup> While there have been a number of reform initiatives promulgated by the Council on the issue,<sup>5</sup> the lack of

transparency in Security Council working methods continues to attract criticism in a variety of fora. The September 2005 World Summit Outcome Document recommended that the Council 'continue to adapt its working methods so as to ... enhance its accountability to the membership and increase the transparency of its work'.<sup>6</sup>

In the context of decision-making on UN sanctions, the concern has been particularly pronounced. Some fifty states have complained about the lack of transparency in the present sanctions system.<sup>7</sup> 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.<sup>8</sup> 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.

### *1.1 Nature of Security Council decision-making on sanctions*

It is appropriate to begin with a brief overview of the nature of Security Council decision-making on sanctions. Of the eleven sanctions regimes currently in place, ten of them are targeted against individuals and non-state entities and envisage or incorporate some form of list of individuals established and monitored by the relevant sanctions committee. The 'blunt instrument', described by Boutros Boutros-Ghali,<sup>9</sup> now differentiates between governments and their people, so that the sanctioned entity is no longer always a state, but more frequently individuals and entities within it. Sanctions may also target specific products, such as diamonds, timber or arms.

The decision-making process in relation to sanctions is generally divided between two key bodies: the Security Council and regime-specific sanctions committees.<sup>10</sup> The decision to impose sanctions is taken by the Security Council and is achieved by way of a Security Council resolution enacted under Chapter VII of the UN Charter. The resolution designates the threat to or breach of the peace that sanctions address, delineates the scope of measures to be applied and identifies the state or parties against which the sanctions are to be imposed. Though the Security Council continues to oversee the implementation of the sanctions regime, responsibility for the day-to-day administration of sanctions is then delegated to a sanctions committee, created as a

subsidiary organ of the Security Council. Many of the key decisions affecting individuals and entities are taken by these subsidiary organs and their practice is the predominant focus of our inquiry.

Reflecting broader Security Council practice,<sup>11</sup> much of the work of sanctions committees takes place in 'informal consultations of the whole', meetings that are held behind closed doors without a record being taken.<sup>12</sup> Yet recourse to informal consultations by sanctions committees is even more frequent than by the Security Council – between the establishment of the Al-Qaeda and Taliban Sanctions Committee in October 1999 and the end of 2005, the Committee held thirty-one formal meetings and approximately 150 informal consultations. Decisions rarely provide any justification and, on occasion, are not even communicated to affected parties. There have been instances when individuals and entities designated by sanctions committees have reportedly found out about their listings from non-official sources.<sup>13</sup> Non-participating states, not to mention the states and individuals targeted by the sanctions, have no means to assess the principles that guide decisions made by sanctions committees. This has led to descriptions of sanctions committee decision-making as 'prone to politicization and ... at times bewildering to the observer'.<sup>14</sup>

The secrecy of proceedings is not something that is contested by the sanctions committees themselves. Indeed, the committees appear to foster the secrecy of their proceedings as essential to ensure the effectiveness of their role. In its Annual Report 2004–2005, the Al-Qaeda and Taliban Sanctions Committee paid tribute to a Chairman who had 'wisely determined that much of the work should be performed at informal meetings of the Committee to allow for enough flexibility in convening them and the free exchange of views, without a record'.<sup>15</sup> In his book on *UN Sanctions and the Rule of Law*, Farrall identifies that the 'closed-door' approach is commonly justified by two factors: first, the need to protect the confidentiality and sensitivity of the issues under discussion, and second, the desire to diminish political 'grandstanding' to the detriment of genuine discussion and negotiation.<sup>16</sup> Against these arguments, Farrall cites the work of Paul Conlon, whose analysis of the inner workings of the Iraq Sanctions Committee concluded that discussion of sensitive confidential matters accounted for a mere 2.5 per cent of the committee's meeting time and that the closed meeting format in fact elicited little candour and frankness from committee members.<sup>17</sup> Even more damning is the same commentator's conclusion that the lack of transparency in the proceedings of the Iraq Sanctions Committee

actually aided Iraq and sanctions evaders as it shielded them from the public spotlight.<sup>18</sup>

In a system that relies heavily on information-sharing between states,<sup>19</sup> including non-members of the Security Council, information is in short supply. The Security Council has taken some steps toward enhancing the transparency of sanctions decision-making in response to criticism of unduly closed sanctions committee processes. This has included successive notes from the President of the Security Council, typically drafted in aspirational rather than mandatory terms, encouraging greater openness.<sup>20</sup> Sanctions committees have been encouraged to convene substantive and detailed briefings on the work of the committees following each meeting, increase press releases, publish information about sanctions committees on the Internet, make summary records of formal meetings publicly available and to prepare annual reports with a concise summary of activities undertaken in the reporting period. Many of these measures have been implemented, albeit at times in a desultory fashion – annual reports contain limited substantive information about committee decision-making and little valuable information on the manner in which the committees function. Concerned states and organisations may be invited to give comments during closed meetings. However, there is no public access to meetings of the committees or to records of those meetings.

The purpose of this chapter is to examine the extent of the duty upon the Security Council to enhance its transparency beyond the ad hoc measures taken to date. Though transparency is a ‘vogue’ term,<sup>21</sup> and is often presented as an unqualified good, the argument of ‘transparency for transparency’s sake’ will have no purchase with those who come from the (not unreasonable) position that greater transparency would undermine the Council’s effectiveness. The call for transparency must be built on stronger foundations and incorporate reasonable limitations.

## **2. Challenging the transparency paradigm: Transparency, legitimacy and the Security Council**

Terms such as ‘transparency’, ‘accountability’ and ‘democracy’ attract automatic reverence such that they can sometimes be employed in political and academic debate beyond their useful purpose. For example, an international institution can be damaged by criticism that it is undemocratic or unaccountable without any interrogation as to whether such a body was ever intended to be democratic or accountable in its

operation. Relevantly to the present discussion, the Security Council is regularly criticised for its lack of transparency, though it is widely recognised that it is the body primarily responsible for international security, and it is commonly accepted at a domestic level that 'security' issues are exempted from public disclosure requirements. In order to determine the applicability of the principle of transparency to the Security Council, it is pertinent to examine the rationale for recognition of the principle in other contexts and consider whether it is a requirement that is appropriately applied to the Security Council framework.

The primary formulation of the principle of transparency, recognised by the majority of legal systems, is a right of access to information by the general public, irrespective of individual motives, justifications or interests regarding the use of the information. This 'general' right is tied most commonly to deliberative theories of democracy. Deliberative democracy theorists argue that legitimate law-making can only arise from the public deliberation of the citizenry, which is dependent in turn upon public knowledge stemming from access to information.<sup>22</sup> In post-modern democracies, information (rather than representation by way of a vote) has become the 'currency of democracy'.<sup>23</sup> Faith in representative government has faltered and the fact of representation by elected officials is no longer regarded as sufficient to gain public trust.<sup>24</sup> Many authors consider the principal benefit of transparency as being a method to address perceptions of a 'democratic deficit'.<sup>25</sup>

This rationale for a general right of access to information is reflected in a variety of legal systems. In the US, the link to democracy is long-standing. In signing the first American access legislation into law, President Lyndon Johnson proclaimed that '[a] democracy works best when the people have all the information that the security of the Nation permits'.<sup>26</sup> Similarly, the Preamble to India's Right to Information Act 2005 recognises that 'democracy requires an informed citizenry and transparency of information which are vital to its functioning'. One of the key aims of Mexico's Federal Law of Transparency and Access to Public Government Information is to '[c]ontribute to the democratization of Mexican society and the full operation of the Rule of Law'.<sup>27</sup> The integral relationship between openness and democracy has also been emphasised as a purpose underlying freedom of information laws in France, Japan, South Africa and the UK.<sup>28</sup> Even the EC regulation regarding public access to European Parliament, Council and Commission documents, pertaining to a less representative form of democracy, stresses in its Preamble that 'openness contributes to strengthening the principles of democracy'.<sup>29</sup>

Of course, the Security Council is not an organ operating within the context of a democracy, which prompts the question as to whether the principle has any application to the Security Council's functioning in the context of the UN and the international legal order. In this respect, it is relevant to note that certain non-democratic systems such as China and Russia recognise the right as a necessary element of their legal and political systems. Moreover, even within democracies, the right of access to information is not generally restricted to citizens (that is, the voting members of the public), but often extends to foreign citizens, corporations and organisations, suggesting the rationale extends beyond enhancing democratic representation to something more. Indeed, when we penetrate beneath the overarching rationale of enhancing a state's democratic credentials, more concrete purposes can be identified with greater relevance to the Security Council. Specifically, nine interrelated rationales for the right of access to information can be distinguished from the various legal systems:

1. promoting transparency in decision-making;
2. ensuring accountability of decision-makers;
3. fighting corruption;
4. enhancing public trust and confidence;
5. enabling public scrutiny;
6. facilitating public participation;
7. conferring public control over decision-makers;
8. protecting community and individual rights; and
9. improving the effectiveness of governance.

Rather than connecting the principle exclusively with enhancing democracy, the principle of access to information is more appropriately seen as a measure capable of correcting a 'deliberative' deficit, a rationale that is not necessarily tied to the liberal democratic model of nation states.<sup>30</sup> Consent is not an essential condition for the application of laws and regulations in the practice of deliberative democracy. Instead, this model 'draws on the insights of deliberative theorists who perceive political will formation processes as essential for democracy' and 'emphasizes active participation rather than intermittent and passive procedural participation of voting in elections as the key to democratic decision-making processes'.<sup>31</sup> In terms of the discourse model of law and politics, the validity of every kind of action norm depends on the agreement of those participating in rational discourses as affected parties – a process of will-formation that leads to justified decisions about the

pursuit of collective goals and the normative regulation of life in common.<sup>32</sup> In this sense, the mischief that the principle of transparency addresses is not a democratic deficit, but a possible deliberative deficit.

Ultimately, the relevant overriding characteristic to which transparency and greater deliberation contribute is legitimacy. Legitimacy is best described (and most often employed) as a theory about compliance. It explains why rules issued by decision-makers are obeyed. While the question as to whether legality is an essential ingredient of Security Council decision-making can be debated, unquestionably the Security Council must aspire to legitimacy in decision-making. The effectiveness of Security Council measures depends upon it. Compliance is secured, at least in part, by the perception of its rules being legitimate by those to whom they are addressed. According to Thomas Franck's exegesis, the essence of legitimacy is that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with 'the right process'.<sup>33</sup> Increasingly, we see the traditional pillars of the international order – state consent, sovereignty and non-intervention – overshadowed by more collective and systemic considerations. In the UN context, the traditional contractual understanding of the system has given way to one that privileges process, in which legitimate decision-making is conditioned not so much on the will of the parties as on the processes of deliberation.<sup>34</sup> Though the quest is often presented as one for democracy, this is generally a synonym for greater participation and deliberation. For example, in an Agenda for Peace, UN Secretary-General Boutros Boutros-Ghali advocated that '[d]emocracy within the family of nations ... requires the fullest consultation, participation and engagement of all States, large and small, in the work of the Organization'.<sup>35</sup> In the Security Council context, Wheatley advocates that '[t]here must be an inclusive process of democratic decision-making, with those who will be subject to the laws and regulations able to participate effectively in the process' and 'a reasoned basis for the introduction of laws and regulations'.<sup>36</sup> He considers this to be particularly necessary where the impugned measure will have the effect of interfering with, or negating, the rights of subjects recognised within the legal order.<sup>37</sup> According to a deliberative understanding of the nature of the system of international law, the legitimacy of the international legal order therefore depends on a process of 'reasoned consensus' and 'discourse, reasoning and negotiation'.<sup>38</sup>

How then do we determine the elements of the 'right process'? According to Franck, 'it is only by reference to a community's evolving



standards of what constitutes right process that it is possible to assert meaningfully that a law is legitimate'.<sup>39</sup> This reference to the 'community's evolving standards' offers a bridge between legitimacy and law. In the international legal sphere, one recognised source of law in particular draws upon those standards common to all legal systems. The 'general principles of civilized nations', a recognised source of international law under article 38(1)(c) of the Statute of the International Court of Justice, includes those principles considered to be integral to the functioning of the international legal system as a whole – the evolving standards of the international community.

According to the above analysis, the legitimacy of Security Council decision-making will be enhanced if it is consistent with general principles. In order to determine whether transparency should be an integral aspect of Security Council decision-making, it is necessary to ascertain whether the right of access to information can be said to constitute a 'general principle' within the meaning of article 38(1)(c), and, if so, to determine the parameters of this principle.

### 3. A concise methodology for determination of general principles

What does international law have to say on the question as to how to identify 'general principles of civilized nations'? Both during and since its recognition by the Advisory Committee of Jurists responsible for drafting the Statute of the Permanent Court of Justice in 1920,<sup>40</sup> the meaning of this omnibus phrase has been debated. As the phrase suggests, the principles referred to are those generally recognised in municipal jurisprudence. While a purely comparativist approach is not advocated in ascertaining these standards, comparative law can be used as a guide. The following analysis will examine the operation of the principle of access to information in eleven legal systems, including the legal system of each permanent member of the Security Council. These systems were chosen on the basis that they represent a cross-section of legal traditions and geographical regions.<sup>41</sup> By way of closer analogy to the UN, we shall also focus on the operation of the principle within a supranational organisation, the European Union.

A general principle is one that 'can be regarded, on the basis of the universal or near universal testimony of municipal legal systems, as part and parcel of universal justice'.<sup>42</sup> Accordingly, a principle will be a general one if (1) it is applied by the most representative systems of

municipal law,<sup>43</sup> and (2) is inherent in the very nature of law and legal systems.<sup>44</sup>

Our analysis will proceed in two parts. First, the notion of ‘inherency’, or the extent to which the principle is necessitated by the terms of ‘universal justice’, will require us to pay consideration to the significance of the principle within legal systems, which can be assessed from the degree to which the principle is entrenched, its permanence and the scope of exceptions.

Second, we will seek to identify common themes observable across the various legal traditions in relation to access to information. In analysing the different legal regimes, as much as it is important to understand the particular context and contours of each regime, it is important to take a synoptic approach to discern whether it is possible to identify a ‘general’ principle. Of course, our aim is not in this case to identify a general principle of transparency in the abstract, but one that applies to the Security Council. Even within domestic systems, the impact of any principle of access to information is significantly reduced by the many exceptions that exist in relation to it. As we shall see, most legal systems incorporate exceptions in relation to information concerning ‘national security’, ‘defence’, ‘law enforcement’ and ‘international relations’. As the Security Council will most often operate in a context in which these issues are at the forefront, such that the information it generates and possesses (including information belonging to national authorities) would generally be caught by domestic exceptions, our analysis of the principle will need to focus predominantly on the operation and scope of these exceptions within domestic legal systems.

#### **4. Nature and significance of right of access to information in different legal systems**

In many legal systems, the right of access to information is of relatively recent origin. At the turn of the millennium, a broad legislative right of access to information had not entered into effect in nine of the eleven legal systems examined. Presently, all legal systems examined include legislation or regulations recognising the right of access to information.<sup>45</sup> In certain cases, the right is contained in ordinances rather than legislation. For example, the Chinese ordinance was passed by the State Council, and accordingly does not have the status of law promulgated by the National People’s Congress. In Pakistan, the ordinance passed by General President Musharraf should have lapsed within six months. However the President

issued a constitutional decree ensuring its continuance. In the case of Russia, rudimentary access to information provisions were implemented in a 1995 law, although a draft bill introduced into the Duma in September 2005 provides for more concrete recognition.

In nine of the eleven domestic legal systems examined, the right of access to information is also recognised in the national constitution. While certain constitutions expressly recognise the right,<sup>46</sup> in other cases the right has been implied from constitutional recognition of a right to freedom of speech and expression.<sup>47</sup> In many cases, the constitutional right is narrower than the statutory right. For example, in Japan, while most scholars agree that the right to know is embodied in the guarantee of freedom of expression in article 21 of Japan's Constitution, so far the furthest the Supreme Court has taken this is to recognise the right to receive information through the media.<sup>48</sup> Similarly, in the US, the Supreme Court has never gone so far as to recognise a positive right to access information in the First Amendment, referring instead to a 'right to receive information and ideas',<sup>49</sup> a 'right to gather information' and a prohibition on government 'from limiting the stock of information from which members of the public may draw'.<sup>50</sup>

Outside the state constitutional framework, the European Union has enshrined the right of access to information in European Community law by way of a treaty provision. In 1997, the Treaty of Amsterdam inserted then article 191a<sup>51</sup> into the Treaty on the European Union, providing that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3'. The right has also been included in the EU Charter of Fundamental Rights. The Charter is not presently binding, but it will form an integral and binding part of the European constitutional order in the event of the adoption of a European Constitution. This has contributed to debate that the right of access to information constitutes a 'fundamental right'. Applicants before European courts have relied on the fundamental nature of access to documents and have argued that action by EC institutions must conform to this right.<sup>52</sup> Although the European Court of Justice acknowledges the importance of the public's right to access documents, to date it has not accepted this right as fundamental.

While some states attribute constitutional significance to the principle of access to information, the scope of the constitutional right is often a

very narrow one. The recent origin of the law in many states, and the choice by some states (at least initially) to consign the principle to secondary or subordinate decrees such as ordinances, also speaks against the status of the principle as fundamental to legal systems. Conversely, the swell of public advocacy and judicial pressure that has often preceded legislative adoption of the right indicates its broader significance within domestic systems. The trend within domestic systems appears to be towards greater rather than lesser recognition of the right.

## 5. Towards a general principle of access to information: Content, scope and exceptions

The right of access to information enjoys wide support among legal systems. Each of the legal systems examined exhibits a general right of access, though the scope of this right differs between legal systems. The following analysis identifies common themes exhibited by the access to information regimes examined in this chapter.

### 5.1 *Presumption of maximum disclosure*

The starting point of many access to information regimes is a presumption of maximum disclosure. The European Court of Justice has held that article 1 of Regulation 1049/2001, read in light of the fourth recital in the preamble, seeks to give ‘the fullest possible effect to the right of public access to documents’ held by the institutions.<sup>53</sup> Courts in the US have also interpreted the relevant US Act as containing a presumption of maximum disclosure, interpreting the disclosure requirements in the Act broadly, and the exceptions narrowly.<sup>54</sup> Article 6 of the Mexican Act provides that ‘[i]n interpretations of this Law, the principle of publicity of information possessed by subjects compelled by the Law must be favoured’.<sup>55</sup> In discussing the extent to which documents should be classified in the lead-up to passage of the bill, both Houses of Parliament in Mexico indicated that ‘[t]he principle that should guide [classification] by authorities is that of publicity rather than withholding’.<sup>56</sup> Relevant laws of other states provide that, in reviewing the application of exemptions denying access, the burden generally falls on the government authority denying access to information to prove it falls within an exemption, further supporting the existence of a presumption.<sup>57</sup>

Exceptional in this respect are the laws of Angola, China and the UK. In the UK, where access to information has been denied on national

security grounds, the burden is on the requester of information to show that non-disclosure is not justified.<sup>58</sup> In China, the General Offices of the Communist Party and the State Council issued a document establishing a presumption of disclosure of information concerning administrative management and public services as a matter of national policy, though the presumption was that information would be disclosed 'strictly according to facts and in strict compliance with the provisions of laws, regulations and relevant policies'.<sup>59</sup> Moreover, this presumption expressly excluded information 'involving state ... secrets ... protected by law'. Article 14 of the Chinese Regulations provides that, in the event the administrative organ cannot determine whether the information should be made public, it should not disclose it.<sup>60</sup> One commentator notes that the provisions of the Chinese regulations 'reflect unease about, and the continuing impulse to control, the release of information'.<sup>61</sup> In both Angola and China, criminal sanctions are imposed for disclosing information that should not be disclosed.<sup>62</sup>

#### 5.1.1 Limits on bodies from whom information may be requested

Limits are sometimes placed on the entities subject to freedom of information requests. Some legislation is extremely broad and extends to all branches of government.<sup>63</sup> In general, though, while the executive and administrative organs are almost always included within the parameters of those subject to requests, the legislature and judiciary are often excluded.<sup>64</sup> Rationales for the exclusion of certain bodies from the parameters of freedom of information laws include that information is not relevant to 'public functions', disclosure would undermine 'operational effectiveness' and information is already publicly available. The reason for Parliament's exclusion is presumably in recognition of parliamentary privilege.<sup>65</sup>

#### 5.1.2 No need to demonstrate special interest

Almost all access laws preclude the need for a requester to show a special interest in obtaining the information or to give any reason for accessing the information.<sup>66</sup>

Curiously, in the case of Pakistan, the application form to be completed by those seeking access to information provides that the requester must state the 'purpose of acquisition of the information or record', and then must sign a declaration that '[t]he information obtained [will] not be used for any purpose other than specified above'.<sup>67</sup> The language of

article 13 of China's Ordinance also intimates that the request may be subject to a needs test, stating that persons can request information 'according to their particular production, life, research and other needs'.<sup>68</sup> However, article 29, which stipulates the content of any information request, does not require the requester to provide reasons as to why they need the requested information.

### 5.1.3 Conclusion

In essence, the common theme that can be derived is a presumption of maximum disclosure of information about public functions carried out by public authorities, to the extent that disclosure would not undermine the effective fulfilment of those functions. The right of access to information does not stem from any special interest on the part of the requester, but is tied to a broader public interest in enhancing governance in accordance with the goals identified in Section 2 above.

### *5.2 Exception where reasonable link established between disclosure and identifiable threat to national security and defence*

As identified above, the Security Council operates predominantly in the domain of international security, processing information relating to national security and defence interests. While national security and defence are normally exceptions to domestic access to information regimes,<sup>69</sup> we see that the regime of exception is not generally a blanket one and can incorporate its own limits and safeguards. Indeed, one of the key concerns of governments establishing access to information regimes has been to balance the public interest in the protection of national security against the public interest in disclosure. On the one hand, governments realise that publicity of intelligence information can severely undermine national security.<sup>70</sup> Secrecy is therefore a common, and sometimes important, tool employed by governments to protect national security interests. On the other hand, as many states have discerned, public access to information is vital to safeguarding important governance values such as accountability, scrutiny and public confidence. National security has been the cover for many examples of disproportionate censorship of information, for example, by the South African apartheid regime and the British colonial administration in India. As Justice Black of the US Supreme Court advocated, '[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic'.<sup>71</sup>

Indiscriminate secrecy is a disproportionate response to occasional threats to national security and ignores the benefits of transparency to other matters in the public interest. Accordingly, governments have sought to draft exceptions to the access to information regimes that achieve an appropriate balance between disclosure and national security.

### 5.2.1 Narrow designation

In line with the presumption of disclosure favoured by most legal systems, exceptions should be construed narrowly.<sup>72</sup> In addition, most exemptions are permissive, and not mandatory, providing discretion to release information even where it is covered by the exception.<sup>73</sup>

### 5.2.2 Degree of harm

Certain specific limitations to the exception are more helpful than the broad rule that exceptions are to be construed narrowly. In most legal systems, it is insufficient merely to establish that the relevant information is related to national security. Generally, it must be established that there is a risk that disclosure would cause some degree of harm to national security, defence or international relations.

Various formulations of this principle are employed. For example, while the standard of harm in the UK is that the disclosure must 'be likely to prejudice' defence or international relations,<sup>74</sup> in the US disclosure must 'be reasonably expected to cause exceptionally grave, serious damage or damage to the national security'.<sup>75</sup>

### 5.2.3 Need for identifiable threat

Tied to this is the requirement in certain access to information regimes to specify an identifiable threat, rather than a general claim of national security harm, to avoid the disclosure requirements.

In Japan, the national security exception permits non-disclosure where, 'with adequate reason', the head of an administrative organ deems disclosure would risk harm to national security or international relations.<sup>76</sup> In the US, information can only be classified on national security grounds in accordance with the Executive Order on Classified National Security Information, which requires that the risk to national security posed by disclosure be identified.<sup>77</sup> In South Africa, the Process of Access to information Act specifically lists concrete examples of information which, if disclosed, could constitute a threat to national security (arguably precluding more general claims according to the principle of *expressio unius est exclusio alterius*), though the list is

declared to be non-exhaustive.<sup>78</sup> In an unusual case in the UK (within a system with a judicial tradition of deference to the executive), the UK Information Tribunal in *Norman Baker v. Secretary of State* quashed a certificate issued by the Home Secretary denying disclosure of information on national security grounds on the basis that it did not sufficiently identify the threat to national security.<sup>79</sup>

#### 5.2.4 Balancing test with public interest in disclosure

The law of several states also incorporates a requirement for some form of balancing test between the public interest in disclosure and the possible harm that disclosure will cause to the protected interests.

Both India's and South Africa's access to information laws incorporate a blanket public interest override, such that authorities have discretion to release information where the public interest in disclosure outweighs the harm to the protected interests.<sup>80</sup> In South Africa, this is confined to situations in which disclosure of the record would reveal 'a substantial contravention of, or failure to comply with, the law' or 'an imminent and serious public safety or environmental risk'. In China, a public interest override is permitted where non-disclosure 'could do serious harm to the public interest'.<sup>81</sup> Similarly, in Japan, authorities have discretion to disclose information when 'there is a particular public interest necessity'.<sup>82</sup>

In the UK, information exempted on grounds of national security, defence or international relations is also subject to a 'public interest' test such that 'in all the circumstances of the case, the public interest in maintaining the exemption [must outweigh] the public interest in disclosing the information'.<sup>83</sup> The DCA's *Full Exemptions Guidance* provides that, if non-disclosure is required to safeguard national security, it is likely to be only in exceptional circumstances that consideration of other public interest factors will result in disclosure.<sup>84</sup> However, in order for this qualification to have meaning, the public interest in disclosure must be weighed in the balance in each case.<sup>85</sup>

In the US, while the most recent Executive Order on the classification of national security information, issued by President Clinton in 1995 and amended by President Bush in 2003, does not incorporate a balancing test,<sup>86</sup> previous executive orders have done so. President Carter's Order included a provision requiring classification decisions to explicitly weigh the potential national security harm from disclosure against the public interest in knowing the information.<sup>87</sup> Interestingly, in 1997, legislation was introduced in Congress to amend the Freedom of Information Act



to require the courts to weigh the public interest in disclosure, but this amendment failed to pass.<sup>88</sup>

Although the EU Regulation 1049/2001 does not recognise a balancing test in relation to security, defence and international relations (while it does in relation to other exceptions), it is possible that the principle of proportionality could be invoked in relation to the application of the exception.<sup>89</sup> The European Court of Justice has recognised that any curb on a fundamental right must be proportionate to the legitimate purpose sought to be achieved.<sup>90</sup> As such, in making a decision to exempt information, regard must be had to a two-part proportionality test ensuring that (1) derogations from public access remain within the limits of what is appropriate and necessary for achieving the aim in view; and (2) the same result could not be achieved by other less restrictive measures.

#### 5.2.5 Least restrictive

The second limb of the proportionality test referred to above also means that authorities should take the least restrictive measures available, and exempt the minimum information necessary to protect the national interest.<sup>91</sup> For example, authorities might be able to give partial access to information, by severing or suppressing only the information that offends the exception.

#### 5.2.6 Conclusion

Ultimately, though we see that certain limitations are built into national security exceptions, access to information in the domain covered by the exception is very narrow indeed. However, this is not the same as blanket censorship. It must be recalled that non-disclosure is exceptional and is only justified if and to the extent that there is a reasonable possibility that disclosure would cause some degree of harm to a state's national security, defence or international relations. Of course, the difficulty in applying this principle to the Security Council, where the Security Council relies on security information derived from member states who would insist on controlling its disclosure, is clear.

### 5.3 *Independent review of decisions to deny access*

A consistent aspect of access to information regimes is the inclusion of a mechanism for independent review of decisions to deny access to information.<sup>92</sup> It is common for legal systems to incorporate at least three tiers of review: an internal review, appeal to an ombudsman or administrative

tribunal and appeal to the courts.<sup>93</sup> Other systems provide two tiers of review, usually where there is no separate administrative tribunal or body for dealing with complaints.<sup>94</sup> It is notable that, in some systems, courts (or the relevant reviewing authority) are given the power to review the information *in camera* to determine whether it has been justifiably withheld on national security grounds.<sup>95</sup>

In many states, the scope of judicial review is generally more limited where the basis for the denial of access to information is national security and defence. In such cases, a high degree of deference is typically given to decisions of the executive. Given the extent of case law on the issue, it is worth giving more focused attention to the case law of particular legal systems in considering the scope of judicial review.

### 5.3.1 European Union

In the EU, the European Court of Justice has emphasised the importance of judicial review, even in relation to questions of national security.<sup>96</sup> Nevertheless, the court has held that the Council enjoys wide discretion for the purpose of determining whether the disclosure of documents relating to public security and international relations could undermine the public interest. In a recent judgment, the European Court of Justice held that the court's review of the legality of such a decision must be 'limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers'.<sup>97</sup>

### 5.3.2 United Kingdom

British courts have traditionally been reluctant to interfere in determinations by the executive in relation to national security. Consistently with a recent judgment of the House of Lords in *Secretary of State v. Rehman*,<sup>98</sup> the UK's Freedom of Information Act has adopted a modified approach, authorising the Information Tribunal to quash a Ministerial certificate authorising non-disclosure on national security grounds if it finds the Minister did not have reasonable grounds for issuing it.<sup>99</sup> As the certificate is 'conclusive evidence' that non-disclosure is required on national security grounds, the burden is on the appellant to show otherwise.<sup>100</sup> The Tribunal is to decide the matter 'applying the principles applied by the court on an application for judicial review', allowing four possible grounds of challenge: illegality, procedural impropriety, irrationality

and perhaps lack of proportionality.<sup>101</sup> While the judicial tradition of deference to the executive suggests that intervention will be rare, the Information Tribunal quashed a certificate issued by the Home Secretary in *Norman Baker v. Secretary of State* (see above).<sup>102</sup>

### 5.3.3 United States

In the US, decisions to deny access have always been subject to review by the judiciary, although early interpretation of the ‘national security’ exemption favoured deference to the executive.<sup>103</sup> In 1974, in the wake of the Watergate Scandal, Congress responded to broad interpretations of the exemptions by proposing amendments mandating greater agency disclosure, and clarifying the national security exception. As a result of the amendments, the court must examine the matter *de novo* and the burden is on the agency to sustain its denial of access. The Act requires the government to give detailed justifications as to why the information is classified, submitting sworn statements by appropriate officials that the disclosure of the information would in fact cause harm to the national security, addressing each item of classified information separately and in detail. The courts are required to give ‘substantial weight’ to an agency’s determination that the information is classified.<sup>104</sup>

In practice, plaintiffs have rarely been successful in seeking the release of classified information.<sup>105</sup> A large degree of deference was shown to the Executive in *Epstein v. Resor*, where the Ninth Circuit held that the Act only requires that the court determine whether the information was properly classified, and that the origin of the file’s contents be sufficiently evidenced to dispel any suggestion that the classification was ‘arbitrary or capricious’. The court considered that courts ‘have neither the “aptitude, facilities, nor responsibility” to review these essentially political decisions’.<sup>106</sup> Other courts have recognised the need to undertake a qualified review into the Executive’s reasoning to ensure there is a reasonable expectation that release of the information would cause harm to national security.<sup>107</sup> Interestingly, this approach seems more consistent with the drafters’ intention. In the debate on the FOIA, the remarks of several Senators made it clear that Congress did not want federal judges to passively approve FOIA exemption claims.<sup>108</sup> As Senator Muskie stated:

I cannot imagine that any Federal judge would throw open the gates of the Nation’s classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides. ... On the contrary, if we constrict the manner in which courts perform this vital review function, we make

the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.<sup>109</sup>

#### 5.3.4 Conclusion

While review of non-disclosure decisions based on national security concerns is inevitably circumscribed, domestic decisions demonstrate a tendency towards some scope for review, even if the review is *in camera* and confined to determining manifest unreasonableness. Of course, the added controversy attracted in the Security Council context to any form of review of decision-making should alert us to the difficulty in translating this aspect of the principle to the international context.

#### 5.4 *Obligation to publish*

Perhaps the simplest way for the sanctions committees to enhance their accountability would be to publish as much information as possible. While freedom of information is generally associated with the right to request access to information, it has also been interpreted as placing an active duty on public bodies to publish certain information, even in the absence of a request.<sup>110</sup> Specifically, where a duty to publish is recognised in domestic legal systems, it generally extends to information in the following categories:

1. a description of the body's structure, functions and duties;<sup>111</sup>
2. the content of all legislation, regulations, decisions and/or policies it has adopted that affect the public, along with the reasons for them, any authoritative interpretations of them and any important background material;<sup>112</sup>
3. any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;<sup>113</sup>
4. a description of the documents or categories of document held by that body;<sup>114</sup> and
5. any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response.<sup>115</sup>

## 6. Conclusion

The general right of access to information enjoys wide support across a range of legal systems. The parameters of a general principle of access

to information can already be defined with some clarity. Having regard to the common themes exhibited within the legal systems examined above, a general principle recognising a right of access to information would contain the following elements:

- The general public (including foreign citizens, corporations and organisations) have a right to request access to information generated or possessed by public bodies.
- There is no need for the requester to provide reasons for the request, nor to establish a special interest in the information requested.
- In considering requests for access, a presumption of disclosure operates, such that disclosure can only be refused if the requested body can identify a legitimate reason in the public interest for non-disclosure.
- Information can be withheld legitimately where the relevant body considers that disclosure could reasonably be expected to cause harm to national security, defence or international relations.
- In the event of non-disclosure of information, there must be a mechanism for the independent review of the decision to deny access. There should be at least two tiers of review, which might include an internal review and review by an independent administrative tribunal or court.
- Even in the absence of a request, public bodies must publish information necessary to provide the public with the tools (1) to understand the purpose and functions of the body; (2) to assess whether these purposes/functions are being fulfilled; (3) to know and comprehend applicable laws or regulations; and (4) to interact with the body where there is scope for such interaction.

While it is possible to identify common themes in a cross-section of legal systems, this is not sufficient in itself to establish a general principle. As discussed above, it is necessary also to determine whether the principle can be said to be integral to the nature of law and legal systems. Having regard to the status of the right in many domestic legal systems, it is probably too early to refer to a general principle of international law recognising a right of access to information. 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.<sup>116</sup>

Of course, the *lex lata* can be distinguished from the *lex ferenda*. While principles of good governance must be differentiated from legal principles, transparency, openness and some opportunity for public

participation have emerged as nearly universal principles of good governance.<sup>117</sup> Moreover, the contemporary trends in legal systems across the globe are striking, and there are clear indications pointing towards a gradual evolution of a general principle of international law recognising a right of access to information. As such, to the extent that the Security Council wants to adopt a 'best practice' approach to its processes and procedures, it would be well-advised to incorporate respect for a public right of access to information. The goals underlying recognition of the right, such as accountability, elimination of corruption, enhancement of public trust, enablement of public scrutiny, facilitation of public participation and improvement in the effectiveness of governance, are also aspirations of the Security Council. Further, by recognising this principle in its operation, the Security Council might contribute to the evolution of this principle, rather than awaiting its development by nation states.

In the context of the UN sanctions regime, a right of access to information would entitle individuals, corporations, organisations and states to request access to information generated or possessed by the Security Council and sanctions committees. To limit the need for individual requests, sanctions bodies should publish as much information as possible through improved websites, more frequent press statements and a broader dissemination of committee procedures.<sup>118</sup>

In the Security Council context, transparency has an obvious downside, given the regularity with which sensitive issues of international security must be weighed in the balance. In its daily work, the Security Council has much to gain from tapping into confidential sources, and states will be more reluctant to share such information where there is a risk such information might be disclosed.<sup>119</sup> Nevertheless, just as domestic systems have managed to incorporate exceptions to access to information regimes that protect information from disclosure where it would compromise important values in the public interest, so too can any regime adopted by the Security Council. For example, instead of meeting regularly in private sessions, the committees should meet openly where possible, moving into informal consultations only when discussions touch upon issues that are considered highly sensitive or confidential.<sup>120</sup>

Adopting common principles accepted by most domestic systems, information would be legitimately withheld in the Security Council context where the relevant body considers that disclosure could reasonably be expected to cause harm to public security or international relations. Public security would encompass both international peace and security, and the national security of individual states. It might include

threats to the survival, integrity or stability of a state's territory, government, citizens or assets, economy or critical infrastructure. International relations would include relations between states, and relations between the UN, individual states and other international organisations. In determining what to disclose, the relevant body should take the least restrictive measure possible and allow partial access to information where this is possible.

A more difficult issue arises in applying the requirement for an independent review of decisions to deny access to information. To the extent the information was provided to the Security Council by a nation state, it might be appropriate for the Security Council to reveal the source of the information so that the individual could utilise the domestic access to information regime (and avenues of appeal) in the relevant nation state. To the extent the information was generated by the Security Council itself, there should be a mechanism for internal review by a separate subsidiary organ. It might also be possible, in time, to establish an independent review tribunal, containing qualified legal experts appointed by members of the Security Council, to review decisions denying access to information.

In conclusion, on the basis that much of the information generated and possessed by the UN sanctions framework clearly concerns public security, defence and international relations, the scope of access to information will be minimal compared to that permitted in domestic legal systems. However, by recognising the application of the principle, the Security Council can avoid disproportionately shielding its practice and procedure from the international community. To do so would represent an important means by which to encourage public understanding, scrutiny and trust, values that are currently lacking in the Security Council's sanctions framework.

### Notes

1. Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490, 1530; Thomas Hale and Anne-Marie Slaughter, 'Transparency: Possibilities and Limitations' (2006) 30(1) *The Fletcher Forum of World Affairs* 153; International Law Association, *Final Report on Accountability of International Organisations* (2004) 8–9.
2. Statement by Ambassador Ronaldo Mota Sardenberg, Permanent Representative of Brazil to the UN, New York, 13 October 2003 [www.un.int/brazil/speech/003d-rms-csnu-RepCSNU-1310.htm](http://www.un.int/brazil/speech/003d-rms-csnu-RepCSNU-1310.htm) at 18 November 2008.

3. *Ambassador Marker of Pakistan*, UN SCOR, 49th sess, 3483rd mtg, UN Doc S/PV.3483 (1994).
4. Security Council Report, *Security Council Transparency, Legitimacy and Effectiveness* (2007).
5. See UN Doc S/2006/78 for the list of efforts made by the Security Council to address its working methods between 1993 and 2005.
6. *2005 World Summit Outcome*, GA Res 60/1, UN Doc A/RES/60/1, 24 October 2005.
7. UN Doc S/2005/572, [37].
8. Interlaken process: Swiss Federal Office for Foreign Economic Affairs, Expert Seminar on Targeting UN Financial Sanctions, 17–19 March 1998, Interlaken (Interlaken Report I), 71; Swiss Federal Office for Federal Economic Affairs, Second UN Seminar on Targeting United Nations Financial Sanctions, Interlaken, 29–31 March 1999 (Interlaken Report II), 211; Bonn-Berlin process: Bonn International Centre for Conversion, *Results of the Bonn-Berlin Process: Design and Implementation of Arms Embargoes and Travel and Aviation-Related Sanctions*, (Bonn, 2001), 109; Stockholm Process: Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options. Results from the Stockholm Process on the Implementation of Targeted Sanctions* (2003) §43, §64. See also Watson Institute Targeted Sanctions Project, *White Paper: Strengthening Targeted Sanctions through Fair and Clear Procedures* (30 March 2006) 36.
9. Report of the Secretary-General, 'Supplement to an Agenda for Peace', UN Doc A/50/60 – S/1995/1, 3 January 1995, [70].
10. See a detailed description of the nature of the UN sanctions regime in Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (2007) ch 4.
11. From the early 1990s the Security Council has tended to conduct a substantial portion of its business in closed meetings. For example, in 2006 the Security Council held 272 formal meetings and 193 informal consultations: Security Council, above n 4.
12. At a debate on the Council's working methods and procedure on 16 December 1994, the French Permanent Representative, Ambassador Merimee, suggested that, 'informal consultations have become the Council's characteristic working method, while public meetings, originally the norm, are increasingly rare and increasingly devoid of content: everyone knows that when the Council goes into public meeting everything has been decided in advance ... informal meetings are not even real Council meetings at all; they have no official existence and are assigned no number. Yet it is in these meetings that all the Council's work is carried out': S/PV.3483.
13. Watson Institute Targeted Sanctions Project, above n 8, 7.
14. G.L. Burci, 'Interpreting the Humanitarian Exceptions through the Sanctions Committees' in Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001) 143, 144–5.
15. *Annual Report* (2004–2005) 10.
16. Farrall, above n 10, 213.
17. Paul Conlon, *United Nations Sanctions Management: A Case Study of the Iraq Sanctions Committee* (2000) 34.
18. *Ibid.* 151.



19. Swiss Federal Office for Foreign Economic Affairs, Interlaken Report I, above n 8.
20. See, e.g., 'Note by the President of the Security Council', UN Doc S/1995/234, 29 March 1995; 'Note by the President of the Security Council', UN Doc S/1996/54, 24 January 1996; 'Note by President of the Security Council', S/1998/1016, 30 October 1998; 'Note by the President of the Security Council: Work of Sanctions Committees', UN Doc S/1999/92, 29 January 1999. See also SC Res 1730, UN Doc S/Res/1730, 19 December 2006, [5], [6(b)], [7]; SC Res 1735, UN Doc S/Res/1735, 22 December 2006, [5], [27], [31].
21. B. Vesterdorf, 'Transparency – Not Just a Vogue Word' (1999) 22 *Fordham International Law Journal* 902.
22. See, e.g., Amy Gutman and Dennis Thompson, *Democracy and Disagreement* (1996); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. W. Rehg, 1998); D. Curtin, 'Democracy, Transparency and Political Participation' in Veerle Deckmyn and Ian Thomson (eds.), *Openness and Transparency in the European Union* (1998) 445.
23. Ralph Nader, 'In Pursuit of Freedom of Information and Strict Product Liability' (1992), 27; Harsh Mander and Abha Singhai Joshi, 'The Right to Information Movement in India – People's Power for the Control of Corruption' (Paper presented at the Commonwealth Human Rights Initiative Conference on Pan-Commonwealth Advocacy for Human Rights, Peace and Good Governance in Africa, Harare, 21–24 January 1998).
24. Herke Kranenborg and Wim Voermans, *Access to Information in the European Union: A Comparative Analysis of EC and Member State Legislation* (2005).
25. Amanda Frost, 'Restoring Faith in Government: Transparency Reform in the United States and the European Union' (2003) 9 *European Public Law* 87, 89.
26. Lyndon Johnson, 'Statement of the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act', 4 July 1966, 2 *Weekly Comp Pres Doc* 895. Cited in F. H. Cate, D. A. Fields and J. K. McBain, 'The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act' (1994) 46 *Administrative Law Review* 41, 46.
27. Federal Law of Transparency and Access to Public Government Information 2002 art. 4.
28. France: CADA, *Premier Rapport d'Activité de la Commission d'Accès aux Documents Administratifs: 1979–1980* (1981) 9 [www.cada.fr/fr/rapport/Rapport1.pdf](http://www.cada.fr/fr/rapport/Rapport1.pdf) at 19 November 2008; Japan: Law Concerning Access to Information Held by Administrative Organs, entered into effect April 2001, art. 1; South Africa: Constitution of South Africa s. 1; United Kingdom: Dr David Clark MP, 'Foreword' in *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (1997).
29. Regulation 1049/2001, Preamble.
30. Curtin, above n 22, 110.
31. *Ibid.* See also Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 *European Journal of International Relations* 249, 263.
32. Habermas, above n 22, 158.
33. Thomas M. Franck, *Fairness in International Law and Institutions* (1995) 5.

34. Steven Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 *European Journal of International Law* 531, 546.
35. Report of the Secretary General, An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping, UN Doc A/47/277-S/24111, 17 June 1992, [82].
36. Wheatley, above n 34, 546. See also comments by the representative of Nepal, S/PV.4950 (2004) (resumption 1), 14: 'the opaque and exclusive decision-making process in the Council does not inspire much confidence among the wider membership of the United Nations member states or the opportunity to participate in negotiations leading to agreements and decisions that would have profound and wide ramifications for member states'.
37. Wheatley, above n 34, 546–7.
38. Franck, above n 33, 14.
39. *Ibid.*
40. Permanent Court of International Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee (with Annexes)* (1920).
41. The survey includes states from the following groups: Western European and others group (France, UK, US); Eastern European group (Russia); Latin-American and Caribbean group (Mexico); Asian group (China, Japan, India, Pakistan); African group (Angola, South Africa). It thereby incorporates the following major legal traditions: common law (South Africa, UK, US); civil law (France, Japan, Mexico); socialist law (China, Russia); Islamic law (Pakistan); Hindu law (India); African law (Angola).
42. Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Two' (1990) 61 *British Yearbook of International Law* 124, 125.
43. Wolfgang Friedmann, 'The Uses of 'General Principles' in the Development of International Law' (1963) 57 *American Journal of International Law* 279, 284–5; F. A. Mann, 'Reflections on a Commercial Law of Nations' (1957) *British Yearbook of International Law* 20, 38–9.
44. Bin Cheng describes general principles as 'the fundamental principles of every legal system', whose existence 'bears witness to the fundamental unity of law': Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (rev. edn, 1987) 390.
45. Angola: Law on Access to Administrative Documents 2002 ([Angola]); China: People's Republic of China Ordinance on Openness of Government Information 2007, entered into effect 1 May 2008 ([China]); European Union: Regulation 1049/2001 ([EU]); France: Act No 78–753 of 17 July 1978 on various measures for improved relations between the civil service and the public on various arrangements of administrative social and fiscal nature (as amended by subsequent Acts) ([France]); India: Right to Information Act 2005 ([India]); Japan: Law Concerning Access to Information Held by Administrative Organs, entered into effect April 2001 ([Japan]); Mexico: Federal Law of Transparency and Access to Public Government Information 2002, entered into effect June 2003 ([Mexico]); Pakistan: Freedom of Information Ordinance 2002 ([Pakistan]); Russia: Law of the Russian Federation on Information, Informatisation and Information Protection 1995 ([Russia]); South Africa: Promotion of Access to Information Act, entered into effect in its entirety on 15 February 2002 ([South Africa]); UK: Freedom of Information Act 2000, entered into effect January 2005 ([UK]); US: Freedom of Information Act 1966 5 USC §552 ([US]).

46. Mexico: Constitution of Mexico art. 6; Russia: Constitution of Russian Federation art. 29(4); South Africa: Constitution of South Africa s. 32.
47. India: Constitution of India art. 21 as interpreted in *State of Uttar Pradesh v. Raj Narain and Others* (1975) 4 SCC 428; *Bombay Environmental Action Group v. Pune Cantonment Board*, Bombay High Court, AS Writ Petition No 2733 of 1986; *L K Koolwal v. State of Rajasthan*, AIR 1988 Raj 2; Japan: Constitution of Japan art. 21 as interpreted in *Kaneko et al v. Japan (Hakata Station Case)*, 23–11 Keishū 1490 (Supreme Court Grand Bench, 26 November 1969); Pakistan: Constitution of Pakistan art. 19 as interpreted in *Sharif v. Pakistan*, PLD 1993 SC 471; US: Constitution of the United States First Amendment as interpreted in *Kleindienst v. Mandel*, 408 US 753, 762 (1972) and *Martin v. City of Struthers*, 319 US 141, 143 (1943). See also France where the Conseil d'Etat recognised the right to administrative documents was one of 'the fundamental guarantees granted to citizens for the exercise of their public liberties' within the meaning of article 34 of the French Constitution: Conseil d'Etat, 29 April 2002, *M. Ullmann*, No 228830, AJDA 2002, 691.
48. *Hakata Station Case*, see n 47 above. See also *Nishiyama v. Japan*, 32–3 Keishū 457 (Supreme Court First Petty Bench, 31 May 1978); *Fukuhara v. Japan*, 37–5 Minshū 793 (Supreme Court Grand Bench, 22 June 1983); *Repeta v. Japan*, 43–2 Minshū 89 (Supreme Court Grand Bench, 8 March 1989), all cited in D.M. Schultz, 'Japan's Information Disclosure Law: Why a Law Full of Loopholes is Better than No Law At All' (2001) 27 *Law in Japan: An Annual* 128, 143 fn 98.
49. *Kleindienst v. Mandel*, see n 47 above; *Martin v. City of Struthers*, see n 47 above.
50. *First National Bank of Boston v. Bellotti*, 435 US 765, 783 (1978). In conformity with the Supreme Court's traditional rejection of the argument that the Constitution imposes affirmative obligations on government, the scope of the right contained in the First Amendment might be interpreted as a 'negative' right to 'be free of governmental interference designed to prevent the natural and inevitable flow of information from the government to the people': M. Cheh, 'Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right to Access to Government Information' (1984) 69 *Cornell Law Review* 690, 720.
51. Now replaced by art. 255.
52. See, eg, *WWF UK v. Commission* (T-105/95) [1997] ECR II-313 *Svenska Journalistförbundet v. Council* (T-174/95) [1998] ECR II-2289.
53. *Sison v. Council of the European Union*, European Court of Justice (C-266/05-P) 1 February 2007, [61].
54. *Getman v. NLRB*, 450 F 2d 670, 672; *Bristol-Myers v. FTC*, 424 F 2d 935, 938 (1970).
55. [Mexico] art. 6.
56. House of Deputies, Commission of Government and Public Security, 'Preamble to the Freedom of Information Law', 25 April 2002; and Senate, United Commissions of Government and First Legislative Studies, 'Opinion Accompanying the Proposed Federal Transparency and Access to Public Government Information Law', 30 April 2002.
57. [India] s. 19(5); [South Africa] s. 81(3); [US] §552(a)(4)(B).
58. [UK] s. 25(1).

59. Opinions of the General Office of the Central Committee of the Chinese Communist Party and of the State Council on Further Promoting Open Government Affairs, March 24, 2005, cited in J Horsley, 'China Adopts First Nationwide Open Government Information Regulations', 9 May 2007 [www.free-dominfo.org/features/20070509.htm](http://www.free-dominfo.org/features/20070509.htm) at 19 November 2008.
60. [China] art. 14.
61. Horsley, above n 59.
62. [Angola]; [China] art. 35.
63. [Pakistan] s. 2(h); [Mexico] art. 3.
64. [China] art. 2 (confined to 'administrative agencies'); [Japan] art. 2(1); [Russia Draft Bill] art. 1; [South Africa] s. 12; [UK] s. 36; [US] §552(f)(1).
65. See Mike O'Brien, Parliamentary Under-Secretary of State for the Home Office in Hansard, HL(series 6), vol. 340, col. 787 (7 December 1999).
66. [EU] art. 6(1); [France] s. 2; [India] s. 6(2); [Japan] art. 4; [Mexico] art. 40; [South Africa] s. 11(3); [UK] ss. 32, 34; [US] §552(a)(3)(A) (though the predecessor Administrative Procedure Act 1946 restricted access to 'properly or directly concerned persons').
67. Freedom of Information Rules 2004, Annexure 1.
68. [China] art. 13.
69. Angola: Press Law 2006, art. 49 ('state or military secrets'); [China] art. 8 ('national security'), art. 14 ('national secrets'); [EU] art. 4(1)(a) ('public security', 'defence and military matters', 'international relations'); [France] art. 6 ('national defence, foreign policy, state security, public security'); [India] s. 8(1) ('India's sovereignty, security, strategic or economic interests or international relations'); [Japan] art. 5(3) ('security of the State', 'damage to trustful relations with another country or an international organization', 'negotiations with another country or an international organization'); [Mexico] art. 13 ('national security, public security or national defense', 'ongoing negotiations or international relations'); [Pakistan] s. 8(e) ('record relating to defence forces, defence installations', 'defence and national security'); [Russia Draft Bill] art. 10 ('state secrets'); [South Africa] s. 41 ('defence, security or international relations'); [UK] s. 23 ('bodies dealing with security matters'), s. 24 ('national security'), s. 26 ('defence'), s. 27 ('international relations'); [US] §552(b)(1) ('classified national defence and foreign policy information').
70. Laura White, 'The Need for Governmental Secrecy: Why the US Government Must Be Able to Withhold Information in the Interest of National Security' (2003) 43 *Virginia Journal of International Law* 1071.
71. *New York Times Co v. United States*, 403 US 713, 719 (1971).
72. EU: *Netherlands and van der Wal v. Commission*, [27]; *Sison v. Council of the European Union*, 1 February 2007, [63]; South Africa: Constitution of South Africa, s. 36; US: *Getman v. NLRB*, 450 F 2d 670, 672; *Bristol-Myers v. FTC*, 424 F 2d 935, 938 (1970).
73. See, for example, [Japan] art. 7; [US] §552(b)(1)-(9).
74. [UK] ss. 26-7.
75. [US] §552(b)(1), read with President Bush, 'Executive Order 13292 - Further Amendment to Executive Order 12958, as Amended, Classified National Security Information', 1.2. See also [EU] art. 4 (disclosure must 'undermine the protection of ... the public interest' as regards these issues); [China] art. 14, read

- with State Secrets Act (disclosure must ‘cause harm to State security and national interests’); [India] s. 8(1)(a) (disclosure must ‘prejudicially affect’ national interests); [France] art. 6 (disclosure must ‘endanger’ national security, public security or national defence); [Mexico] art. 13 (disclosure must ‘compromise’ national security, public security or national defence); [Pakistan] s. 15 (disclosure must ‘be likely to cause grave and significant damage’ to the interests of the state in the conduct of international relations); [Japan] art. 5(3) (disclosure must ‘pose a risk of harm to the security of the State, a risk of damage to trustful relations with another country or an international organization, or a risk of causing a disadvantage in negotiations with another country or an international organization’).
76. [Japan] art. 5(3).
  77. President Bush, above n 75, s. 1.2.
  78. [South Africa] s. 41(2).
  79. *Norman Baker MP v. Secretary of State for the Home Department* [2001] UKHRR 1275.
  80. [India] s. 8(2); [South Africa] s. 46.
  81. [China] art. 14.
  82. [Japan] art. 7.
  83. [UK] s. 2(2)(b).
  84. Department of Constitutional Affairs, *FOI Full Exemptions Guidance on Section 24*, [3.7].
  85. Conversely, it has been held in relation to the Official Secrets Act (criminalising the unauthorised release of government information relating to national security) that there is no public interest defence in the act: *R v. Shayler* [2003] 1 AC 247. Interestingly, in 2001, the UN Human Rights Committee expressed concern over the broadness of the Act: UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom and Northern Ireland*, UN doc CCPR/CO/73/UK; CCPR/CO/73/UKOT, 6 December 2001.
  86. President Bush, above n 75.
  87. President Carter, ‘Executive Order 12958’, s 3.4.
  88. Government Secrecy Act of 1997, 712§4(c) and (f); Cong Rec, 7 May 1997, 4111–2.
  89. Prior to the enactment of Regulation 1049/2001, the principle of proportionality was applied by the European Court of Justice to the Council’s decision to refuse access in reliance on the public interest exception of international relations under the Code of Practice: *Hautala v. Council*, (T-14/98) Judgment of the European Court of Justice, 6 December 2001, [28–30].
  90. *Rutili v. Minister for the Interior* (Case 36/75) [1975] ECR 1219; *Bosphorus Hava Yollari AS v. Minister for Transport, Energy and Communications, Ireland* [1996] 3 CMLR 257.
  91. See [Japan] art. 6; South Africa: Constitution of South Africa s. 36; UK: Department of Constitutional Affairs, *FOI Full Exemptions Guidance on Section 24*, [2.5].
  92. *Contra* China, where the General Office of the State Council is designated as the principal office in charge of supervising implementation of the access to information system.
  93. [EU] arts. 7–8; France: Decree No 88–465 of 28 April 1988 concerning the procedure for obtaining access to administrative documents; [India] ss. 19 (1)–(2) and Constitution of India s. 226; [Russia Draft Bill] art. 22; [South Africa] ss. 74–82; [UK] ss. 45(2)(2), 50, 59, 60.

94. [Angola]; [Japan] Chapter III; [Mexico] arts. 36(2), 45, 59; [Pakistan] s. 19; [US] §552(a)(6)(A), (a)(4)(B).
95. [India] s. 19(3); [Mexico] art. 59; [South Africa] s. 80(1); [US] §552(a)(4)(B).
96. *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1986] ECR 1651, [18], [60].
97. *Sison v. Council of the European Union*, European Court of Justice (C-266/05-P) 1 February 2007, [34].
98. [2003] 1 AC 153, [22].
99. [UK] s. 60(3); Data Protection Act s. 28(5).
100. [UK] s. 25(1).
101. *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 409 (Lord Diplock).
102. *Norman Baker MP v. Secretary of State for the Home Department*, see n 78 above.
103. *Environmental Protection Agency v. Mink* 410 US 73 (1973).
104. 5 USC §552(a)(4)(B).
105. M. Silverman, 'National Security and the First Amendment: A Judicial role in Maximizing Public Access to Information' (2003) 78 *Indiana Law Journal* 1120.
106. 421 F 2d 930 (9th Cir, 1970).
107. *Bevis v. Department of State* 575 F Supp 1253 (DDC 1983), remanded 801 F 2d 1386 (DC Cir, 1986); *Maynard v. CIA*, 986 F 2d 547, 559 (1st Cir, 1993).
108. Silverman, above n 105, 1121.
109. 120 Congress Records 36,870 (1974) (Statement of Senator Muskie).
110. [China] arts. 9–10; [EU] art. 12.
111. [China] art. 9(3); [India] s. 4(1)(b)(i) and (ii); [US] §552(a)(1) (A)&(B); [Mexico] art. 7(I), (II), (VI)–(VII); Russia's Government Decree on the Guaranteeing of Access to Information on the Actions of the Government of the Russian Federation and Federal Bodies of Executive Power, 12 February 2003, ([Russia Government Decree]) Regulation No 98, s. I(4), II(47)–(50); [South Africa] s. 14 (1)(a), (b), (f).
112. [EU] art. 12(2)–(3); [China] art. 9(2), 10(1)–10(2), 10(9); [France] art. 7; [India] s. 4(1)(b)(v), (vii), (c)–(d); [US] §552(a)(1)(D), (2)(A)&(B); [Mexico] art. 8; [Pakistan] art. 7(a), (d); [Russia Government Decree] Regulation No 98, ss. I (1)–(3), (12).
113. [China] art. 9(3); [France] art. 7; [India] s. 4(1)(b)(iv), (v); [Mexico] art. 7(VIII), (XIV); [Russia Government Decree] Regulation No. 98, s. II(21), (22); [US] §552 (a)(1)(B)&(C), 2(C).
114. [EU] art. 12(4); [India] s. 4(1)(a), (b)(vi), (xiv); Japan: Law Concerning Access to Information Held by Administrative Organs 1999, art. 40; [South Africa] s. 14(1)(d).
115. [India] s. 4(1)(b)(iii), (d); [US] §552(a)(1)(B)&(C), 2(C); [Mexico] art. 7(VIII), (XVI); [Pakistan] art. 7(d); [Russia Government Decree] Regulation No. 98, s. I (16), (20), II(35); [South Africa] s. 14(1)(h).
116. See Angola's Law on Access to Administrative Documents 2002 (which is poorly enforced); China's Ordinance on Openness of Government Information 2007; Pakistan's Freedom of Information Ordinance 2002; China's Ordinance on Openness of Government Information 2007 and Russia's Draft Bill on safeguarding access to information about the activities of state bodies and bodies of local self-government.

117. Esty, above n 1, 1530; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 22.
118. Watson Institute Targeted Sanctions Project, above n 8, 4, 43.
119. Bonn International Centre for Conversion, *Results of the Bonn-Berlin Process: Design and Implementation of Arms Embargoes and Travel and Aviation-Related Sanctions*, (2001).
120. Farrall, above n 10, 242. As Farrall points out, maintaining discussions and decision-making behind closed doors can actually deprive the committees of a valuable tool for publicising the activities of sanctions-busters and thus promoting adherence to and implementation of sanctions.

# Who guards the guardian? Towards regulation of the UN Security Council's Chapter VII powers through dialogue

HITOSHI NASU

## 1. Introduction

This chapter addresses the question of how the supremacy of the rule of law can be sustained in relation to the Security Council acting under Chapter VII of the UN Charter.<sup>1</sup> Since the 1990s, recourse to Chapter VII has become a commonplace and unchallenged practice of the Council, furnishing a wide range of flexible grounds for justifying its actions.<sup>2</sup> The highly political nature of the body, influenced largely by the five permanent members (P-5), in combination with the discretionary use of Chapter VII powers, has allowed the Council to expand its scope of activities whenever the political hurdle of the veto can be overcome. Recent developments in the Council's activity have seen a legislature-like endeavour to address threats posed by non-state actors,<sup>3</sup> and more complex and technical administrative operations imposing sanctions against such non-state actors.<sup>4</sup>

There is no doubt that Chapter VII powers must be exercised consistently with the UN Charter.<sup>5</sup> The legality of the Council's actions is subject to the purposes and principles of the Charter including subsequently developed human rights norms.<sup>6</sup> It is also arguable that the Council's decisions under Chapter VII must be adopted within the jurisdictional limits, which form the prerequisites for the valid exercise of Chapter VII powers.<sup>7</sup> Yet the reference to such requirements does not automatically lead to the objective assessment of the legality and validity of the Council's action. It requires a mechanism whereby the legality and validity of the Council's decision is subject to public scrutiny. The following two sections examine conventional review mechanisms – political accountability and judicial review – showing their constraints in controlling Chapter VII powers. An alternative mechanism is proposed in the final section with a



view to fostering communities of dialogue based on the concept of 'regulatory conversation' in an attempt to complement the two conventional methods of control by filling the gap with the development of legal accountability.

## 2. The Security Council and distrust

There is no doubt that the Security Council is a political organ that has reflected and institutionalised the asymmetric power balance between the P-5 and other states. The veto power, the voting privilege given to the great powers, has played a significant role in preserving the Council's authority by preventing it being used as a politically 'privatised' tool in the face of a powerful dissenter, whilst allowing it to take peacekeeping action when they are acting in concert.<sup>8</sup> The political coalition among the P-5, however, does not guarantee that necessary action will be taken, but rather allows for the exercise of discretion in determining whether action is to be taken. The discretionary element involved in decision-making is characteristic of governance generally.<sup>9</sup> Nevertheless, it has laid the ground for the Council being accused of adopting double-standards or a selective approach in responding to threats to the peace.<sup>10</sup>

While the view that the Council is not acting enough represents one side of the criticism, the view that the Council may be acting excessively is also suggested.<sup>11</sup> The fact that the P-5 states have been more readily agreeable to forming collective decisions since the end of the Cold War has facilitated the expansion of the Council's scope of activity, reflected in the widening concept of a threat to the peace,<sup>12</sup> as well as in the proliferation of measures taken under Chapter VII.<sup>13</sup> At times, doubt has been cast on the legality and validity of the Council's decisions, especially when they purport to trump or override existing legal orders, seemingly in the interest of particular states rather than in the international public interest.<sup>14</sup> Illustrative is the Council's action on the Lockerbie incident, whereby it demanded the extradition of two Libyan nationals who were indicted for terrorist offences overseas,<sup>15</sup> notwithstanding the existing legal arrangements under the Montreal Convention.<sup>16</sup>

The Council's expanded functionality – beyond traditional peacekeeping and peace-enforcement – could well be characterised as international security regulation. UN member states have delegated to the Council their sovereign powers to regulate activities,<sup>17</sup> both of state and non-state actors relating to the maintenance of international peace and security.<sup>18</sup> Whilst having been successful in deterring the 'privatisation' of the body

by a permanent member, the veto power does not prevent the P-5, when acting in concert, from using the Council as the source of legitimacy for pursuing their own national interests.<sup>19</sup> From the regulatory point of view, this possibility of the P-5 taking advantage of their privileges and influence in mobilising the Council to pursue their own national interests can be loosely explained as 'capture' of the regulatory regime. The risk of corruption and capture is at the heart of regulatory debates, calling for innovative accountability mechanisms to constrain the exercise of the Council's discretion.<sup>20</sup>

Barring exercise of the collective veto by non-permanent members, there is no mechanism in place within the UN system to hold the Council accountable for its decisions. Once the Council adopts a resolution, moreover, it follows its own path independent of the collective will of Council members,<sup>21</sup> leaving ambiguous terms to be interpreted differently and thereby wittingly or unwittingly 'de-legalising' the situation at hand.<sup>22</sup> UN member states arguably reserve the right of 'last resort' to raise opposition if the Council's decision is not adopted in accordance with the UN Charter,<sup>23</sup> although the refusal to implement a resolution remains controversial in the absence of objective third party assessment of the legality of the Council's decision.<sup>24</sup> Instead, states may seek action through the General Assembly, whether in the form of a declaration challenging the authority of the Council's decisions, by using its budgetary powers or, arguably, by requesting the submission of explanatory memoranda.<sup>25</sup> While not legally prohibited from doing so,<sup>26</sup> such channels of protest remain ad hoc, sporadic and ineffective. All this has contributed to the perception that the General Assembly is stagnant or impotent.<sup>27</sup>

There is no doubt that the extent to which the Council is subject to political accountability is, at best, weak. Viewed against the trajectory of the quest for Security Council reform in the historical context,<sup>28</sup> the primary concern has predominantly been the issue of representation and democratisation of the Council, presumably in an attempt to strengthen political accountability. As Bailey and Daws point out, however, 'perceptions of whether the Council is acting in a representative manner are based more on the perceived legitimacy of the content of Council *actions* than on the size and composition of its membership'.<sup>29</sup> The term 'democratisation' in the context of Security Council reform is in fact deceptive. Institutional decision-making itself is arguably responsible for undermining substantive democracy at both inter-state and intra-state levels.<sup>30</sup> It is therefore doubtful whether compositional changes can significantly enhance the Council's accountability in respect of the use of Chapter VII powers.

### 3. Inherent limits of judicial review

The conventional view is that the supremacy of the rule of law over the exercise of discretionary power is best maintained through judicial control. The concern that the Security Council may act *ultra vires* has led to the development of a significant body of literature examining the possibility of the International Court of Justice (ICJ) reviewing the Council's actions.<sup>31</sup> Different views have been expressed on the doctrinal basis for judicial review by the ICJ of the acts of international organisations.<sup>32</sup> The ICJ has developed its practice of judicial review on an incidental, rather than primary, basis of judicial power.<sup>33</sup> However, proposals have been made to expand the review role of the ICJ on the basis of the advisory jurisdiction.<sup>34</sup>

The true point of contention could be not so much with the jurisdictional basis of judicial review by the ICJ, but rather with the propriety of judicial review of the Council's decisions under Chapter VII. Even if the ICJ assumed jurisdiction of a case involving an issue as to the legality or validity of the Council's decision, its proceedings might well be challenged on the basis of the non-justiciability of the matter.<sup>35</sup> The Court can exercise judicial restraint by virtue of the 'inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore'.<sup>36</sup> The likelihood of the Court finding a matter non-justiciable under its advisory jurisdiction could be greater owing to the permissive wording of art 65 of the ICJ Statute,<sup>37</sup> though the court has noted that a matter will be justiciable in the absence of compelling reasons.<sup>38</sup>

Judicial discretion must be carefully circumscribed lest it expose the Court to criticism of arbitrariness.<sup>39</sup> In practice, however, the attitude towards judicial restraint is deep-rooted and commonly observed in the judgments of the ICJ and other international courts.<sup>40</sup> It is thus argued that the discretionary determinations under article 39 of the Charter are by their very nature non-justiciable by virtue of a number of the political, social and circumstantial factors involved, which cannot objectively be weighed or balanced by judicial scrutiny.<sup>41</sup> This stance has been influenced by the political question doctrine,<sup>42</sup> originating from US case law.<sup>43</sup> It has also been suggested that the ICJ should refrain from exercising its judicial power in cases where the decision may not entail practical consequences,<sup>44</sup> or where it may put the international legal system into greater jeopardy than if the question of lawfulness remained unresolved.<sup>45</sup>

The alternative possibility of judicial review lies with domestic courts. Given that each state theoretically retains the right of last resort to challenge the legality and validity of Council decisions,<sup>46</sup> review by an independent

domestic court would carry more weight than review by a political organ.<sup>47</sup> The push towards a more active judicial role may well be echoed in different jurisdictions, which could encourage judicial engagement in an iterative process of interaction, interpretation and reinterpretation, creating a pathway to transnational judicial dialogue. This possibility has been flourishing recently, especially in the context of human rights litigation.<sup>48</sup>

However, the recourse to domestic courts is also subject to the issue of justiciability.<sup>49</sup> The idea of judicial restraint lies in the distinction, familiar to common law countries, between public policy and legal principle, the former being based on technical expertise and political judgment.<sup>50</sup> This traditional common law approach, albeit diverse in each jurisdiction, tends to defer to the public authority's decision about what is required, in so far as it conforms to the formal conception of the rule of law.<sup>51</sup> Judicial restraint is also commonly observed in other countries, suggesting that domestic courts are inclined to find acts of international organisations non-justiciable.<sup>52</sup> Some aspects of Security Council decisions under Chapter VII – such as reasonableness and proportionality – therefore may well lie beyond the reach of judicial scrutiny.

It is rightly pointed out that there are no independent international legal barriers to review of decisions of international organisations by domestic courts.<sup>53</sup> Yet the conservative attitude common to international and domestic courts is likely to incline them to refrain from evaluating executive decisions. The sentiment that domestic judicial review of Council decisions will undermine the whole collective security arrangements under the UN Charter seems strong.<sup>54</sup>

However, the impropriety of judicial justice does not necessarily mean that the Security Council's decisions are beyond the reach of law. In the context of administrative justice and the international rule of law, Lauterpacht states that: 'Administrative justice and legal justice are not opposed one to another. It is only judicial justice which is opposed to administrative justice. But judicial justice is not the only manifestation of the rule of law.'<sup>55</sup>

It is an established principle that, whilst barring conduct that is *ultra vires*, it is for each organ to determine its own jurisdiction. This creates a *prima facie* presumption of validity of its own decision.<sup>56</sup> The requirement that discretionary powers be legally authorised or regulated does not necessarily require that all discretionary powers be judicially reviewable.<sup>57</sup> Judge Schwebel in fact pointed out that many legal systems rely 'not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ'.<sup>58</sup> At issue,

therefore, is the question of what alternative mechanisms are available or can be set in place to ensure that the Security Council, acting under Chapter VII, remains within its authorised jurisdiction.

#### 4. Legal accountability through dialogue

##### 4.1 *Theoretical basis*

There is potential to enhance the accountability of the Security Council by streamlining ways in which the legality or the validity of its decisions can be addressed. The Report of the UN Secretary-General's High Level Panel on Threats, Challenges and Change recommended that 'processes to improve transparency and accountability be incorporated and formalized in the Council's rules of procedure'.<sup>59</sup> Although it is not clear what kinds of processes were envisaged in the report, the intention was evidently to promote greater legal accountability of the Council.

The extension of Chapter VII powers has transformed the Council's role from that of a peace enforcer to that of a regulator governing international peace and security as understood broadly.<sup>60</sup> The Council, drawing an analogy to the modern welfare-regulatory state, is 'no longer a mere conduit for the implementation of programmes' authorised by the UN Charter, but 'has become an independent source of policy formulation and governance, reflecting its own views of the public interest'.<sup>61</sup> The legal techniques employed to control Chapter VII powers must respond to the changing volume and nature of Council activity.

The rise of the modern regulatory state in the late twentieth century saw the de-centring of the state, its resources and powers, as a result of privatisation and regulatory growth.<sup>62</sup> This brought a shift in regulatory focus from the central command and control model to de-centred, responsive regulatory techniques.<sup>63</sup> This shift has posed serious accountability problems that the traditional control mechanisms – judicial control and political accountability – may not adequately address. In an attempt to rectify the accountability deficit in the regulatory state, it has been suggested that 'communities of dialogue' be developed wherein each actor is recursively accountable to each other.<sup>64</sup> The way in which dialogue is generated depends on how we conceive dialogue within the institutional construction. In the context of constitutional dialogue it is shown that a dialogue theory in Canada has been conceived of predominantly as an inter-branch conversation, whereas US legal scholars have begun to reconsider the role of judicial review as part of

a broader dialogue involving societal discussion about constitutional meaning.<sup>65</sup> Given the insufficiency of political accountability and the restricted scope of judicial review, an attempt should be made, for the purpose of controlling Chapter VII powers, to create 'communities of dialogue' wherein a broader societal discussion can take place.

Reconceptualising the Council's role under Chapter VII as that of regulator sets a new paradigm requiring the development of legal techniques for the management and regulation of increasingly complex and technical operations. The reconceptualisation can also be described, using Summer's categorisation of legal techniques,<sup>66</sup> as a shift of focus from grievance-remedial and penal techniques to administrative-regulatory techniques. The latter are intended to operate preventively before any grievance arises. A theoretical ground upon which to develop such administrative-regulatory techniques with a view to controlling Chapter VII powers can be found in the concept of 'regulatory conversation' proposed by Julia Black.<sup>67</sup>

Julia Black suggests the conversational model of regulation as one of the strategies to ameliorate the inherent limitations of rules, such as their over- or under-inclusiveness due to generalisation, their indeterminacy and the need for interpretation.<sup>68</sup> The conversational model can adopt a variety of forms and aspects of interaction in the course of rule formation, rule re-formulation, rule application and rule enforcement to suit individual regulatory relations.<sup>69</sup> Regulatory conversations play a particularly significant role in cases where decision-making is subject to discretion and where the task of regulation involves uncertainty and ambiguity.<sup>70</sup> This approach, when it is adopted in the context of public administration, has the potential to develop into a system of responsiveness and reflectivity facilitating public participation.<sup>71</sup> However, the regulatory conversation takes place only within the regulatory framework once it has been established. Four elements have been identified as central to the effective operation and acceptability of regulatory conversations: commitment, accessibility, authority, and accountability.<sup>72</sup>

## 4.2 *Regulatory conversation model*

### 4.2.1 Commitment

The establishment of a regulatory framework requires conversants (including the regulator and the regulated) to be committed to the regulatory process, if not to individual regulatory measures. The relationship between the Security Council and UN member states may well

be characterised, in theory, as unilateral in that the ‘enforcer’ takes enforcement action against the ‘enforced’ with the cooperation of other ‘audience’ states. Yet in reality, the relationship has been increasingly bilateral or multilateral between regulator and regulated,<sup>73</sup> some of the latter being closer to, and having greater influence over, the former than others. For instance, the P-5 have been given special constitutional status with more legal privileges in the sphere of law-making and enforcement, whereas so-called ‘rogue states’ have been susceptible to strict regulation with little or no influence within the Security Council.<sup>74</sup>

*Pro tanto*, the P-5 may appear to have a significant disincentive to commit to conversational regulation, since they fear that it threatens their existing hegemony legalised under the current Charter framework. However, such commitment may well gain momentum in the midst of the constitutional crisis of the UN, which has formed the platform for the Council’s reform agenda.<sup>75</sup> The declining perception of the Council’s legitimacy by UN member states could be rectified by the P-5 pledging their commitment to regulative conversational processes. The mere expansion of the Council’s membership, including the introduction of additional permanent positions, will not help to enhance the legitimacy of the body.<sup>76</sup> The legitimacy of the body does not stem from political accountability to member states, but rather lies with the institutional role that it plays in maintaining and restoring international peace and security. What is required of the Council is its commitment to a more principled system of regulation to improve the profile of the body in terms of impartiality and objectivity.

#### 4.2.2 Accessibility

The regulatory conversation must be accessible to the regulated, external actors and wider communities. By ‘closing off’ the regulatory system the regulator would have a monopoly over the interpretation and application of rules.<sup>77</sup> The Council lacks vertical legitimacy to redeem the democratic deficit resulting from the state-centred structure of the UN. Greater accessibility reinforces the significance of ensuring greater openness, participation and transparency by means of reinforced guarantees for and greater involvement of civil society.<sup>78</sup> The key to this issue is to ensure accessibility, not only in the decision-making phase, but also in the interpretation and application phases.

Accessibility in the decision-making phase can be enhanced by an expanded engagement with international civil society,<sup>79</sup> the movement indicative of extending dialogue to wider communities.<sup>80</sup> Yet this idea of

resorting to international civil society at large must be examined with caution.<sup>81</sup> While transparency is generally desirable, politically sensitive issues may well require conversation in a private forum.<sup>82</sup> Likewise, greater participation in the conversation is not always justified unless there is a direct impact upon the third party's interest.<sup>83</sup> Although it is ultimately a matter to be resolved by public policy and political debates,<sup>84</sup> the extent to which, and the manner in which, international civil society is involved in decision-making must not interfere with the effective and efficient functioning of the Council.

On the other hand, the trend towards targeted sanctions,<sup>85</sup> brought under Chapter VII against individuals and non-state actors and imposing implementation obligations on states, has drawn attention to the issue of accessibility during the interpretation and application phases of Council decisions. Traditionally the exercise of Chapter VII powers targeted sovereign states directly. Conventional remedial mechanisms – limited political accountability and judicial review – are only available for sovereign states to challenge the Council's decisions for political, economic or strategic reasons. There is no avenue for individuals or non-state actors to seek review of the legality or validity of decisions even where they are directly adversely affected.<sup>86</sup> Given that the Council's extended powers are such that the interests of individuals and other non-state entities can be directly and adversely affected by Chapter VII measures, a question has arisen concerning the legal entitlements of such entities, including the right to freedom of information.<sup>87</sup>

When the interests of individuals and other non-state entities are directly and adversely affected, the establishment of a tribunal affording standing to non-state actors would enhance their accessibility to the dialogue.<sup>88</sup> The power given to a tribunal cannot supersede the authority of the Council. Therefore, unless the Council were to delegate review authority, such a tribunal would be unable to substitute its views for those of the Council.<sup>89</sup> Nevertheless, the primary purpose of establishing a tribunal would be to provide adversely affected parties with the opportunity to present their case for review of the way in which sanctions are applied and administered. Even without the power to quash or substitute original decisions, the adjudicatory nature of the body would enable it to provide a fairer and more objective decision than administrative de-listing procedures.

#### 4.2.3 Authority

The *locus* and distribution of authority to determine the interpretation of rules within the regulatory framework is critical to the operation of



conversation.<sup>90</sup> Where the ultimate authority should lie to interpret the UN Charter is a contested point. Some suggest that the ultimate authority is given to each organ in pursuance of the principle of '*compétence de la compétence*' and consistently with the actual practice of the UN,<sup>91</sup> whereas others argue that it is reserved for sovereign states.<sup>92</sup> The *travaux préparatoires* of the Charter, while affirming that each organ is empowered to make an initial interpretation in the course of day-to-day operations, stipulate that 'if an interpretation made by any organ of the Organization ... is not generally acceptable it will be without binding force'.<sup>93</sup> It remains unclear how and by reference to which criteria general acceptability should be measured.

The development of an interpretive community, as Black suggests, may well contribute to the fostering of a shared body of understanding relating to the meaning and interpretation of rules.<sup>94</sup> The key to the development of an interpretive community is that whoever has the authority to interpret rules should do so consistently, objectively and not arbitrarily.<sup>95</sup> Palmer underlines the significance of dialogue from a legal realist perspective as an inherent element of the separation of the law-maker from the law-interpreter, because those two groups of people come to their conclusions using different processes and speaking in different languages.<sup>96</sup> While the Council has increasingly been playing a greater role in law-making, little attention has been given to the institutional development of legal interpretation. Accordingly, the authority to interpret has been left to states and sanctions committees represented by the Council's member states. Proposals for creating independent review mechanisms seem to echo this concern for the monopolisation of interpretive authority by political bodies.<sup>97</sup> Interpretive authority needs to be dispersed among different law-interpreting institutions such as tribunals,<sup>98</sup> ombudsman<sup>99</sup> and expert bodies.<sup>100</sup>

#### 4.2.4 Accountability

The regulatory framework needs to incorporate accountability mechanisms so as to engender and maintain trust in the regulator's actions. Despite the confusion as to the meaning of accountability, especially in relation to international organisations,<sup>101</sup> accountability in the strict sense indicates the process by which one party that asserts authority to call to account seeks answers and obtains rectification from the other party who, in turn, being separate and accountable to the former, responds to the call.<sup>102</sup> Working with this strict sense of accountability, the accountability deficit in relation to the Council's Chapter VII powers

consists in the fact that the powerful states with leverage and authority to call others to account are in fact those which are required to respond to the call.<sup>103</sup>

Attempts to rectify accountability deficits have led to the emergence of global administrative law,<sup>104</sup> and the move towards the creation of institutions to enhance the accountability of international public authorities.<sup>105</sup> The recent development of ombudsman is worthy of note in this context. There are a wide variety of different systems of ombudsman, with differences of institutional status, powers, jurisdiction and mode of functioning.<sup>106</sup> Nonetheless, independent investigatory powers, either upon receipt of a complaint or under the office's own initiative, constitute the defining feature of the office.

The idea is not alien to the UN, as can be seen in the Office of Ombudsman established within the Secretary-General's Office to make available services of an impartial and independent review to address employment-related issues of staff members.<sup>107</sup> In relation to the Council's action, the creation of an ombudsman has been suggested for each peacekeeping mission since the late 1990s.<sup>108</sup> In 2000, it formed part of the UN Mission in Kosovo, albeit as an institution established by the Organization for Security and Co-operation in Europe (OSCE), to 'receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution'.<sup>109</sup> Although its role and effects were limited, both in scope and intensity,<sup>110</sup> it exhibits potential to play a greater role in developing communities of dialogue.

The suggestion has been made for the establishment of a system-wide ombudsman institution as a permanent independent body to supervise the activities of the Security Council.<sup>111</sup> Yet there are serious questions concerning what role the ombudsman should play. Should the Council be held accountable to the ombudsman? To what extent should the ombudsman be empowered to intervene in the Council's decisions? How far should the scope of review by the ombudsman extend? Realists will cast doubt on any opportunistic answers to these questions. It might be realistic to expect such a body to have its function limited to the collection and investigation of complaints on the administration of sanctions. Even this, however, would enhance the extent to which the Council is held accountable for its action if the ombudsman creates a pathway through which dialogue is facilitated among regulators in furtherance of collectively prudential judgments.

## 5. Implications of the regulatory conversational model

The application of the regulatory conversational model to the Council measures under Chapter VII is not straightforward. The creation of such a framework will have immense implications for political, administrative and financial aspects. A critical question to be asked is whether the creation of a regulatory conversational framework will adversely affect the effective performance and authority of the Council. The regulatory conversational model, when applied to the Council's sanction regimes, adopts a form of continuous dialogue between the Council and regulatory institutions, clarifying the interpretation and application of rules, potentially resulting in their re-formulation. The Council's authority and effective performance will not be diminished, as long as the regulatory conversation stays away from the Council's decision-making itself. The regulatory conversation is rather designed to enhance the Council's authority and effective performance by developing a system that is responsive to, and facilitates participation by, the public.

The mere establishment of a regulatory conversational framework will not be sufficient to enhance the legal accountability of the Security Council. Efforts must be made, through the creation and activity of regulatory institutions, to require the Council to provide convincing justifications for decision-making under Chapter VII.<sup>112</sup> Transparency of decision-making is required to the extent necessary to provide greater clarity and awareness of legal issues surrounding Council resolutions and to facilitate deliberations within and among regulatory institutions. The duty to provide reasons for action may help foster a 'culture of justification',<sup>113</sup> upon which clear, well-accepted and legally embedded procedures can be developed.<sup>114</sup> Although legal considerations have already had some bearing on decision-making processes of the Council,<sup>115</sup> the 'power of the better argument' will carry more weight in a regularised process of dialogue. The input of legal voices may well help regulatory institutions to ascertain the synoptic values underlying the Council's decision which, together with deliberation through a regularised process of dialogue, assists the realisation of collectively prudential judgments.

## 6. Conclusion

It is suggested in this chapter that, given the need to manage and regulate increasingly complex and technical operations of Chapter VII powers, administrative-regulatory techniques be developed to foster communities

of dialogue based on the concept of 'regulatory conversation'. A regulatory conversational framework will complement the conventional methods of control – political accountability and judicial review – whose scope of application to the Council's exercise of Chapter VII powers is inherently limited.

There is an increasing emphasis on the management of international regulatory regimes, guiding states and international organisations towards compliance with norms, rather than assigning responsibility on the basis of traditional binary ways of legal thought (i.e., behaviour is either in conformity with the law or is not).<sup>116</sup> The concept of regulatory conversation for fostering communities of dialogue provides an effective regulatory framework within which the exercise of Chapter VII powers is subject to public scrutiny and therefore guided towards more accountable action.

### Notes

1. Charter of the United Nations, opened for signature 26 June 1945, USTS No 993 (entered into force 24 October 1945), as amended by GA Res 1991, 557 UNTS 143 (1963); GA Res 2101, 638 UNTS 308 (1965); GA Res 2847, 892 UNTS 119 (1971).
2. See, e.g., David Malone, 'The Security Council in the Post-cold War Era: A Study in the Creative Interpretation of the UN Charter' (2003) 35 *New York University Journal of International Law and Politics* 487, 492–5.
3. SC Res 1373 (28 September 2001); SC Res 1540 (28 April 2004).
4. See, e.g., SC Res 1267 (15 October 1999); SC Res 1390 (28 January 2002); SC Res 1452 (20 December 2002); SC Res 1455 (17 January 2003); SC Res 1526 (30 January 2004); SC Res 1566 (8 October 2004); SC Res 1617 (29 July 2005).
5. Cf. Gabriël H. Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.
6. For details, see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 178–368; David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001) 165–82.
7. Hitoshi Nasu, 'Chapter VII Powers and the Rule of Law: The Jurisdictional Limits' (2007) 26 *Australian Year Book of International Law* 87. See also, Ian Brownlie, *The Rule of Law in International Affairs* (1998) 219.
8. See, e.g., Mariano-Florentino Cuéllar, 'Reflections on Sovereignty and Collective Security' (2004) 40 *Stanford Journal of International Law* 211, 224.
9. See, Ian Brownlie, 'The United Nations as a Form of Government' in James E. S. Fawcett and Rosalyn Higgins, (eds.), *International Organization: Law in Movement* (1974) 26, 31–3.
10. See, e.g., Thomas M. Franck, 'Of Gnats and Camels: Is There a Double Standard at the United Nations?' (1984) 78 *American Journal of International Law* 811.

11. David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *American Journal of International Law* 552, 559–61.
12. See generally, Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 *Journal of Conflict and Security Law* 15; Inger Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (1998).
13. See, e.g., Nico Krisch, 'Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council' in Christian Walter *et al.* (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004) 879, 881–93.
14. John Quigley, 'The "Privatization" of the Security Council Enforcement Action: A Threat to Multilateralism' (1996) 17 *Michigan Journal of International Law* 249, 270–3.
15. For details of the incident, see Fiona Beveridge, 'The Lockerbie Affair' (1992) 41 *International and Comparative Law Quarterly* 907.
16. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).
17. Charter of the United Nations arts 24–5.
18. See generally, Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005) 28–107.
19. See, e.g., Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council' (2002) 8 *Global Governance* 35, 44–5; John Quigley, 'The United Nations Security Council: Promethean Protector or Helpless Hostage?' (2000) 35 *Texas International Law Journal* 129, 167–70.
20. See, e.g., Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 55–6.
21. The veto can obstruct the modification or termination of sanctions (reverse veto). The recent practice has shifted to imposing time limits for sanctions. See generally, Lutz Oette, 'A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council' (2002) 13 *European Journal of International Law* 93.
22. See, Michael Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165, 166.
23. See generally, Nicolas Angelet, 'Protest against Security Council Decisions' in Karen Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998) 277; Karl Döbring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 *Max Planck Yearbook of United Nations Law* 91.
24. See, Jost Delbrück, 'Article 25' in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn, 2002) 452, 459.
25. See, eg, M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts* (1994) 119–26.
26. The prohibition against making recommendations while the Council is exercising its power over a matter under art. 12(1) of the Charter would not pose an obstacle to assessing and reviewing the legality or the validity of the Council's decisions.
27. See, UN Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004) [241].

28. See, e.g., Joachim Müller (ed.), *Reforming the United Nations: The Struggle for Legitimacy and Effectiveness* (2006).
29. Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (3rd edn, 1998) 388 (emphasis original).
30. See generally, B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1; Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *American Journal of International Law* 489.
31. See e.g., de Wet, above n 6, 69–129; Schweigman, above n 6, 267–85.
32. Different doctrinal views include: (1) a residual or implied power from the lack of an express prohibition against engaging in judicial review (Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309, 326–37); (2) the very nature of the judicial function (Malcolm Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in A. S. Muller *et al.* (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (1997) 219, 255–7); and (3) a general principle of law (Erika de Wet, 'Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice' (2000) 47 *Netherlands International Law Review* 181–210).
33. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 (*Namibia case*), 45 [89].
34. See, e.g., D.W. Bowett, 'The Court's Role in Relation to International Organizations' in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 181, 187–92; Christopher Weeramantry, 'Expanding the Potential of the World Court' in Nandasiri Jasentuliyana (ed.), *Perspectives on International Law* (1995) 309, 334–8.
35. The distinction between jurisdiction to entertain a case and the admissibility of a claim is acknowledged in *Oil Platforms (Iran v. United States) (Merits)* [2003] ICJ Reports 161, 177 [29]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits)* [1986] ICJ Reports 14 (*Nicaragua case*), 26–27 [32]–[34].
36. *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)* [1963] ICJ Reports 15, 29.
37. It provides: 'The Court *may* give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request' (emphasis added).
38. See, e.g., *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996(1)] ICJ Reports 226, 235 [14]; *Western Sahara (Advisory Opinion)* [1975] ICJ Reports 12, 21 [23]; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Reports 65, 72.
39. Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005* (4th edn, 2006) vol. 2, 538.
40. See from a critical point of view, Judge Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56 *International and Comparative Law Quarterly* 741.

41. See, e.g., *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Provisional Measures)* [1992] ICJ Rep 3, 66 (Judge Weeramantry dissenting opinion); *Prosecutor v. Joseph Kanyabashi (ICTR) (Jurisdiction)* Case No ICTR-96-15-T (18 June 1997), [20]; *Prosecutor v. Dusko Tadic (ICTY) (Jurisdiction) (Trial Chamber)* (1997) 105 ILR 427, 435 [23]–[24].
42. See, e.g., Ioana Petculescu, 'The Review of the United Nations Security Council Decisions by the International Court of Justice' (2005) 52 *Netherlands International Law Review* 167, 174–7; Schweigman, above n 6, 265–7.
43. See, *Baker v. Carr*, 369 US 186 (1961); *Powell v. McCormack*, 395 US 486 (1968).
44. See, *Nicaragua* case, above n 35, 237 [53] (Judge Oda dissenting opinion); *Nuclear Tests Case (Australia v. France) (Judgment)* [1974] ICJ Reports 253, 270–2 [55]–[59]; *Nuclear Tests Case (New Zealand v. France) (Judgment)* [1974] ICJ Reports 457, 476–7 [58]–[62].
45. See, Georg Nolte, 'The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections' in Michael Byers (ed.), *The Role of Law in International Politics* (2000) 315, 318.
46. See Section 2.
47. See generally, Erika De Wet and André Nollkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 184–200.
48. Erika de Wet, 'Holding the UN 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* 143; Harold Hongju Koh, 'Bringing International Law Home' (1998) 35 *Houston Law Review* 623, 649–51.
49. In the Australian domestic context, see: 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* 313.
50. Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) 188–91.
51. *Ibid.* 18–19. For the distinction between formal and substantive conceptions of the rule of law, see, e.g., Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.
52. See generally, August Reinisch, *International Organizations Before National Courts* (2000) 84–99.
53. De Wet and Nollkaemper, above n 47, 195.
54. See, eg, Anthony Aust, 'The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View' in Erika de Wet and André Nollkaemper (eds.), *Review of the Security Council by Member States* (2003) 31, 36–8.
55. Hersch Lauterpacht, *The Function of Law in the International Community* (1933) 386.
56. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 168.
57. See, Timothy Endicott, 'The Reason of the Law' (2003) 48 *American Journal of Jurisprudence* 83, 87–95.

58. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Preliminary Objections)* [1998] ICJ Reports 9, 76 (Judge Schwebel dissenting opinion).
59. *A More Secure World*, above n 27, [258]. See also, *The UN Security Council and the Rule of Law: Final Report and Recommendations from the Austrian Initiative, 2004–2008*, [30] (February 2008), [www.bmeia.gv.at/index.php?id=67169&L=1](http://www.bmeia.gv.at/index.php?id=67169&L=1) at 15 April 2008.
60. A remarkable event in this respect was the discussion over environmental issues as a threat to the peace, as proposed by the UK delegate: see, UN Doc S/PV.5663 (17 April 2007); UN Doc S/PV.5663 (Resumption 1) (17 April 2007).
61. Trevor Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' (2003) *Public Law* 429, 433.
62. See generally, John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222, 223–7; Giandomenico Majone, 'The Rise of the Regulatory State in Western Europe' (1994) 17 *West European Politics* 77.
63. See, e.g., Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; Ayres and Braithwaite, above n 20.
64. See, Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 48–54; John Braithwaite, 'Accountability and Governance under the New Regulatory State' (1999) 58 *Australian Journal of Public Administration* 90, 93.
65. For details, see Christine Bateup, 'Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Contemporary Perspective' (2007) 21 *Temple International and Comparative Law Journal* 1.
66. Summers suggested five different types of legal techniques: administrative-regulatory, grievance-remedial, penal, public benefit conferral and distributional techniques. See Robert S. Summers, *Law, Its Nature, Functions and Limits* (2nd edn, 1972) 21–437; Robert S. Summers, 'The Technique Element in Law' (1971) 59 *California Law Review* 733.
67. Julia Black, *Rules and Regulators* (1997); Julia Black, 'Talking about Regulation' [1998] *Public Law* 77; Julia Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163.
68. Black, *Rules and Regulators*, above n 67, 6–45. Other strategies include the choice of rule type and the creation of regulatory interpretive communities through institutional practices.
69. *Ibid.* 37–42.
70. Black, 'Regulatory Conversations', above n 67, 171–2.
71. Black, 'Talking about Regulation', above n 67, 91–2.
72. *Ibid.* 96–104.
73. See, Krisch, above n 13, 890–3.
74. See, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) 319–51.
75. See above Section 2.
76. The recent initiative for reform was rather seen as an attempt to weaken the position of developing countries within the UN. See, eg, Müller, above n 28, 95.
77. Black, *Rules and Regulators*, above n 67, 34–5.



78. See, Sabino Cassese, 'Administrative Law without the State?: The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law and Politics* 663, 687–9.
79. See, e.g., *A More Secure World*, above n 27, [260]; *We the People: Civil Society, the United Nations and Global Governance*, UN Doc A/58/817 (11 June 2004) 45–6.
80. See especially, Jochen Prantl, *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* (2006).
81. For a critical view of international civil society, see, Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society' (2000) 11 *European Journal of International Law* 91.
82. The Security Council in fact developed the practice of making important decisions behind closed doors: see, e.g., Michael C. Wood, 'Security Council Working Methods and Procedure: Recent Development' (1996) 45 *International and Comparative Law Quarterly* 150, 154–9.
83. Black, 'Talking about Regulation', above n 67, 100.
84. See, Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (2006) 178–87.
85. See 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* 191, 193.
86. For details, see, e.g., David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68 *Law and Contemporary Problems* 127, 140–52; Krisch, above n 13, 887–90; J.E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 873, 876–8.
87. See, 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* 92.
88. The tribunal envisaged here is of an administrative nature, as distinct from a court-substitute tribunal such as the International Criminal Tribunal for the Former Yugoslavia and its equivalent for Rwanda.
89. See, Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (2001) 424.
90. Black, 'Regulatory Conversation', above n 67, 194–5.
91. See, e.g., M. S. Rajan, *United Nations and Domestic Jurisdiction* (1958) 499.
92. See, e.g., J. S. Watson, 'Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter' (1977) 71 *American Journal of International Law* 60.
93. UNCIO vol. 13, 832. See also, Benedetto Conforti, *The Law and Practice of the United Nations* (3rd edn, 2005) 14–16.
94. See, Black, *Rules and Regulators*, above n 67, 30–7.
95. Black, 'Talking about Regulation', above n 67, 102.
96. Matthew S. R. Palmer, 'The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People', The 2007 Bora Laskin Lecture delivered at the Osgoode Hall Law School, York University, Toronto, 23 January 2007, available at SSRN: [ssrn.com/abstract=1012892](http://ssrn.com/abstract=1012892) at 22 October 2007.

97. See, e.g., Thomas J. Biersteker and Sue E. Eckert, 'Strengthening Targeted Sanctions Through Fair and Clear Procedures' (Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006), available at [watsoninstitute.org/pub\\_detail.cfm?id=626](http://watsoninstitute.org/pub_detail.cfm?id=626) at 8 February 2008; Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159, 208–11.
98. See above Section 4.2.2.
99. See below Section 4.2.4.
100. See generally, Farrall, above n 85.
101. See, e.g., International Law Association, *Final Report of the Committee on the Accountability of International Organizations* (2004) [www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm) at 26 March 2007. Note the confusion between two different categories of unlawful acts of international organisations, to which responsibility and accountability are separately attributed: Elihu Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations' in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965) 88, 89.
102. Richard Mulgan, "'Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555, 555–6.
103. Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29, 37.
104. See, e.g., C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187; Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490; Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.
105. See, e.g., 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* 75; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247.
106. See, Carolyn Stieber, '57 Varieties: Has the Ombudsman Concept Become Diluted?' (2000) 16 *Negotiation Journal* 49.
107. Secretary-General's Bulletin: Office of Ombudsman – Appointment and Terms of Reference of the Ombudsman, UN Doc ST/SGB/2002/12 (15 October 2002).
108. See, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc S/1999/957 (8 September 1999) 19 [61]; Report of the Secretary-General: Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, UN Doc A/58/694 (26 January 2004) 14 [72].
109. UNMIK Regulations, UN Doc UNMIK/REG/2000/38 (30 June 2000) s. 3.1.
110. See, Florian Hoffmann and Frédéric Mégret, 'Fostering Human Rights Accountability: An Ombudsperson for the United Nations?' (2005) 11 *Global Governance* 43, 56–7; R. Kolb, G. Porretto and S. Vité, *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales: Forces de Paix et Administrations Civiles Transitoires* (2005) 441–4; Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004) 146–50.

111. See, Hoffmann and Mégret, above n 110, 57–60.
112. Nasu, above n 7, 116.
113. See generally, Michael Taggart, ‘Reinventing Administrative Law’ in Nicolas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution* (2003) 311, 332–4; David Dyzenhaus, Murray Hunt and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 *Oxford University Commonwealth Law Journal* 5, 29–32; Paul Craig, ‘The Common Law, Reasons and Administrative Justice’ (1994) 53 *Cambridge Law Journal* 282.
114. Leighton McDonald, ‘The Rule of Law in the “New Regulatory State”’ (2004) 33 *Common Law World Review* 197, 218–20. See also, John W. Halderman, *The United Nations and the Rule of Law* (1966) 5–6, 220–7.
115. See, Ian Johnstone, ‘Security Council Deliberations: The Power of the Better Argument’ (2003) 14 *European Journal of International Law* 437.
116. Jan Klabbers, *An Introduction to International Institutional Law* (2002) 274.

# 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’?

ERIKA DE WET

## 1. Background

### 1.1 *The legal framework*

I have previously argued extensively that the competence of the United Nations Security Council to adopt measures in the interest of international peace and security is not unlimited under international law.<sup>1</sup> In addition, I have argued that due to the absence of a centralised international judiciary that has explicit competence to review the legality of Security Council decisions, domestic and regional courts will increasingly be confronted with requests to this effect in an era where international organs frequently take decisions with direct consequences for the rights of individuals.<sup>2</sup> In particular, such review may occur in cases where domestic or regional courts are confronted with challenges to domestic or regional measures that implement Security Council resolutions in a manner that results in the infringement of individual human rights. When reviewing these implementation measures, the domestic or regional courts may also be incidentally confronted with the question of whether the Security Council itself acted in accordance with international law when adopting the decision that ultimately resulted in the measure under debate.<sup>3</sup>

As far as the legal obligations to which the Security Council itself is bound under international law are concerned, I have argued extensively that when the Security Council creates subsidiary organs exercising (quasi) judicial functions,<sup>4</sup> such organs have to function in accordance with basic standards of procedural justice; notably, the principles of independence, even-handedness and impartiality. This argument is distilled from public international law itself, namely from article 24(2) of

the Charter of the United Nations, read together with articles 1(1), 1(3) and 2(2) of the Charter.<sup>5</sup> Article 24(2) of the Charter determines that, in discharging its duties, the Security Council shall act in accordance with the purposes and principles of the United Nations, which, in the present context, are contained particularly in articles 1(1), 1(3) and 2(2).

Article 1(1) articulates the primary goal of the United Nations, namely the maintenance of international peace and security and the peaceful settlement of disputes in accordance with international law and procedural justice. Article 2(2) requires that the United Nations (and its organs) respects the principle of good faith, whereas article 1(3) obliges the organisation to protect human rights. According to my line of argument, the principle of good faith as articulated in article 2(2) of the Charter is closely related to the concept of equitable (promissory) estoppel, which applies to international organisations as a general principle of law. Where a country or an international organisation creates the legitimate expectation that it will act in a certain manner, it is under a legal obligation to fulfil that expectation.<sup>6</sup> More concretely, in light of the interaction of the principle of good faith with articles 1(1) and 1(3) of the Charter, the principle of good faith would estop the organs of the United Nations from behaviour that violates the rights and obligations flowing from these articles. As a result, the Security Council would be estopped from behaviour that violates the core elements of the human rights norms underpinning article 1(3) of the Charter.<sup>7</sup>

One can draw these core human rights elements from the human rights instruments developed under the auspices of the United Nations itself.<sup>8</sup> These documents represent an elaboration of the original human rights vision found in article 1(3) and articles 55–56 of the Charter. The human rights contained in these documents thus constitute the human rights that, under article 1(3), the United Nations must promote and respect. The United Nations is not a party to these instruments but was responsible for their creation, and also for the creation of an elaborate system for monitoring their implementation by member states. This created the expectation that the (organs of the) organisation itself should respect the core content of the norms propagated by that same organisation. The obligation to act in good faith thus obliges the member states, when acting in the context of an organ of the United Nations, to fulfil legally relevant expectations that are raised by their conduct with regard to international human rights standards adopted in the framework of the organisation. It also implies that those (permanent) members of the Security Council that have not yet ratified any of the above mentioned

instruments are nonetheless bound to the core of the rights contained therein when acting on behalf of the organisation itself.<sup>9</sup>

This line of argument acknowledges that the adoption of coercive measures (such as targeted sanctions) in the interest of international peace and security can result in the limitation of rights and obligations under international law – including human rights obligations – as long as the core content of the rights in question is respected. It thus rejects the notion that the Security Council can deviate completely from international human rights standards when adopting binding measures under Chapter VII of the Charter. It also rejects the notion that the Security Council is only bound by the very small number of peremptory norms of international law (*ius cogens*), a point which will be revisited below. The above line of argument will form the background against which I will analyse recent regional and domestic decisions in Europe, in which courts were called upon to review the legality of Security Council resolutions.

### 1.2 *The Yusuf and Kadi decisions*

Central to the analysis are two (for relevant purposes identical) decisions of the Court of First Instance of the European Communities (CFI), *Yusuf and Al Barakaat International Foundation v. Council and Commission*,<sup>10</sup> and *Kadi v. Council and Commission*,<sup>11</sup> as well as some elements of the subsequent appeal before the European Court of Justice (ECJ) in *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*.<sup>12</sup> The dispute has its roots in Security Council Resolutions 1267 of 15 October 1999<sup>13</sup> and 1333 of 19 December 2000<sup>14</sup> and the measures subsequently adopted within the European Union (EU) in order to implement them uniformly in all member states.<sup>15</sup>

Following the attacks on the US embassies in Kenya and Tanzania, and the suspected involvement of Osama Bin-Laden with those acts, the Security Council adopted Resolutions 1267 (1999) and 1333 (2000). These resolutions, geared towards pressuring the (then) de facto Taliban regime in Afghanistan into extraditing Osama Bin-Laden to the US, authorised a Security Council Sanctions Committee (the Al-Qaeda Committee) to identify and blacklist individuals and entities associated with the Taliban, Osama Bin-Laden and Al-Qaeda (the Al-Qaeda sanctions regime).<sup>16</sup> The assets of blacklisted individuals and entities were to be frozen by their state of residence until such time as the Sanctions Committee might remove them from the list. Since the attacks on the United States of 11 September 2001, the Al-Qaeda Committee has been

very active in expanding the list of targeted persons and entities. Although following the fall of the Taliban regime the Security Council lifted the sanctions against Afghanistan in Security Council Resolution 1390 of 16 January 2002,<sup>17</sup> sanctions have been maintained against the Taliban, Osama Bin-Laden and Al-Qaeda. Neither Resolution 1267 (1999) nor subsequent resolutions explicitly provide for independent judicial review for the individuals and entities targeted.<sup>18</sup> Instead, the 1999 resolution merely provides for a political procedure in the form of de-listing, a point which will be revisited below in Section 2.3.2.

The EU implemented Resolution 1267 and subsequent resolutions through Common Positions and Regulations in order to ensure uniform application in all member states.<sup>19</sup> The respective regulations had direct effect, and as they did not explicitly provide for an independent review mechanism, the issue of the right to a fair trial was bound to arise before the CFI. In its decision of 21 September 2005, the CFI concluded that it did not have any (extensive) power to review whether blacklisting resulted in the violation of fundamental human rights, including the right to a fair hearing. The Court saw itself restricted to assessing whether the Security Council had acted in accordance with peremptory norms of international law (*ius cogens*), ultimately concluding that no such violations had occurred.

Subsequently on appeal, the ECJ reached the opposite jurisdictional conclusion, namely that the Community judicature had the right to review the blacklisting, and *inter alia* that the right to judicial protection guaranteed by EU law was violated in this case.<sup>20</sup> Even so, the CFI's reasoning remains highly relevant. The ECJ's conclusion that the blacklisted individuals and entities had the right to a fair hearing at the EU level was based exclusively on EU law, leaving the question of whether or not the Security Council had acted in accordance with international law unanswered.

This means that the ECJ did not follow the same methodology as the CFI, which attempted to resolve the matter on the basis of international law itself. Due to this difference in approach, the validity of the CFI's arguments pertaining to international law have not been formally refuted. This applies in particular to the CFI's reasoning on whether the Security Council violated (peremptory) obligations of international law. As a result, it remains unclear whether a decision to grant the affected individuals access to an independent tribunal at the EU level (and on the basis of EU law) would result in a violation of binding Security Council resolutions. If this were the case, it would trigger the international responsibility of the respective member states, which could lead to countermeasures by the Security Council.

The answer to the question of whether state responsibility could be triggered in this fashion would, in turn, depend on whether the Security Council itself acted in accordance with international law when requiring states to implement sanctions in a manner that effectively suspends the right to a fair trial of those affected by the sanctions regime. According to the CFI's reasoning, the Security Council acted in accordance with international law when suspending this right. This reasoning – which was not addressed at all by the ECJ – has subsequently been adopted by domestic courts in Switzerland<sup>21</sup> and the UK.<sup>22</sup> These examples of the potential spill over effect of the reasoning of domestic and regional courts further underline the importance of analysing the reasoning of the CFI.

This chapter challenges the CFI's reasoning on the basis of the legal framework outlined above in Section 1.1. What follows will focus on three questions of public international law that were of central importance to the CFI's decision. The first concerns the relationship between the primacy rule in article 103 of the Charter and the purposes and principles of the Charter, as well as peremptory norms of international law. The second relates to the competence of the courts of the European Communities under international law to review Security Council decisions, while the third concerns the implications of the right to a fair trial for the Security Council. Although the right to a fair hearing was not the only fundamental right affected by (domestic implementation of) Resolution 1267 (1999) and subsequent resolutions, it was arguably the most deeply affected. In addition, it constitutes a procedural prerequisite for the effective enforcement of all other fundamental rights that were affected by the sanctions regime. As a result, it ought to have a prominent place in the subsequent analysis. Following this discussion, the author will draw some general conclusions from the case law in order to illustrate the (role of domestic courts in the) development of a hierarchy of norms within international law itself.<sup>23</sup>

## 2. Challenging the reasoning on the basis of public international law

### 2.1 *The relationship between article 103 and article 24 of the Charter and ius cogens*

The CFI's analysis of the Charter framework reflects an insufficient appreciation of the complexities pertaining to the scope of article 103 of the Charter and its relationship with the obligation to respect the



Charter's purposes and principles, as articulated in article 24. In addition, its analysis of the relationship between the Charter purposes and principles and *ius cogens* norms is confusing, as is its identification of the norms which have acquired *ius cogens* status.<sup>24</sup>

The CFI correctly stated that the primacy rule laid down in article 103 of the Charter extends to decisions contained in resolutions of the Security Council, in accordance with article 25 of the Charter, which obliges members of the United Nations to accept and carry out the decisions of the Security Council.<sup>25</sup> However, the CFI failed to deal extensively with the question of whether the primacy rule also applies in instances where the Security Council itself acts illegally, for example, by violating human rights obligations to which the Security Council itself is bound. Although a disputed point, this author has argued elsewhere that article 25 of the Charter would only apply to decisions which are *intra vires*. As a result, the primacy rule contained in article 103 would be inapplicable to decisions taken *ultra vires*. Thus, states would be under no obligation to implement such decisions.<sup>26</sup>

A question which comes to mind in this context is how to reconcile the Security Council's own human rights obligations under international law with the presumption of legality attached to Security Council resolutions.<sup>27</sup> In light of this presumption, which follows from the Security Council's special role in the maintenance of international peace and security, one cannot lightly assume that a Security Council resolution does not conform with its human rights obligations. The most logical way to harmonise the different obligations would be to interpret Security Council decisions in a human-rights-friendly manner.<sup>28</sup> This would *inter alia* imply that a limitation or derogation from human rights norms cannot be assumed unless explicit.<sup>29</sup> This approach would mean interpreting Resolution 1267 as necessarily (implicitly) granting states discretion to enforce the sanctions regime in accordance with human rights standards, even though this is not self-evident on the face of the resolution.

In this context the recent *Möllendorf* decision of the ECJ provides an interesting example.<sup>30</sup> This request for referral to the ECJ arose from unforeseen third party property rights consequences of the Al-Qaeda sanctions regime. A contract of sale concerning real property was concluded between the Möllendorfs (the sellers) and buyers who were subsequently blacklisted under the Al-Qaeda sanctions regime. At the time of the blacklisting the buyers were already in possession of the immovable property and the sellers had already received (and spent) the sales

price. However, ownership had not yet transferred since the transaction was not yet registered in the Land Register as required by German law.<sup>31</sup>

Since registration was no longer possible after the blacklisting of the buyers, the question arose whether the sales transaction had to be reversed. This would have been the normal procedure under German civil law in cases where a legal impediment arises against the transfer of property.<sup>32</sup> The sellers objected, arguing that rescission of the contract would disproportionately limit their right to property.<sup>33</sup> The ECJ supported this position to the extent that it required the national authorities to apply German contract law in a manner that gave maximum effect to the EU protection regime for fundamental rights.<sup>34</sup> It is important to note that the legality of the sanctions regime itself was not at stake in this case. Instead, it concerned the scope of the EU implementation measures and in particular their impact ('collateral damage') on the rights of third parties under EU law. Even so, the case provides an interesting example of the technique of human rights-friendly interpretation, in the sense that elements of proportionality and human rights protection were interpreted into a sanctions regime. Neither Resolution 1267 and subsequent resolutions nor the EU implementation measures explicitly provide for such protection in instances where the sanctions regime affects the rights of unlisted third parties. Even so, the ECJ was prepared to read it into the sanctions regime.<sup>35</sup>

If one considers the approach of the CFI in the *Yusuf* and *Kadi* decisions in light of the aforementioned analysis, it appears that the CFI did not succeed in striking a balance between the presumption of legality attached to Security Council resolutions and respect for human rights obligations. The CFI essentially concluded that the Security Council acted *intra vires*, but this conclusion was reached in a manner that was confusing both in relation to its interpretation of the purposes and principles of the Charter, as well as its treatment of *ius cogens*. The CFI acknowledged that article 24(2) of the Charter obliges the (organs of the) United Nations to respect the purposes and principles of the Charter, which include respect for human rights and fundamental freedoms.<sup>36</sup> However, at the same time the CFI equated the human rights standards contained in the purposes and principles to *ius cogens* obligations and in this fashion severely limited their scope.<sup>37</sup> This is rather perplexing, since the purposes and principles are drafted in broad language. In addition, the concept of *ius cogens* did not yet exist at the time the Charter was adopted, as it was only introduced into positive law through article 53 of the Vienna Convention on the Law of Treaties of 1969.<sup>38</sup>

Therefore, it seems unconvincing to reduce the scope of the purposes and principles of the Charter to a narrow category of norms, the existence of which was only formally acknowledged at a much later point in time. One should also consider the fact that the concept of *ius cogens* was first and foremost introduced to regulate interstate treaties, begging the question of whether it even applies to decisions of international organisations and their organs.<sup>39</sup> Current legal doctrine tends to answer this question in the affirmative, as anything else would allow states to circumvent their most fundamental obligations by creating an international organisation.<sup>40</sup> Nevertheless, one would have expected the CFI to address this issue directly.

One can further criticise the CFI for its over inclusive categorisation of *ius cogens* norms, considering both the prohibition of arbitrary deprivation of property and the immunity of the United Nations (including decisions of its organs) within the corpus of *ius cogens* obligations.<sup>41</sup> At no point does the CFI indicate any authority for these conclusions. One should keep in mind that neither the International Covenant for Civil and Political Rights (ICCPR)<sup>42</sup> nor the International Covenant for Economic, Social and Cultural Rights (ICESCR)<sup>43</sup> guarantees the right to property.<sup>44</sup> Although the right was subsequently included in the three regional human rights instruments,<sup>45</sup> it remains contested whether it has acquired the status of customary international law, let alone *ius cogens* status.<sup>46</sup> If the right to property itself has not acquired *ius cogens* status, it seems unconvincing to argue that the arbitrary deprivation of the right to property has done so.

Similarly, the immunity enjoyed by the United Nations, as specified in article 105(1) of the Charter,<sup>47</sup> does not belong to the corpus of *ius cogens* norms. The article was intended to protect the organisation against direct action in domestic (or regional) courts, which must be distinguished from the case at hand, which concerns the incidental review of a binding decision taken by an organ of the United Nations.<sup>48</sup> In essence therefore, the CFI's analysis of the human rights obligations binding on the Security Council is both under-and over-inclusive. It is under-inclusive insofar as the CFI reduces the purposes and principles of the Charter to *ius cogens* obligations. However, by simultaneously attaching *ius cogens* status to obligations which are not recognised as such in state practice, the CFI's analysis is over-inclusive.

## 2.2 *Judicial review of the application of Security Council decisions*

Insufficient reasoning also plagues the CFI's conclusion that it would not have the right to review incidentally binding Security Council

resolutions.<sup>49</sup> First, the CFI failed to explain if and to what extent the existing practice of the CFI and ECJ in this regard, as well as those of other (international) courts and tribunals, would be relevant to its decision. Second, it failed to explain why an exception to its 'non-competence' would exist in relation to peremptory norms of international law. At this point it is necessary to mention that similar deficits plague the reasoning of the ECJ. Although its decision turned on EU law, the ECJ did note in rather categorical terms that the Community judicature did not have the jurisdiction to review incidentally the lawfulness of a decision adopted by an international body. Moreover, the ECJ was unwilling to accept that any exception existed in relation to the compatibility of the international decisions with peremptory norms of international law.<sup>50</sup>

Before engaging in analysis of these points, it is worth recalling that when conducting incidental review, domestic and regional courts may be confronted with several different dimensions of a hierarchy of norms. The first concerns the more traditional question of the standing of international law in the domestic legal order, whereas the second (and for the purposes of this article more relevant) dimension concerns the existence of a normative hierarchy within international law itself. Incidental review implies that the regional or domestic court is first of all concerned with reviewing or interpreting domestic or regional implementation measures – a competence that is regulated by its own domestic or regional legal order. This legal order may also give an indication of the extent to which international law overrides domestic law. From the perspective of public international law, the dominant view is that international law takes precedence over all domestic law, including states' constitutions.<sup>51</sup> Even so, it remains debatable whether this position corresponds with state practice. The relationship between international and constitutional law is not always (explicitly) clarified in domestic constitutions and, where it is clarified, the picture is varied in terms of whether international law takes precedence. These conflicting positions are illustrated by the *Kadi* case itself, since the CFI determined that international law overrides EU law, whilst the ECJ gave preference to fundamental principles of EU law, which it treated as a municipal legal order.<sup>52</sup>

In those instances where the domestic or regional court gives preference to international law, it will also engage in an interpretation of international law. This, in turn, may lead to a domestic or regional court reviewing whether a hierarchy exists amongst different international obligations. In these instances the question arises if and to what extent such a review is permitted under international law. In the European context, such review

has become common where the relationship between states' human rights obligations under the European Convention of Human Rights (ECHR)<sup>53</sup> and other treaty obligations is concerned.<sup>54</sup> The fact that neither the European Court of Human Rights (ECtHR) nor the respective domestic courts were explicitly set up with the purpose of reviewing different sets of international obligations against one another has not prevented them from developing this competence in practice. Less common and more controversial is the incidental review of Security Council obligations by domestic and regional courts. This review is complicated by the fact that the courts are not necessarily confronted solely with the balancing of different treaty obligations pertaining to the same state. They can also be called upon to determine the legality of the acts of an international organisation, which is itself a product of one of the treaties in question.

Recent practice of the Community judicature indicates that one can identify three situations of incidental review of Security Council resolutions. In the first scenario, the ECJ had to interpret the scope of the EU's implementation measures, and incidentally that of the relevant Security Council resolutions. However, in this situation neither the legality of the measures nor that of the Security Council resolutions were questioned. In the second scenario, the ECJ was confronted with challenges to the legality of the implementing measures, but could avoid an incidental review of the legality of the respective Security Council measures. In this instance the Security Council measures were formulated in broad terms, as a result of which those responsible for their implementation had discretion as to how to achieve the desired result. The third scenario concerned disputes about the legality of measures of implementation that incidentally also touched on the legality of the respective Security Council resolutions. This was the case where the relevant Security Council resolutions were formulated in narrow terms that did not *prima facie* allow the member states (or the EU) any discretion in relation to their implementation. As far as the first two scenarios are concerned, the ECJ has not hesitated to exercise its competence in the past, even though such review was not provided for under the Charter. This suggests that international law has developed in a manner that permits domestic and regional courts some discretion in interpreting or even reviewing Security Council resolutions.

An example of the first scenario is found in the *Bosphorus* decision.<sup>55</sup> In that instance, the ECJ had to determine the scope of EC Regulation 990/93<sup>56</sup> and, in particular, whether it authorised the impoundment by the Irish authorities of two aircraft leased to the applicant by the former

Yugoslav airline JAT. As the respective EC regulation implemented a Security Council sanctions regime against the former Federal Republic of Yugoslavia, the ECJ also had to determine the scope of Security Council Resolution 820 of 17 April 1993.<sup>57</sup> The ECJ also took the purpose of the sanctions regime into account when concluding that the limitation of the applicant's right to property under international law (he effectively lost three years of a four-year lease) was proportionate under the circumstances.<sup>58</sup> However, neither the legality of EC Regulation 990/93 nor the sanctions regime from which it resulted was in question.

The second scenario is exemplified in the *Segi* case.<sup>59</sup> In this instance the ECJ reviewed the EU measures implementing Security Council Resolution 1373 of 28 September 2001,<sup>60</sup> which, *inter alia*, requested United Nations member states to freeze all funds and other financial assets or economic resources of those involved in terrorist activities.<sup>61</sup> In order to ensure consistent implementation of this resolution across member states, the EU implemented this resolution through a series of measures, which *inter alia* resulted in the blacklisting of the Basque organisation *Segi*.<sup>62</sup> This organisation filed an action for damages arising from the implementation measures, on the basis that those measures violated their international right to judicial protection in accordance with article 6(2) of the Treaty on European Union (EU Treaty).<sup>63</sup> In their view, the violation consisted in the fact that they had no means of challenging *Segi*'s inclusion on the blacklist, due to the nature of the Common Positions that were adopted under the so-called third pillar of the EU Treaty. Effectively, this claim also constituted an indirect challenge to the validity of the relevant Common Position.<sup>64</sup>

In reviewing the matter and concluding that EU law indeed provided for an avenue of legal protection in this case, the ECJ emphasised the applicants' right to a remedy and access to a court of law.<sup>65</sup> However, it is important to note that Security Council Resolution 1373 clearly left states the discretion to implement the obligations contained therein in accordance with international human rights obligations. For example, it did not identify the persons to be blacklisted in a manner that appeared to suspend any avenue of (domestic) legal protection for such individuals.<sup>66</sup> As a result, the question of whether the respective implementing measures were in accordance with the EU standards of legal protection could be addressed without raising the issue of the possible illegality of Security Council Resolution itself.

The *Yusuf* and *Kadi* cases represent the third scenario mentioned above. In these instances the CFI and ECJ were confronted with a request

for an annulment of EC regulations. However, due to the manner in which these regulations implemented a Security Council sanctions regime, the request for annulment unavoidably raised issues concerning the legality of the Security Council measures. As these regulations were near literal transpositions of the relevant Security Council resolutions, any review of the substance of the challenged regulations necessarily amounted to indirect review of the relevant Security Council measures.<sup>67</sup>

It is surprising that the both the CFI and the ECJ reached the conclusion about their own lack of competence to review the legality of Security Council resolutions adopted under Chapter VII of the Charter in a rather categorical fashion.<sup>68</sup> One would have expected these courts to justify their power to both review the *scope* of Security Council decisions and *balance* these obligations against other international (human rights) obligations of states, while distinguishing this from the power to review the *legality* of such decisions, a power which they did not have. In addition, both the CFI and ECJ could have considered the potential relevance of previous, well-known international decisions that confirmed the power of the respective international courts or tribunals to review the legality of Security Council resolutions. The first such case concerned the *Namibia* opinion of the International Court of Justice (ICJ),<sup>69</sup> in which the ICJ confirmed the power of the General Assembly and the Security Council to terminate a League of Nations mandate. In doing so, the ICJ effectively reviewed the legality of binding Security Council resolutions terminating South Africa's mandate over (then) South-West Africa. Whilst acknowledging that it was not a court of appeal, the ICJ nonetheless – in the exercise of its judicial function – considered the validity of the respective Security Council resolutions and concluded that they were adopted in accordance with the Charter.<sup>70</sup>

Similarly, in the *Tadić* decision,<sup>71</sup> the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), itself a sub-organ of the Security Council, reviewed the legality of the Chapter VII resolution by means of which the Security Council created the ICTY. Relying *inter alia* on the *Namibia* opinion of the ICJ, the Appeals Chamber concluded that it had the inherent jurisdiction to determine its own jurisdiction, which effectively amounted to the competence to review the legality of the relevant Security Council resolution 'in the exercise of its judicial function'. Of course one has to acknowledge that the Community judicature is not in any way bound by these decisions. What is more, the nature of the ICJ and the ICTY is very different from that of the CFI and ECJ. Whereas the two former courts are international institutions, the CFI

and ECJ, given their centralised nature, arguably bear more resemblance to municipal courts. Even so, one should keep in mind that all of these institutions are independent judicial bodies, none of whose statutes explicitly provide for the competence to review the legality of Security Council resolutions. A coherent and systematic approach to international law would have required the CFI and ECJ to explain whether this fact has any bearing on their own competence and if so (or if not), why (not). Moreover, if one accepted that no power of review existed, one would also have expected an explanation as to why an exception would exist in relation to *ius cogens* norms. In this instance the ECJ was more consistent than the CFI, since it rejected the CFI's submission that an exception existed in relation to peremptory norms of international law.

### 2.3 *The right to a fair hearing*

#### 2.3.1 The content of a right to a fair hearing

As indicated in Section 1, the human right that was arguably restricted most severely by the implementing measures pertaining to Resolution 1267 and subsequent resolutions is that of the right to a fair trial. The substance of this right (of which the core content is binding for the United Nations)<sup>72</sup> is defined in article 14(1) of the ICCPR. That article provides that, in the determination of any criminal charges against individuals, or of their rights and obligations in a civil suit of law, everyone is entitled to a fair and impartial hearing by a competent, independent and impartial tribunal established by law.

Although there has not been much dispute about the fact that Resolution 1267 and subsequent resolutions affect the civil limb of article 14(1), the question of whether the freezing of assets undertaken in accordance with these resolutions constituted a sanction belonging to the criminal sphere has been more controversial.<sup>73</sup> However, recent jurisprudence of the UK House of Lords pertaining to a right to a fair trial as guaranteed by article 6(1) of the ECHR indicates that the level of protection provided respectively under the criminal and civil limbs of this article would not necessarily differ significantly.<sup>74</sup> There is sufficient similarity in the wording of article 6(1) of the ECHR and article 14(1) of the ICCPR to apply the decision by analogy in the present context.<sup>75</sup> The relevance is increased by the fact that the case relates to precautionary measures adopted in order to prevent terrorism, as is the case with the Al-Qaeda sanctions regime.



The so-called *Control Orders* decision of the House of Lords illustrated that a fair trial, whether in a civil or criminal context, implies a core minimum protection of access to an independent, impartial and even-handed judicial hearing.<sup>76</sup> In question were so-called non-derogating control orders imposed under the Prevention of Terrorism Act 2005 (UK)<sup>77</sup> which confined targeted individuals to their homes for eighteen hours per day. The orders were adopted on the basis of a reasonable suspicion of their involvement in terrorism. Although the individuals had the right to challenge the legality of the order, neither the individuals nor the Special Advocates whom the state appointed on their behalf had access to the evidence which led to the imposition of the order in the first place.<sup>78</sup>

By a majority decision, the House of Lords did not accept that the (cumulative effect of the) control order constituted a criminal charge, as there was no assertion of criminal conduct but merely a foundation of suspicion. In addition, the purpose of the order was preventative, and not punitive or retributive.<sup>79</sup> The House of Lords confirmed that the proceedings fell within the civil limb of article 6(1) of the ECHR,<sup>80</sup> moreover, it explicitly relativised the difference between the criminal and civil limb of that article by emphasising the need for procedural protection commensurate with the gravity of the potential consequences – regardless of whether one is dealing with the criminal or civil dimension of article 6(1).<sup>81</sup>

Acknowledging the severe nature of the control orders at stake, the House of Lords further described the right to be heard in judicial proceedings as being of essential importance. It underlined that, whilst the right was not absolute, it contained a core, irreducible and non-derogable minimum.<sup>82</sup> In the present circumstances this core content was undermined as the affected individuals were effectively confronted by a bare, unsubstantiated assertion that they could only deny. The justifiability of the control orders depended exclusively on closed (inaccessible) materials, which could not be effectively challenged by the controlled persons. The situation was therefore distinguishable from cases where the thrust of the case was conveyed to the controlled person by a summary of statements that have been made anonymous.<sup>83</sup>

In essence therefore, the House of Lords confirmed that the ability to effectively challenge allegations of involvement in terrorism constitutes an irreducible minimum of the right to a fair trial, regardless of whether one is dealing with a civil suit or criminal charge.<sup>84</sup> If one applies this reasoning analogously to article 14(1) of the ICCPR, a similar core content of the right to a fair hearing would constitute an outer limit for

Security Council action. Consequently, Security Council resolutions authorising the freezing of individual assets as a preventative measure against terrorism have to provide for some form of independent and impartial *ex post facto* judicial review that enables the affected individuals to be informed about the gist of the case against them. An unsubstantiated assertion supported by inaccessible evidence would not meet this criterion. This would be the case regardless of whether one regards the freezing of assets as a criminal charge or civil suit in light of the severe consequences for the listed individuals.<sup>85</sup> Where a Security Council resolution does not explicitly provide for such review, one would have to assume that it is implicit in the resolution so as to prevent the conclusion that the Security Council adopted an illegal resolution.

### 2.3.2 The CFI's analysis of the Al-Qaeda Sanctions Committee's (de-) Listing procedure

An examination of the Al-Qaeda Sanctions Committee's procedures reveals that they do not adhere to the core of the elements of a fair trial, notably those of access to a judicial tribunal, impartiality, independence and even-handedness. The CFI's analysis reflects a poor understanding of the procedure itself as well as its impact on international human rights standards to which the United Nations itself is bound.

According to the Guidelines of the Sanctions Committee for the Conduct of its Work (the Guidelines),<sup>86</sup> affected individuals do not have a right to be heard before the sanctions committee and can submit requests for de-listing to the sanctions committee only via their states of citizenship or residence,<sup>87</sup> or the so-called Focal Point in the Secretariat of the United Nations. The Focal Point, which was created in December 2006, does not engage in any substantive review of the request. It merely serves as an administrative unit that passes on de-listing requests to the sanctions committee.<sup>88</sup> Whether the request for de-listing will actually be considered by the sanctions committee depends on the willingness of the state of residence or citizenship to exercise diplomatic protection with the sanctions committee.<sup>89</sup> Although public international law acknowledges the right of states to exercise diplomatic protection, it does not oblige them to do so.<sup>90</sup> In this context one has to note that subsequent to the *Yusuf* and *Kadi* decisions, the CFI decided that EU law obliges the EU member states to exercise such diplomatic protection in relation to blacklisted individuals in their territory.<sup>91</sup> However, this does not alter the fact that this avenue of diplomatic protection does not amount to even-handed, independent and impartial judicial protection.

First, the affected individuals have no access to the information upon which their inclusion in the sanctions list was based, as it is in the discretion of the state requesting the listing whether such information has to be made public.<sup>92</sup> The listed individuals therefore do not have access to the thrust of the case against them. The sanctions committee also reaches its decisions by means of political consensus, as a result of which the objection of one member can prevent the removal from the list.<sup>93</sup> In addition, the committee effectively reviews its own decision; the same members who initially suspected individuals of involvement in international terrorism consider the accuracy of that judgment.<sup>94</sup> Where the sanctions committee refuses to de-list individuals, the result is that they remain blacklisted for an indefinite period of time as there is no sunset clause attached to the blacklisting procedure.<sup>95</sup> In order to introduce a sunset clause, a new Chapter VII resolution would be necessary, which could, in turn, be prevented by a veto from one of the permanent members.

In light of these considerations, it is unconvincing for the CFI to claim that the Guidelines guarantee an effective de-listing procedure and that rights of individuals are only affected for a limited period of time.<sup>96</sup> Similarly, the submission that the Guidelines take the fundamental rights of the listed persons into account as much as possible<sup>97</sup> seems apologetic at best since the Security Council could have done much more to ensure the right to a fair hearing. It could, for instance, have instituted a quasi-judicial body conforming to the standards of a fair trial to deal with complaints of listed individuals, or alternatively it could have explicitly authorised decentralised judicial review of such individuals along the lines of Resolution 1373.<sup>98</sup> However, the fact that the Security Council did not follow these options does not necessarily mean that no avenue for judicial review existed. As explained in Section 2.3.1, the CFI could have adopted the interpretation endorsed in this article that the Al-Qaeda sanctions regime implicitly authorised judicial review in a decentralised fashion. Instead, by assuming the opposite – namely that the de-listing procedure was the only remedy available to the listed individuals – it legitimated a sanctions regime in violation of the Charter purposes and principles.<sup>99</sup>

### 3. Assessment in light of subsequent developments

In light of the above analysis one can conclude that the reasoning of the CFI in the *Yusuf* and *Kadi* decisions is convoluted and unconvincing.

However, this has not prevented these decisions from significantly influencing the approach of other courts in the region towards the emerging hierarchy of norms in international law and the role of domestic courts in enforcing such a hierarchy. At first glance, the *Yusuf* and *Kadi* decisions have strengthened the notion of a hierarchy in international law by imposing an outer limit on Security Council action (compliance with *ius cogens* norms). They have also confirmed (a limited) role for domestic and regional courts in enforcing this hierarchy.

Closer scrutiny reveals that this development does not result in any meaningful human rights protection when human rights infringements are likely to result from binding Security Council resolutions. Equating the outer limits for Security Council action with the very small number of *ius cogens* obligations currently acknowledged under international law makes these limits ring hollow in the ears of those concerned about the Security Council's increasing encroachment on individual human rights. It is also likely to spark attempts to elevate all human rights to *ius cogens* status in order to curb the Security Council's powers, a move that may ultimately devalue the concept.

While the subsequent reaction of the ECJ to the CFI's decision provides for comprehensive human rights protection for individuals affected by Security Council sanctions at a EU level, it is not an entirely satisfactory solution. As its reasoning was based entirely on the nature of the EU as an autonomous legal order in which certain fundamental (human rights) values had to be protected, it leaves the question of whether the Security Council is bound by more than *ius cogens* obligations unanswered. Stated differently, it is possible to argue that the CFI's reasoning pertaining to article 103 of the Charter and its relationship with *ius cogens* norms on the one hand, and the purposes and principles of the Charter on the other remains valid as it has not (yet) been overturned.

This, in turn, implies that from the perspective of public international law, EU member states that provide extensive judicial protection to individuals when implementing Resolution 1267 and its follow-up resolutions would violate Security Council obligations and could face state responsibility claims on the international level. This perception is strengthened by the fact that the Swiss Federal Supreme Court already adopted the reasoning of the CFI in December 2007, in a case in which the facts were similar to that of the *Yusuf* and *Kadi* decisions.<sup>100</sup> For this reason, it would have been preferable if the ECJ had also overturned the deficient reasoning of the CFI in relation to international law, on the basis that the Security Council itself is bound by the core content of the

international human rights standards developed under the auspices of the United Nations.

Moreover, such clarification also has practical relevance on the domestic level. As long as the CFI's analysis regarding international law is not refuted, it can result in different levels of human rights protection within EU member states when implementing Security Council resolutions – depending on whether the respective Security Council measures affect Community law. In accordance with the ECJ decision in *Kadi*, member states would have to live up to the extensive fundamental human rights protection required by Community law whenever they give effect to Security Council measures that affect the Common Market.<sup>101</sup> However, when giving effect to Security Council decisions that fall outside the scope of community law, they would be able to effectively suspend fundamental human rights protection, as long as this does not result in a violation of a *ius cogens* obligation. In this context the *Al-Jedda* case, which was decided before English courts, provides an interesting example.

This case concerned an entirely different issue, namely whether the detention without trial on the basis of Security Council Resolution 1546 of 8 June 2004<sup>102</sup> of a British/Iraqi national by British forces in Iraq in 2004 violated the extraterritorial application of article 5(1) of the ECHR.<sup>103</sup> Following the reasoning of the *Yusuf* and *Kadi* decisions,<sup>104</sup> the Court of Appeal concluded that there was no such violation. This resulted from the authorisation to use 'all necessary means' in Iraq in Resolution 1546,<sup>105</sup> which served as a basis for deviating from the protection provided by rights in the ECHR.<sup>106</sup> Subsequently on appeal, the House of Lords<sup>107</sup> did not review this part of the Court of Appeal's reasoning, aside from confirming that the Security Council is bound by *ius cogens*. As a result, one could interpret its decision as an approval, in principle, of the Court of Appeal's reasoning that the Security Council is only bound by peremptory norms of international law and no more.

At this point it is worth noting that, although the House of Lords did accept that Resolution 1546 provided a legal basis for internment – a ground for detention which is not covered by article 5(1) of the ECHR – it was not inclined to accept a complete displacement of the protection provided by article 5, and determined that it should be applied as far as possible.<sup>108</sup> Of particular interest is the extent to which the guarantees provided by article 5(4) of the ECHR would still be applicable in instances where individuals were interned in Iraq for security purposes on the basis of Resolution 1546. Unfortunately this particular question was not under debate before the House of Lords at the time, and is

unlikely to be resolved in the near future. On the one hand, a convincing argument can be made that Resolution 1546 did not intend to have the effect of suspending the protection provided by article 5(4) of the ECHR. The text of this resolution explicitly calls for the promotion and the protection of human rights and the maintenance of international peace and security in accordance with international law.<sup>109</sup> However, even though this line of argument might result in better judicial protection for those prisoners detained on the basis of Resolution 1546 as such, it would not clarify – as a matter of principle – whether the Security Council could suspend human rights protection entirely. It would still make it possible for EU member states to provide different levels of human rights protection when implementing Security Council measures, depending on whether or not those measures affect areas governed by Community law.

These developments illustrate that judicial review of Security Council measures by regional and domestic courts has thus far raised as many (if not more) questions than it attempted to answer. This may strengthen the hand of those opposing such review, claiming that it results in legal uncertainty and an undermining of the efficacy of Charter obligations.<sup>110</sup> In addition, domestic or regional courts can only provide limited relief. The regional or domestic determination of illegality of a Security Council resolution on the basis of international law, or a determination of its non-applicability due to incompatibility with fundamental values of domestic law or EU law, could not result in an annulment of that resolution. It remains in force on the international level – even if not applied on the domestic or regional level – until such a time as it is revoked by the Security Council itself.

However, one should also keep in mind that the fact that decisions of domestic or regional courts are not universally binding and have no formal effect outside their own jurisdiction does not necessarily mean that they have no practical effect on other jurisdictions or on the international level. If nothing else the *Kadi* decision of the CFI has illustrated the potential spillover effect of a regional decision pertaining to international law on various domestic jurisdictions and in very different contexts. Courts are keen to take note of developments in other jurisdictions, regardless of whether this stems from a legal obligation.

Moreover, the uncertainties resulting from the *Kadi* jurisprudence may be a necessary element in the dialogue that is developing between domestic and regional courts, as well as these courts and (international) political organs in an era where the infringement of human rights

increasingly originates from within international organisations. In time, this dialogue may result in more underlying consensus between the different actors, less differences in interpretation and better protection of individual human rights by international organisations. After all, much of the current confusion could be removed if the Security Council itself had sufficient political will to provide for an effective judicial review mechanism at the level of the United Nations, and in accordance with the human rights standards developed by the organisation itself.<sup>111</sup> In such a situation, domestic and regional courts would be much less inclined to engage in stringent judicial review of Security Council decisions, and the risk of contradictory interpretations would be significantly reduced.

### Notes

1. See Erika de Wet and André Nollkaemper, 'Review of the Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 171; See generally Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004); Cf. L. M. Hinojosa Martinez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *International & Comparative Law Quarterly*, 334.
2. de Wet and Nollkaemper, above n 1, 184.
3. Ibid. 195. This issue is taken up again below in Section 2.2.
4. Art. 7(2) of the Charter of the United Nations provides as follows: 'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter'.
5. The text of these and all other United Nations human rights documents cited in this article are available at [www.unhchr.ch/data.htm](http://www.unhchr.ch/data.htm).
6. See *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253.
7. de Wet and Nollkaemper, above n 1, 173.
8. These include the Universal Declaration of Human Rights of 10 December 1948; the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979 and the Protocol thereto; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984 and the Protocol thereto; the International Convention on the Rights of the Child of 20 December 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990; and the Convention on the Rights of Persons with Disabilities of 13 December 2006 and the Protocol thereto.
9. See de Wet, above n 1, 2, and in particular ch 4.
10. *Yusuf and Al Barakaat International Foundation v. Council and Commission* (T-306/01) [2005] ECR II-3353.

11. *Kadi v. Council and Commission* (T-315/01) [2005] ECR II-3649 (*Kadi*).
12. *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P), judgment of 3 September 2008 (*Kadi* (ECJ)).
13. SC Res 1267, 39 ILM 235 (2000).
14. SC Res 1333, 40 ILM 509 (2001).
15. See, *inter alia*: 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 implementing the targeted sanctions of Resolutions 1267 (1999), 1333 (2000) and 1390 (2002).
16. SC Res 1333 (2000) above n 14, [8(c)]; SC Res 1390, 41 ILM 511 (2002), [2(a)], [5(a)].
17. SC Res 1390 (2002), above n 16.
18. M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanctions Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities' (2006) 19 *Leiden Journal of International Law* 755; Cf J. Almqvist, 'A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions' (2008) 57 *International & Comparative Law Quarterly* 318.
19. See, eg, Common Position 2002/402, above n 15, 1 and Regulation 881/2002, above n 15, 2. See also Bulterman, above n 18, 758.
20. *Kadi* (ECJ), above n 12, [316], [322], [326]; See also Advocate General Poirares Maduro, 'Advocate General's Opinion in Case C-402/05', [curia.europa.eu/en/content/juris/index.htm](http://curia.europa.eu/en/content/juris/index.htm) at 19 November 2008.
21. *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft*, BGE, No 1A 45/2007, [www.admin.ch/ch/d/sr/sr.html](http://www.admin.ch/ch/d/sr/sr.html) at 19 November 2008 (*Nada*).
22. See *R (on the application of Al-Jedda) v. The Secretary of Defence*, [2005] EWHC 1809. For subsequent developments on appeal before the House of Lords, see below n 103.
23. For a discussion of the CFI's treatment of European Community Law in this decision see Bulterman, above n 18, 753; A. Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 *Max Planck Yearbook of United Nations Law* 178-9.
24. See also Bulterman, above n 18, 764; Orakhelashvili, above n 23, 149.
25. *Kadi*, above n 11, [183]-[184]; *Nada*, above n 21, [5]; See also *Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Provisional Measures)* [1992] ICJ Rep 231 [39]; Christian Tomuschat, 'Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*' (2006) 43 *Common Market Law Review* 541.



26. See de Wet and Nollkaemper, above n 1, 186–7; See also Bulterman, above n 18, 754.
27. *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 168.
28. This argument can find support in the Report of the Study Group of the International Law Commission, *Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law*, UN GAOR, 53rd session, UN Doc A/CN.4/L.682 (2006).
29. See also J. E. Alvarez, ‘The Security Council’s War on Terrorism: Problems and Policy Options’ in Erika de Wet and André Nollkaemper (eds.), *Review of the Security Council by Member States* (2003) 119, 134.
30. *Gerda Möllendorf and Christiane Möllendorf-Niehuus* (C-117/06) [2008] 1 CMLR 11 (*Möllendorf* decision).
31. *Ibid.* [24].
32. *Ibid.* [34], [52].
33. The purchase money would then have to remain in a frozen account for as long as the buyers remained blacklisted; See *Ibid.* [70].
34. *Ibid.* [76], [81].
35. Some might question whether the situation of third parties who are indirectly affected by the sanctions regime would at all be comparable with that of persons forming the direct object of the sanctions regime. However, this author submits that the *Möllendorf* case remains an interesting example of how a court can read human rights protections into a sanctions regime.
36. *Kadi*, above n 11, [228]–[229]; See also *Nada*, above n 21, [5.4], [7].
37. For the very restricted list of *ius cogens* norms generally recognised as such, see International Law Commission, *Report of the International Law Commission*, UN GAOR, 61st session, Supp. No. 10, UN Doc A/61/10, 421. Cf. Orakhelashvili, above n 23, 184 who defines *ius cogens* in a much broader fashion.
38. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 1155 UNTS 331 (entered into force 27 January 1980). Article 53 determines that: ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’
39. The CFI assumed that this was the case in the *Kadi*, above n 11, [226].
40. See Erika de Wet, ‘The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law’ (2004) 14 *European Journal of International Law* 1; See also Tomuschat, above n 25, 546.
41. *Kadi*, above n 11, [242], [288]. The term arbitrary is rather perplexing in itself, as it remains unclear what the CFI means by this.
42. International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
43. International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
44. Tomuschat, above n 25, 547.
45. See art. 1 of the First Protocol to the European Convention on Human Rights, opened for signature 20 March 1952, 213 UNTS 262 (entered into force 18 May

- 1954); art. 21 of the Inter-American Convention on Human Rights, opened for signature 23 May 1969, 1144 UNTS 123 (entered into force 18 July 1978); and art. 14 of the African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 21 ILM 58 (1982) (entered into force 21 October 1986).
46. Tomuschat, above n 25, 547.
  47. The basis is not art. 25 or 103 of the Charter as suggested in *Kadi*, above n 11, [288]; See also Tomuschat, above n 25 550.
  48. See also Bulterman, above n 18, 772.
  49. *Kadi*, above n 11, [221], [225]–[6]; See also *Nada*, above n 21, [6.2].
  50. *Kadi* (ECJ), above n 12, [287].
  51. See, eg, *Treatment of Polish Nationals and Other Persons of Polish Origin in the Danzig Territory (Advisory Opinion)* [1932] 1932 PCIJ (Ser A/B) No 44.
  52. *Kadi* (ECJ), above n 12, [285], [308], [316].
  53. European Convention on Human Rights, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
  54. For example, both the European Court of Human Rights (ECtHR) and domestic courts have been confronted with the question of whether the obligation not to subject someone to cruel, inhuman and degrading punishment in accordance with art. 3 of the ECHR would override the obligation to extradite a suspect in accordance with an extradition treaty to which a state is party. See, e.g., *Soering v. The United Kingdom*, 11 EHHR 439 (1989); *Netherlands v. Short*, Hoge Raad 30 March 1990, [7.4], excerpted and translated in (1990) 29 *International Legal Materials* 1375.
  55. *Bosphorus Hava Yollari Turzüm ve Ticaret AS v. Minister of Transport, Energy and Communications, Ireland and the Attorney General* (C-84/85) [1996] ECR I-3953; See also the *Möllendorf* decision, above n 30.
  56. EC Regulation 990/93 of 11 July 1994 [1993] OJ L 102, 14.
  57. SC Res 820 (1993) [www.un.org/Docs/scres/1993/scres93.htm](http://www.un.org/Docs/scres/1993/scres93.htm) at 19 November 2008; *Bosphorus* decision, above n 55, [15].
  58. *Bosphorus* decision, above n 55, [26]; See also Bulterman, above n 18, 767.
  59. *Segi, Araitz Zubimendi Izaga, Aritza Galarraga v. Council of the European Union* (C-355/04 P) [2007] ECR I-01657.
  60. SC Res 1373, 40 ILM 1278 (2001).
  61. See also Bulterman, above n 18, 757.
  62. See, e.g., Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism [2001] OJ L 344, 90; Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism [2001] OJ L 344, 70; Decision 2001/927/EC Establishing the List Provided for in art. 2(3) of Council Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism [2001] OJ L 344, 83; Common Position 2002/340/CFSP Updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism [2002] OJ L 116, 75; Common Position 2002/462/CFSP Updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2002/340/CFSP [2002] OJ L 160, 32.
  63. Treaty on European Union, opened for signature 7 February 1992, OJ C 224/1 (entered into force 1 November 1993).

64. *Segi* decision, above n 59, [52].
65. *Ibid.* [51]–[52], [54].
66. See in particular *Segi*, above n 59, [57] (Advocate General Mengozzi); See also Bulterman, above n 18, 757.
67. Tomuschat, above n 25, 543.
68. A similar approach is found in *Nada*, above n 21, [6.2].
69. *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16.
70. See also Tomuschat, above n 25, 545.
71. *Prosecutor v. Dusko Tadić a/k/a 'Dule' (Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction)* (IT-94-1-AR72) (2 October 1995) [27].
72. See above section 1.1.
73. Elsewhere I have answered this question in the affirmative in light of the punitive nature, severity, as well as the stigmatisation resulting from the sanctions, see de Wet and Nollkaemper, above n 1, 177.
74. *Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF* [2007] UKHL 46 (*Control Orders* decision).
75. The relevant sentence of art. 14(1) of the ICCPR, see above n 42, reads as follows: 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' The relevant sentence of art. 6(1) of the ECHR, see above n 53, reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
76. D. Marty (Rapporteur) Committee on Legal Affairs and Human Rights, 'UN Security Council and European Union Blacklists' to the Parliamentary Assembly of the Council of Europe, 16 November 2007, Doc 11454 [52], [assembly.coe.int](http://assembly.coe.int) at 19 November 2008; See also de Wet and Nollkaemper, above n 1, 177–8.
77. Prevention of Terrorism Act 2005 (UK).
78. *Control Orders* decision, above n 74, [65] (Baroness Hale of Richmond).
79. *Ibid.* [24] (Lord Bingham of Cornwall).
80. *Ibid.* [15] (Lord Bingham of Cornwall).
81. *Ibid.* [24] (Lord Bingham of Cornwall), [657] (Baroness Hale of Richmond).
82. *Ibid.* [28]–[30] (Lord Bingham of Cornwall); See also [32], [43].
83. *Ibid.* [41], [43] (Lord Bingham of Cornwall), [85] (Lord Carswell), [46] (Lord Brown of Eaton-Under-Heywood).
84. See also *Kadi* (ECJ), above n 12, [433], which comes to a similar conclusion although without reference to the *Control Orders* decision.
85. See D. Marty (Rapporteur), above n 76.
86. Guidelines of the Sanctions Committee for the Conduct of its Work (pursuant to Resolution 1267) (12 February 2007), [www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf) at 12 September 2008.
87. *Ibid.* 92 [8(e)].
88. *Ibid.* [8(d)]. The Focal Point was created in SC Res 1730 of 19 December 2006, [www.un.org/Docs/sc/unsc\\_resolutions06.htm](http://www.un.org/Docs/sc/unsc_resolutions06.htm) at 19 November 2008, [1], and was not yet

- in existence at the time of the *Yusuf* and *Kadi* decisions. See C Feinäugle, 'Die Terroristenlisten des Sicherheitsrats', (2007) 40 *Zeitschrift für Rechtspolitik* 75.
89. Guidelines, above n 86, [8(d)(vi)], [8(e)].
  90. International Law Commission, above n 37; See also Bulterman, above n 18, 756.
  91. See *Ayadi v. The Council* (T-253/02) Judgment of July 12, 2006, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0253:EN:HTML at 19 November 2008; *Hassan v. The Council* (T-49/04) Judgment of July 12 2006, www.astrid-online.it/uef/Documenti/Giurisprud/TPI\_Hassan\_luglio06.pdf at 19 November 2008.
  92. Guidelines, above n 86, [5(g)]; See also *Kadi* (ECJ), above n 12, [323]–[325].
  93. Guidelines, above n 86, [4(e)], See also Bulterman, above n 18, 756.
  94. Guidelines, above n 86, [3(b)].
  95. SC Res 1333 (2000) above n 14 [23]–[24], initially imposed these measures for 12 months. However, thereafter SC Res 1390 (2002) above n 16, [3], extended them for an indefinite period of time.
  96. *Kadi*, above n 11, [274]; See also *Ayadi*, above n 91, [142]–[143]. In *Nada*, above n 21, [8.3], the Swiss Federal Supreme Court acknowledges that the procedures provided for the sanctions committee do not satisfy the requirements of art. 6(1) of the ECHR and art. 14(1) of the ICCPR. It nonetheless accepts that these procedures are the only avenue of redress available to the listed individuals.
  97. *Kadi*, above n 11, [265]; *Ayadi*, above n 91, [140].
  98. See also United Nations Commission of Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/61/267 (2006) [39]. The Special Rapporteur is of the view that if there is no adequate international review available for United Nations sanctions lists then national review procedures are necessary.
  99. The ECJ for its part acknowledged that the procedures of the sanctions committee do not amount to judicial protection: *Kadi* (ECJ), above n 12, [323]. However, in doing so the ECJ referred to the standards of judicial protection as recognised within the EU legal order and applicable to Community acts (including those implementing Security Council resolutions. It did not address the issue of whether international human rights standards pertaining to judicial protection were applicable to a (sub-organ) of the Security Council.
  100. *Nada*, above n 21. One might have expected a slightly more critical analysis of the reasoning in this case, especially as Switzerland is not a member of the European Union and therefore not bound by a decision of the CFI. Instead, the Swiss Federal Supreme Court endorsed the *Yusuf* and *Kadi* reasoning in its entirety.
  101. See Advocate General Poiares Maduro, above n 20.
  102. SC Res 1546, 43 ILM 1459 (2004).
  103. *R (an the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, Judgment of 12 December 2007.
  104. *Ibid.* [64].
  105. SC Res 1546 (2004) above n 102 [10].
  106. *Al-Jedda* decision, above n 103, [71].
  107. *Al-Jedda*, above n 103, [35] (Lord Bingham of Cornhill).
  108. *Al-Jedda*, above n 103, [126] (Baroness Hale of Richmond). It is also interesting to note that by a majority the House of Lords was not inclined to accept that there

was no extraterritorial application of the ECHR. See, e.g., [5] (Lord Bingham of Cornhill).

109. See SC Res 1546 (2004) above n 102, Preamble, [7(a)]; Orakhelashvili, above n 23, 172.
110. See also *Nada*, above n 21, [6.2].
111. This position was supported by Advocate General Poiares Maduro, above n 20, [54] and also alluded to in *Kadi* (ECJ), above n 12, [322].

## PART III

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### Implementing Security Council sanctions



## ‘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?

KEVIN BOREHAM

### 1. Introduction

The object of this chapter is to show that Australia did not violate its international legal obligations as a result of the kickbacks by AWB to the former Iraqi regime under the United Nations Oil-for-Food Programme (OFFP), but that the AWB scandal showed systemic failures in effective domestic governance and the appropriate conduct of Australia’s foreign policy, compounded by a failure of accountability when the AWB scandal was exposed.

The chapter will examine the relevant norms of the Charter of the United Nations and customary international law, and Australia’s conformity with them in its implementation of the OFFP, as follows:

- Australia’s treaty obligations under the Charter to implement Security Council sanctions resolutions only require the implementation in Australian law of the measures in the relevant resolutions, rather than an imaginary standard of vigorous enforcement. The report resulting from the Inquiry into certain Australian companies in relation to the UN Oil for Food Programme (the Cole Report) confirmed that Australian regulations implementing the Security Council Iraq sanctions regime covered the subsequent modification of the sanctions by the setting up of the OFFP.<sup>1</sup>
- The relevant customary international law standard by which any alleged violation of Australia’s obligations should be judged is want of due diligence. This standard can only be defined by state practice in relation to the relevant obligations.<sup>2</sup> The relevant standard of due diligence was met by Australia in respect of the OFFP: the Cole Report acknowledges that ‘DFAT [the Australian Department of



Foreign Affairs and Trade] had been astute to give proper advice, when asked [by AWB], regarding the operation of the UN sanctions and the Oil-for-Food Programme.<sup>3</sup>

- The customary international law rules of state responsibility for imputation to Australia of responsibility for AWB's internationally wrongful actions, as substantially codified in the International Law Commission's Articles on State Responsibility,<sup>4</sup> reflect the 'general principle [that] the conduct of private ... entities is not attributable to the State under international law'.<sup>5</sup> AWB's relationship with the government did not meet the strict test for an exception to this rule where the relevant entity that has committed an internationally wrongful act is under the 'effective control' of the state.<sup>6</sup> AWB's complicity in violation of the relevant Security Council Resolutions therefore cannot be imputed to Australia.

The AWB scandal did nevertheless show systemic failures in domestic governance and the moral and political conduct of Australia's foreign relations that the Howard Government resolutely resisted exposing to public scrutiny.

The Cole Inquiry 'was restricted to the activities of the AWB and did not extend to scrutiny of executive responsibility for the scandal, or to the level of government knowledge at each step of the process'.<sup>7</sup> Despite the former government's care to avoid scrutiny of its own conduct, the recently published 'memoirs' of former Treasurer Peter Costello fatuously claim that 'the royal commission dismissed any suggestion that Ministers had been warned and it exonerated them'.<sup>8</sup>

Legislative and budgetary measures, which were implemented before the change of government in Australia in November 2007, appear to ensure that Australia will monitor the domestic implementation of sanctions measures more effectively in future.

## 2. UN Iraq sanctions, the Oil-For-Food Programme and the AWB kickbacks

The Security Council's decision-making on sanctions against Iraq began with Resolution 660 of 2 August 1990, which demanded at paragraph 2 'that Iraq withdraw immediately [from Kuwait]'.<sup>9</sup> On 6 August 1990 the Council decided in Resolution 661, in order to secure Iraq's compliance with resolution 660, 'that all States shall prevent: (a) The import ... of all products originating in Iraq'.<sup>10</sup> Resolution 687 of 3 April 1991,<sup>11</sup> which set out the conditions for a ceasefire with Iraq, explicitly affirmed all the

Council's previous resolutions on Iraq, including Resolutions 660 and 661. Sanctions therefore remained in place.

Resolution 986 of 14 April 1995 set up the OFFP: responding to 'the humanitarian needs of the Iraqi people' the Council authorised states, 'notwithstanding the provisions of resolution 661 ... to permit the import of petroleum and petroleum products originating in Iraq'; determined that the funds from these sales should be paid into a UN escrow account; and decided 'that the funds in the escrow account shall be used to meet the humanitarian needs of the Iraqi population'.<sup>12</sup>

The Council generally, with only a few exceptions, carries out its responsibility for monitoring the implementation of sanctions by setting up a committee for each individual sanctions regime to monitor its implementation, usually designated by the number of the resolution that creates the sanctions regime.<sup>13</sup> In the case of the Iraq sanctions measures, this was the 661 Committee.<sup>14</sup>

The report resulting from Independent Inquiry Committee into the United Nations Oil-for-Food Programme (the Volcker Report),<sup>15</sup> found that AWB had paid a total of US\$ 221.7 million in side payments to the Iraqi regime, more than 14 per cent of all the funds illicitly collected by Iraq under its OFFP kickback schemes.<sup>16</sup>

The AWB affair was 'by a wide margin, Australia's biggest-ever foreign bribery and kickbacks scandal'.<sup>17</sup>

### 3. Australia's obligations under the Charter to implement Security Council sanctions resolutions

The extent and content of member states' obligations under the Charter to implement sanctions, and their parallel obligations under the customary international law norm of due diligence, are infused with doubt arising from highly inconsistent state practice.<sup>18</sup>

The Security Council's responsibility for the implementation of sanctions comes from article 24 of the UN Charter under which the member states give the Council 'primary responsibility for the maintenance of international peace and security', and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.<sup>19</sup> Article 25 of the Charter provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.<sup>20</sup>

The Charter does not refer to sanctions: however, it is accepted that the Council's power under article 41 to 'decide what measures not

involving the use of armed force are to be employed to give effect to its decisions' includes the imposition of sanctions. Article 48 provides that:

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.<sup>21</sup>

The extent and content of member state obligations under articles 25 and 48 therefore depend on the interpretation of the obligation to 'carry out' resolutions concerning sanctions. This requires the application of the rules of treaty interpretation in article 31 of the Vienna Convention on the Law of Treaties.<sup>22</sup> Although the Vienna Convention applies strictly speaking to treaties concluded after the Convention came into force in 1980, the International Court of Justice has applied its principles in several cases as customary international law.<sup>23</sup> Authoritative commentators agree that article 31 may be applied by 'analogy' or as customary international law to the interpretation of the Charter.<sup>24</sup>

Article 31 provides that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.

The application of article 31(1) presents particular difficulties in dealing with the constitutive documents of any international organisation, but particularly the UN Charter. The Charter has no mechanism for settling disputes about its interpretation. There are some long-standing differences of view about interpretation of particular provisions.<sup>25</sup> These

include the extent and content of member states' obligations to 'carry out' the decisions of the Security Council under article 25 and article 48.

The determination of the object and purpose of any provision of the Charter is particularly difficult. As with any multilateral treaty, it is difficult to assess the common 'will' of all states parties.<sup>26</sup> In any case, it is questionable whether the object and purpose of the drafters of the Charter are relevant to interpreting it when the membership of the UN has almost quadrupled since the San Francisco Conference: new members can only be reasonably considered to be bound by the objective wording.<sup>27</sup>

### 3.1 *The travaux préparatoires of the Charter*

For these reasons, the historical will of the original drafters is only of secondary importance in the interpretation of the Charter.<sup>28</sup>

Bearing this caveat in mind, we can derive some broad insight into the drafters' intentions in articles 25, 41 and 48 from the *travaux préparatoires* of the San Francisco Conference, formally titled the United Nations Conference on International Organisation (UNCIO). Discussion of these articles by Commission III of the Conference, which dealt with the functions and powers of the Security Council, was limited. Most of the Commission's discussions were consumed with debate on the Permanent Five veto and military enforcement measures.

There was certainly a common opinion among the drafters of the Charter that the inability of the Council of the League of Nations to impose binding measures on member states had been fatal to the effectiveness of the League, and a common determination that the Security Council should not be similarly handicapped.<sup>29</sup>

#### 3.1.1 *The travaux préparatoires of the Charter: Article 25*

There were several unsuccessful attempts to amend article 25 (Chapter VI, section B, paragraph 4 of the 1944 Dumbarton Oaks proposals). All these proposed amendments were evidently intended to limit member states' obligations to 'carry out' the decisions of the Council. For example, one amendment would have given the General Assembly 'the power to revise the decisions of the Council'.<sup>30</sup>

#### 3.1.2 *The travaux préparatoires of the Charter: Articles 41 and 48*

Agreement was easily reached on the Council's power under article 41 to decide on economic enforcement measures with binding effect on

member states (Chapter VIII, section B, paragraph 3 of the Dumbarton Oaks proposals).<sup>31</sup> There appears to have been little or no discussion of article 48 (Chapter VIII, section B, paragraph 7 of the Dumbarton Oaks proposals) which represented the ‘affirmation of members’ obligations under article 25 to accept binding decisions of the Council’.<sup>32</sup>

Nevertheless, the *travaux préparatoires* tend to support the comment on article 48 that the expectation at the San Francisco Conference was that ‘the Great Powers would bear the main burden’ of enforcement of Council decisions.<sup>33</sup> The Rapporteur of Commission III reported that the relevant sections of the final text of the Charter ‘represent an attempt to harmonise power with responsibility, recognising that certain states must, by virtue of their immense strength, necessarily bear a predominant share of the responsibility for the enforcement of the future peace’.<sup>34</sup>

### 3.2 *The ICJ’s jurisprudence on Article 25*

The International Court of Justice (ICJ) in its *Namibia* Advisory Opinion referred to member states’ obligations under article 25 as a consequence of the Council’s declaration of the illegality of South Africa’s continued occupation of Namibia. The application of article 25 in this situation was straightforward. The ICJ declared that:

It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, ... Members [of the UN] would be free to act in disregard of such illegality ... Members of the United Nations would be expected to act [under Article 25] in consequence of the declaration made on their behalf.<sup>35</sup>

The Charter *travaux* and the ICJ’s jurisprudence therefore confirm that member states must ‘act in consequence’ of a decision of the Council under article 41 relating to sanctions, but this does not settle whether member states are bound to do anything beyond implementing the sanctions in their domestic law. A fuller interpretation of member states’ obligations under articles 25 and 48 therefore requires a broader contextual understanding of the way the Charter has been interpreted by the ICJ.

### 3.3 *The ICJ’s approach to interpreting the Charter*

The ICJ’s Advisory Opinions on the interpretation of the Charter have taken divergent approaches. They have been assessed as both mainly teleological<sup>36</sup> and mainly literal.<sup>37</sup>

In general, the ICJ has followed the teleological or 'principle of effectiveness' approach.<sup>38</sup> In the 1998 *Fisheries Jurisdiction Case (Spain v. Canada)* the ICJ affirmed that 'this principle has an important role in the law of treaties and in the jurisprudence of this Court'.<sup>39</sup> Under the principle of effectiveness 'of one or more possible interpretations, the one that best serves the recognisable purpose of the treaty ... provisions must be preferred'.<sup>40</sup>

In the *Namibia* Advisory Opinion quoted in the previous section, the ICJ went on to say that:

[W]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision ... *To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.*<sup>41</sup>

In his classic work on the development of the ICJ's jurisprudence, Sir Hersch Lauterpacht explained the principle of effectiveness as based upon the Court's 'determination to secure a full degree of effectiveness of international law, in particular of the obligations undertaken by parties to treaties'.<sup>42</sup> However, Lauterpacht cautions that the principle of effectiveness must not be permitted to displace the intention of the parties.<sup>43</sup>

Lauterpacht acknowledges that in many cases the common intention (or 'recognisable purpose') of the parties 'is an assumption rather than a reality'.<sup>44</sup> This is particularly relevant to an assessment of the extent and content of member states' obligations under articles 25 and 48. The broad application of the principle of effectiveness to obligations of member states to 'carry out' the decisions of the Council under articles 25 and 48 would suggest that the obligation extended as far as was necessary to ensure the fullest possible effectiveness of the decisions of the Council under article 24. But does this 'recognisable purpose' correspond with the intention of member states?

### 3.4 *The role of 'subsequent practice' in Charter interpretation*

The key provision in article 31 of the Vienna Convention on the Law of Treaties for the interpretation of member states' obligations under the Charter is found in article 31(3)(b) (noted above in full). This provision directs attention to 'any subsequent practice in the application of the treaty'.<sup>45</sup> Aust states that this provision:

is a most important element in the interpretation of any treaty, and reference to practice is well established in the jurisprudence of international

tribunals. However precise a text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent.<sup>46</sup>

The 'subsequent practice' in the context of the Charter usually means the practice of UN organs. 'Pure' state practice may be only 'indirectly relevant'.<sup>47</sup> But as we are dealing here with member states' interpretation of their obligations under articles 25 and 48, reliance on the practice of UN organs rather than the state practice of member states seems to risk a lack of 'reality', to quote Lauterpacht.<sup>48</sup>

In order to interpret the 'carrying out' of obligations of Security Council sanctions resolutions, Aust's explanation of the role of 'subsequent practice' of article 31(3)(b), while highly relevant, has to be stood on its head. It is the widespread *inconsistency* of relevant state practice that suggests a minimalist interpretation of the extent and content of member states' obligations to 'carry out' Council sanctions resolutions.

The high level of variability among national regimes for implementing sanctions means that it is not possible to discern any consistent state practice on the monitoring of sanctions regimes and the imposition of penalties for breaching them.

The Council has responsibility for monitoring the implementation of sanctions but member states have the primary responsibility for implementation.<sup>49</sup> With some exceptions,<sup>50</sup> Security Council resolutions leave the choice of means to implement sanctions measures up to member states.<sup>51</sup>

In practice, 'the Council's authorisation of mandatory sanctions is rarely sufficient ... to guarantee that sanctions will actually be implemented'.<sup>52</sup> Implementation in particular cases goes well below or well beyond the requirements of Council resolutions;<sup>53</sup> domestic implementation is affected by whether states are 'enthusiastic' about the particular sanctions regime; and the penalising of nationals who violate sanctions regimes is 'problematic': 'There are few indications that States have carried out prosecutions in a consistent and across the board manner.'<sup>54</sup>

Simma's authoritative commentary on the UN Charter acknowledges that:

The implementation of measures under Article 41 has proven to be generally unsatisfactory. Apart from the cases in which military means were employed to give those measures effect, their actual enforcement depended upon the will and capabilities of the member states concerned.

A recent study of the Security Council's anti-terrorism measures has shown a continuing pattern of inconsistent implementation by member

states<sup>55</sup> and 'difficulties that the SC has encountered in managing the implementation of the sanctions regime'.<sup>56</sup>

Professor Iain Cameron, in his paper for the Swedish Foreign Ministry on 'targeted' UN sanctions and their impact on human rights found that:

Many states do not implement targeted sanctions properly, or implement them at all. ... The lack of enthusiasm is shown inter alia by the huge number of doubtful applications for humanitarian etc. exceptions ... indicating a lack of seriousness, or even good faith, on the part of certain applying states.<sup>57</sup>

A report by the Security Council Committee established in 1999 by Resolution 1267 to monitor sanctions against Al-Qaeda and the Taliban (the 1267 Committee)<sup>58</sup> found that there were three main methods by which member states had implemented the assets freeze required by Resolution 1267. The first was legislation that automatically froze assets upon the relevant listing by the Committee (the method used by Australia). The second was legislation authorising the executive to name those parties whose assets were to be frozen. The final method employed the state's criminal code, which required proof of a specific domestic criminal offence as a condition of freezing assets. The Committee commented that this last method 'generally does not satisfy the requirements of the sanctions. ... This is untenable'.<sup>59</sup>

In the case of the OFFP, the Volcker Report found that member states generally fell well short of reasonable expectations in the fulfillment of their responsibilities for ensuring that the regime was implemented in accordance with Resolution 986.<sup>60</sup>

Any contention that Australia violated UN sanctions in its implementation of the OFFP must be tempered by recognition of the inherent difficulties in sanctions implementation, not only by member states, but by the Security Council itself. Cameron observes that:

The implementation of UN Security Council sanctions is a delicate business. If states are not wholehearted in their implementation, if the customs authorities, the export control agencies, the financial inspection units, and financial police are less than enthusiastic, then the sanctions are very easily undermined.<sup>61</sup>

The UN Security Council failed, in its oversight of the OFFP, to enforce a higher standard of member state enforcement of sanctions: there was no consistent level of effectiveness, practice or procedure by the 661 Committee.<sup>62</sup> The Council, in the words of the Volcker Report, 'struggled



in clearly defining the broad purposes, policies, and administrative control of the Programme. ... When things went awry, no one was in charge'.<sup>63</sup>

Specifically, the Volcker Report found that the Security Council committee responsible for implementing the OFFP was unable to agree whether the making of some form of payment for internal transportation costs to companies that may have links to the government of Iraq (the main vehicle for the AWB kickbacks) was 'permissible'.<sup>64</sup>

States are clearly obliged to take *some* form of binding legal steps in their domestic jurisdiction to implement sanctions, because of their obligation under article 25 of the Charter to 'carry out' Security Council decisions. Australia had legislated appropriately to implement the Iraq sanctions regime.<sup>65</sup> The obligation of states under international law to implement Security Council sanctions resolutions, given the highly inconsistent state practice, cannot be said to extend beyond this minimal requirement.

#### **4. Was there a breach of Australia's customary international law obligation to observe a standard of 'due diligence' in its performance of its international obligations?**

The customary international law concept of due diligence recognises that a state is liable for an internationally wrongful act for which private individuals are responsible, where organs of the state have been at fault in failing to prevent or repress the act concerned.<sup>66</sup>

A violation of UN sanctions' measures is unquestionably an internationally wrongful act because of member states' obligations under the Charter to obey Security Council decisions. A member state might therefore be liable for 'a failure to show due diligence in taking measures to prevent or punish such violations'.<sup>67</sup>

The due diligence rule is, however, not a fixed standard: 'there is no single standard but different standards relating to different situations'.<sup>68</sup>

The difficulty in stating that the Australian government committed an internationally wrongful act by omitting to detect or prevent AWB's corrupt dealings with the former Iraqi government cannot therefore be separated from the question discussed above: what is the nature and extent of the obligation of states in relation to implementation and enforcement of sanctions?

The finding of the Cole Report that Australian officials 'did very little' in relation to the occasional reports they received indicating possible AWB conduct in violation of the UN sanctions *might* relevantly amount to a failure of due diligence.

However, the Cole Report acknowledges that 'DFAT had been astute to give proper advice, when asked [by AWB], regarding the operation of the UN sanctions and the Oil-for-Food Programme.'<sup>69</sup> It is arguable that the uncertain standard of due diligence was met by the consistent 'proper advice' of officials to AWB about its obligation to observe UN sanctions.

When is the obligation of due diligence engaged? The *Encyclopedia of Public International Law* finds 'persuasive' the commentary in the Harvard Law School's 1929 Draft Convention on State Responsibility that 'due diligence implies ... jurisdiction to take measures of prevention ... consequent upon *knowledge* of impending injury or circumstances which would justify an expectation of a probable injury'.<sup>70</sup> The former government's oversight of AWB's involvement in the OFFP was inadequate, but it had no *knowledge* of AWB kickbacks to the Iraqi regime. Commissioner Cole has stated that '[t]here was no evidence of any such knowledge'.<sup>71</sup>

## 5. State responsibility

The final issue of international law in relation to AWB's complicity in the corruption of the OFFP is whether the rules governing state responsibility can be interpreted as attributing responsibility to the Australian government. The relevant rules are contained in the Articles on Responsibility of States for Internationally Wrongful Acts, contained in the Annex to a UN General Assembly resolution adopted in 2001 (Articles on State Responsibility).<sup>72</sup>

An internationally wrongful act such as non-implementation of Security Council decisions will give rise to state responsibility: no distinction can be drawn between states unable and those unwilling to carry out sanctions.<sup>73</sup>

State responsibility would have been incurred by Australia if the Australian government's failure to detect and prevent the violation of sanctions measures by AWB itself constituted an internationally wrongful act by omission; or if AWB's status as a statutory body during the initial phase of its corrupt dealings with the former Iraqi regime made its conduct a wrongful positive act by Australia; or if the subsequent actions of AWB could be attributed to the Australian government.

The first issue potentially invokes article 2 of the Articles on State Responsibility which states that:

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.<sup>74</sup>

Given the uncertain standard of member states' obligations in relation to implementation and enforcement of sanctions, it is doubtful that the Australian government itself or its agencies committed any 'action or omission' in relation to AWB's wrongdoing which would bring the governments conduct within article 2.

The second issue is whether there was any 'positive conduct' leading to sanctions-busting by the government or its agencies. It is true that the discussions between AWB and the Iraqi regime that led to the corrupt kickbacks began in June 1999 while AWB was still a statutory agency<sup>75</sup> but it was privatised 'soon after' in July 1999.<sup>76</sup> The actual contracts for wheat sales under which kickbacks were paid were concluded in July and October 1999.<sup>77</sup> A study of rural policy under the Howard government notes: '[b]y the time of the [AWB] offences, AWB Limited was a private company'.<sup>78</sup>

Because discussions leading up to sanctions-busting conduct began while AWB was a statutory body consideration should be given to whether this 'positive conduct' should be directly attributed to the Australian government under article 4 of the Articles on State Responsibility which states that:

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

However, this 'conduct' must still clear the hurdle for attribution of state responsibility under article 4 set by the ICJ in the *Bosnian Genocide* case, that is that the body in question must be in a relationship of 'complete dependence on the State'.<sup>79</sup> The July 1999 privatisation of AWB was the end stage of a process 'almost entirely driven by industry' in which 'Government observers were little more than observers'.<sup>80</sup> This test would therefore not be met for the relevant brief period in which AWB remained technically a statutory body.<sup>81</sup>

The third issue is whether the conduct of the AWB can be attributed to the Australian government under article 8 of the Articles on State Responsibility:

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

It should be acknowledged that interpretation of article 8 should take account of the fluid relationship between governments and private entities at a time when former government functions (such as managing a monopoly on wheat sales) have been increasingly devolved to private entities through privatisation (as in the case of AWB) or outsourcing arrangements.<sup>82</sup> It is reasonable to warn that '[i]nternational law rules on State responsibility should not ... encourage [governments] to transfer functions from State organs to private organs'.<sup>83</sup>

However, the attribution of state responsibility under article 8 is subject to the strict test of 'effective control' which the ICJ affirmed in the *Bosnian Genocide* case. The ICJ said that the threshold test for 'direction or control' under article 8 is that:

It must ... be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.<sup>84</sup>

In rejecting the less-stringent test of 'overall control' adopted by the Appeals Court of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case, the ICJ emphasised that the ICTY test broadened the scope of state responsibility:

well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.<sup>85</sup>

Applying this strict interpretation of article 8 to the findings of the Cole Report shows that AWB was not under the 'effective control' of the Australian government: indeed the report finds that during the period of AWB's corrupt dealings with the Iraqi authorities:

the process of receiving notification forms and contracts from AWB and forwarding them to the Australian Mission to the United Nations for

submission to the 661 Committee became an essentially routine procedure performed by lower level DFAT officers – so much so that DFAT’s role came to be described as nothing more than a ‘post box’.<sup>86</sup>

Therefore application of the relevant tests in the Articles on State Responsibility shows that Australia did not incur responsibility for the wrongful acts of AWB.

Indeed, the application of the concept of state responsibility for the corruption of the OFFP is largely theoretical: the OFFP was ‘arguably’ ‘destined from the start to be corrupted by Iraq ... because it was a basic premise of the programme that Iraq was free to choose the companies with whom it did business ... [which] meant ... power for Iraq to extract secret kickback payments from the companies with whom it did business’.<sup>87</sup> The response of a representative of China on the 661 Committee to representations about the need for stricter mechanisms to prevent illicit kickbacks to the Iraqi government through inflated oil prices was to quote ‘an old Chinese proverb, “If the river is too clean, there are no fish”’.<sup>88</sup>

## 6. Standards of accountability and governance

This chapter’s conclusion that AWB’s kickbacks to the Iraqi regime did not constitute a violation of Australia’s international obligations is not a defence of the failure of the previous Australian government and its officials to detect and stop the kickbacks. Conformity with conveniently minimal requirements of international law does not equal competent governance. The enforcement of sanctions against Iraq by Australian government agencies was inept and inadequate.

The Cole Inquiry found that ‘DFAT did very little in relation to the allegations or other information it received that either specifically related to AWB, or related generally to Iraq’s manipulation of the Programme’.<sup>89</sup> The former Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, has reflected that ‘the findings of the Cole Royal Commission into the behaviour of the Australia Wheat Board [sic] in breaching UN sanctions exposed significant organisational weaknesses: inadequate channels of communication, structural demarcations, insufficient quality control and poor reporting systems’.<sup>90</sup>

A study of governance under the fourth Howard government found that ‘[t]he government was either unwilling or unable to exercise oversight of the illegal activity [by AWB]’.<sup>91</sup> Stephen Bartos’ assessment is that the failure to put together the pieces of information about AWB’s activities was ‘systemic rather than individual’. ‘More important still’, he

adds, 'is the question of why, when there was ample evidence of something amiss, there was no investigation'.<sup>92</sup>

The refusal of responsible Howard government ministers to acknowledge that there were *any* shortcomings of governance in Australia's implementation of the OFFP raised reasonable adverse comment.<sup>93</sup> '[T]he unwillingness of senior officials and ministers to acknowledge awareness or responsibility, in particular the failure of the Prime Minister to require his ministers to accept ministerial responsibility was depicted as symptomatic of arrogance and being out of touch.'<sup>94</sup>

The AWB scandal was a failure of Australian foreign policy. The Howard government's 2003 White Paper *Advancing the National Interest* listed the 'core challenges and strategies' of foreign and trade policy.<sup>95</sup> These included 'promoting good governance, human rights and development'. The White Paper declared that 'the high quality of governance in Australia [described elsewhere in the White Paper as 'among the highest in the world'<sup>96</sup>] means that we have a distinctive contribution to make to other countries'.<sup>97</sup> This 'strategy' seems richly ironic in the light of the governance failures revealed by the AWB scandal.

Media assessments of Alexander Downer's record tenure as Minister for Foreign Affairs at the time of his retirement from politics in July 2008 cited Downer's oversight of the OFFP and his handling of the AWB scandal as among his significant failures.<sup>98</sup> Downer himself 'does not accept that the government should have known \$300 million worth of bribes were paid to Saddam': he says 'there were clearly people within AWB determined to deceive the ... Australian Government'.<sup>99</sup> (One prominent commentator found the AWB scandal not worth considering among Downer's achievements.)<sup>100</sup>

It is only fair to acknowledge that Commissioner Cole's report stated that 'the shadow over Australia's reputation in international trade' cast by AWB 'has been removed by Australia's intolerance of inappropriate conduct in trade, demonstrated by shining the bright light of this independent public inquiry on AWB's conduct'.<sup>101</sup>

The need for oversight of conformity with UN sanctions has been addressed. The Cole Inquiry recommended a series of reforms directed to ensuring that a repeat episode like AWB's dealings with the former Iraqi regime could be detected and punished.<sup>102</sup> These reforms, it must be acknowledged, constitute a detailed interlocking suite of measures that require effective domestic enforcement of sanctions and clear penalties for violators of sanctions. These reforms *should* minimise the possibility of further serious breaches in the Australian Commonwealth jurisdiction.

The then Attorney General introduced into the Commonwealth Parliament on 14 June 2007 legislation that faithfully implements the relevant recommendations of the Cole Report.<sup>103</sup> In his Second Reading Speech the then Attorney General emphasised that '[t]he government is committed to promoting a culture of ethical dealing in connection with UN sanctions and international trade'.<sup>104</sup>

The 2007–2008 Commonwealth Budget included AUS \$4.6 million over four years to address a number of recommendations of the Cole Inquiry. The Budget papers state that the funding will enable the Department of Foreign Affairs and Trade to incorporate UN and bilateral sanction regimes into Australian law, administer and coordinate their implementation and contribute to whole-of-government efforts to monitor and ensure compliance with Australian law on sanctions.<sup>105</sup>

## 7. Conclusion

One of the hardest, but most necessary, aspects of any analysis of international law is to keep clear the distinction between a state's obligations under international law and its moral and political obligations to the international community. It is wrong to inflate international legal norms in order to assert that a state's conduct has been unlawful as well as irresponsible, just as it is wrong to assert that compliance with strictly defined international legal norms constitutes good international citizenship.

Australia's failure of oversight over the OFFP was not unlawful. But the AWB scandal showed that Australian Ministers and officials had no sense of responsibility for the active and effective governance of the OFFP, and no sense of accountability when it went wrong.

Winston Churchill, acknowledging in his war memoirs the devastating inadequacies in the defences of Singapore, said 'I do not write this in any way to excuse myself. I ought to have known. My advisers ought to have known and I ought to have been told, and I ought to have asked.'<sup>106</sup>

Australian Ministers ought to have asked whether the OFFP was being effectively managed to prevent abuse. Having failed to do so, they ought to have given the Cole Inquiry terms of reference that would have enabled Commissioner Cole to tell the Australian people why it had not been.

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# Should the United Nations Security Council leave it to the experts? The governance and accountability of UN sanctions monitoring

JEREMY FARRALL

## 1. Introduction

The chapters in this collection use the example of United Nations sanctions as a means to explore the questions of accountability and governance that arise when legal norms are applied with cross-boundary effect. The boundaries in question are both physical, in the sense of clearly delineated national borders, as well as conceptual, as with the traditional distinctions that are drawn between the domains of public and private law, and between international and domestic law. Some contributors explore the broad theoretical questions that arise when seeking to enforce global norms across diverse jurisdictions (Danchin, Sampford). Some discuss accountability and governance at the international level, where the decision to apply cross-border norms is made (Chesterman, Hovell, Nasu). Some concentrate on the domestic interpretation, application and regulation of globally articulated norms (Botterill and McNaughton, Fraser, Nolan, Rice, Stewart, Tully). Others examine the way that actors at the domestic or regional level might influence the accountability and governance of actors at the international level, or vice versa (Boreham, Holmes, Mulgan, de Wet).

This chapter focuses on accountability and governance within the UN sanctions system for sanctions monitoring. The task of sanctions monitoring, which was traditionally undertaken by the Security Council's sanctions committees, is increasingly being delegated to independent bodies of experts. Over the past decade the Council has created a range of sanctions monitoring expert bodies. These bodies provide independent analysis of particular sanctions regimes and make recommendations to strengthen sanctions implementation.

The evolution of sanctions expert bodies, as with the UN sanctions system more broadly, has been ad hoc and reactive, rather than systematic and strategic. While this approach has allowed the Security Council to be flexible and inventive at times, it has had the consequence that principles of governance and accountability have developed in an equally ad hoc manner. The Security Council's practice of outsourcing sanctions monitoring to independent actors raises a number of questions. Are there any limits on the Council's ability to delegate its responsibilities for the maintenance of international peace and security? When the Council creates independent bodies to monitor sanctions implementation, how closely should it supervise those bodies? How does the Council regulate governance and accountability within the independent expert bodies?

A familiar criticism of global efforts to regulate transboundary activities is 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. UN sanctions form one of the most visible examples of a global enforcement mechanism, yet they are often criticised for being ineffective. In the literature it is common to find calls for more frequent and more effective monitoring, evaluation and enforcement of UN sanctions. Surprisingly, there is little written about the expert monitoring bodies that pursue these objectives.<sup>1</sup>

This chapter describes how the sanctions expert bodies operate and explores questions of governance and accountability. It concludes that mechanisms for the governance and accountability of sanctions expert bodies, where they exist, have evolved in an ad hoc, reactive manner, just like the UN sanctions system and the expert bodies themselves. The chapter argues that the Security Council should reconsider its approach of leaving it to the experts. Instead, the Council should promote a more strategic, coherent and accountable approach to sanctions monitoring.

The chapter proceeds in four parts. It starts by introducing the UN Charter framework for UN sanctions and describes the traditional approach to sanctions monitoring. It goes on to trace the recent evolution of sanctions expert bodies and describe the governance structure for sanctions monitoring and examines the accountability of the key actors within this structure. Finally, it explores alternatives for improving the governance and accountability of sanctions monitoring.

## 2. The UN Charter sanctions framework and the traditional model of sanctions monitoring

The UN Charter bestows primary responsibility for the maintenance of international peace and security upon the UN Security Council.<sup>2</sup> Chapter VII of the UN Charter outlines the steps that the Council may take in order to address a threat to the peace, breach of the peace or act of aggression.<sup>3</sup> These steps can include provisional measures,<sup>4</sup> sanctions short of the use of force<sup>5</sup> and even the use of force itself.<sup>6</sup> Article 41, the Charter's sanctions provision, provides that:

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.<sup>7</sup>

During the Cold War, the Council was only twice able to muster the necessary agreement to apply sanctions, doing so against Southern Rhodesia (targeted then comprehensive economic sanctions)<sup>8</sup> and South Africa (arms embargo).<sup>9</sup> In stark contrast, since August 1990 the Council has created twenty-three new sanctions regimes.<sup>10</sup> This represents a remarkable increase in sanctions activity. Accompanying this dramatic expansion in the use of sanctions has been a growing sophistication, both in how sanctions are applied and evaded. Sanctions were originally applied against a nation as a whole, but they increasingly target individual policy-makers. Gone are the days of blunt, comprehensive economic sanctions. 'Targeted' or 'smart' sanctions, such as individual assets freezes and travel bans, are the preferred UN sanctions measures of the early twenty-first century.<sup>11</sup>

Under article 25 of the UN Charter, UN member states have a legal obligation to implement decisions of the Security Council.<sup>12</sup> When the Security Council decides to apply sanctions under Chapter VII, UN member states are therefore legally required to take the necessary steps to ensure that sanctions are implemented within their jurisdiction. Yet in the absence of action by UN member states to take the concrete steps necessary to prohibit the stipulated trade, commercial, financial, diplomatic or travel activities, a decision by the Security Council to apply sanctions will simply amount to strong words on paper rather than robust action in practice. The UN sanctions architecture thus relies upon the good will of UN member states to act upon their legal obligation to implement the Council's sanctions decisions.

The UN Charter sanctions framework recognises that the Security Council may need to create subsidiary bodies to fulfil its responsibility for the maintenance of international peace and security. Article 29 of the Charter provides that '[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions'.<sup>13</sup> In addition, rule 28 of the Security Council's provisional rules of procedure enables the Council to 'appoint a commission or committee or rapporteur for a specified question'.<sup>14</sup> It is also important to note the role played by the UN Secretariat in servicing and supporting the activities of the Security Council and its subsidiary organs. The UN Charter established the Secretariat, headed by the Secretary-General, as the UN's sixth principal organ.<sup>15</sup> The Secretariat is responsible for supporting the activities of the other principal organs, with the exception of the International Court of Justice (ICJ).<sup>16</sup> Indeed, the Council and its subsidiary organs could not function without Secretariat support.

The Security Council has traditionally delegated responsibility for sanctions administration and monitoring to sanctions committees.<sup>17</sup> The Council usually establishes a sanctions committee when it creates a new sanctions regime.<sup>18</sup> In a number of instances, however, months or years have elapsed between the imposition of sanctions and the creation of a sanctions committee.<sup>19</sup> In fact, the Council did not even create a sanctions committee for the 1054 Sudan sanctions regime, suggesting that it was not particularly interested in monitoring the implementation of these sanctions.<sup>20</sup>

Sanctions committees operate as Security Council committees of the whole. They thus mirror the membership of the Council at a given point in time. Committees have conducted their business almost entirely in meetings that are closed to the public. Moreover, records of these closed meetings are rarely made public.<sup>21</sup> In their substantive activities, sanctions committees have tended to conduct their work by receiving and analysing reports from UN member states on steps taken to implement sanctions. The activities of sanctions committees have been conducted almost entirely at UN Headquarters in New York, despite a movement by the Chairs of some sanctions committees to conduct field visits.<sup>22</sup> The diplomats representing their nations on sanctions committees do not generally do so on a full-time basis. Indeed, they are usually required to fulfil a range of additional diplomatic responsibilities. The amount of time that a particular sanctions committee member is able to devote to preparing for and attending sanctions committee meetings thus varies considerably.

Some sanctions committees have met more regularly and reported more routinely than others. The 253 Southern Rhodesia Committee held a total of 352 formal meetings during its twelve-year existence.<sup>23</sup> The 661 Iraq Committee met formally more than 230 times between its establishment in August 1990 and its dissolution in May 2003.<sup>24</sup> By contrast, the 918 Rwanda Committee held just seven formal meetings in its first twelve and a half years.<sup>25</sup> Although the task of reporting to the Security Council has been included in the mandate of all sanctions committees, they have not always submitted routine reports. The low-watermark was set by the 841 Haiti Sanctions Committee, which did not submit a single report to the Council during its sixteen-month tenure.<sup>26</sup>

Concerns over the irregularity of sanctions committee reporting led to the issuance in early 1995 of a note by the President of the Security Council, calling on sanctions committees to report to the Council on an annual basis.<sup>27</sup> On the whole this call has been heeded, but the annual reports by sanctions committees still vary significantly in length, scope and quality. Annual reports sometimes appear to have been written with the aim of inducing the reader to fall asleep lest they detect something interesting! At their worst, as in the case of the 918 Rwanda Sanctions Committee, these reports simply state that nothing much has happened over the preceding year.<sup>28</sup> More accomplished examples have surveyed trends in sanctions implementation and identified sanctions violations. Unfortunately, the very best annual reports tend to have been final reports issued by sanctions committees that had just been dissolved.<sup>29</sup> Diplomatic politics seem to prevent sanctions committees from engaging in critical analysis until they reach the post-mortem phase.

### 3. The turn to experts

The impracticability of sanctions committees conducting meaningful monitoring of sanctions implementation from New York, combined with the discomfort of sanctions committees at airing genuinely critical recommendations, eventually prompted the Security Council to explore other avenues for securing effective sanctions monitoring. The first experiment with tasking a body other than a sanctions committee with sanctions monitoring responsibilities occurred in April 1991 when the Council established the UN Special Commission (UNSCOM), which was to monitor Iraq's disarmament activities in accordance with its obligations under the Iraq sanctions regime.<sup>30</sup> Since then, the Council has established more than a dozen bodies tasked with monitoring and recommending how to improve sanctions implementation.<sup>31</sup>



The Security Council creates each expert body individually.<sup>32</sup> Each body is established by a resolution that outlines the body's mandate, size and duration. Sanctions expert bodies have taken various forms, including disarmament commissions and commissions of inquiry; panels, groups, teams and committees of experts; and monitoring mechanisms, groups and teams. They have been created in different sizes (from two to twelve members) for different periods (from weeks to years) and have been tasked with a variety of different tasks. While there has been a general evolution in sanctions monitoring trends, the ad hoc nature of the process means that each sanctions expert body is unique. The common thread is that expert bodies are nominally independent bodies with short, discrete mandates to monitor the implementation of a specific UN sanctions regime.

### 3.1 *Commissions: Disarmament commissions and commissions of inquiry*

Of the various bodies that have played a role in sanctions monitoring and implementation, commissions are the most formal. They are established by the UN Secretary-General at the request of the Security Council and they report to the Council through the Secretary-General. By contrast, the other sanctions expert bodies report to the Security Council through the appropriate sanctions committee.

#### 3.1.1 Disarmament commissions

The Security Council has established two disarmament commissions to monitor Iraq's compliance with its disarmament obligations under the Iraq sanctions regime, including in particular those outlined by Resolution 687 (1991).<sup>33</sup> The UN Special Commission (UNSCOM) was established in April 1991 to carry out on-site inspections based on Iraq's declarations regarding its weapons holdings and programmes; to undertake the destruction, removal or rendering harmless of all nuclear, biological or chemical weapons and anti-ballistic missiles with a range of greater than 150 kilometres; and to develop a plan for the ongoing monitoring and verification of Iraq's compliance with its disarmament obligations under Resolution 687.<sup>34</sup> UNSCOM played a constructive role in monitoring Iraq's compliance with its disarmament obligations, but it confronted major difficulties following Iraq's refusal to allow it to resume operations after UNSCOM inspectors had been withdrawn from Iraq in late 1998.<sup>35</sup>

In December 1999 the Council replaced UNSCOM with another disarmament commission, the UN Monitoring Verification and Inspection Commission (UNMOVIC), which was to establish a reinforced system of ongoing monitoring and verification of Iraq's compliance with its disarmament obligations.<sup>36</sup> UNMOVIC did not have an auspicious beginning, as it was unable to establish operations in Iraq for almost three years. It was not until November 2002, when the Council adopted Resolution 1441 (2002), that Iraq finally agreed to UNMOVIC's deployment on its territory. During the subsequent three months, UNMOVIC's role became quite prominent, as the international community scrutinised the extent to which Iraq was complying with its disarmament obligations. However, since the conclusion of the second Gulf War, the Commission's work has effectively been placed on hold, as it has not been permitted to resume its inspections in Iraq.<sup>37</sup>

### 3.1.2 Commissions of inquiry

The Council has established commissions of inquiry in connection with the Rwanda, 1556 Sudan and Hariri sanctions regimes. The International Commission of Inquiry for Rwanda (ICIR) was established in September 1995 to investigate the illegal supply of arms to former Rwandan government forces in the Great Lakes region, in violation of the Rwandan sanctions, and to recommend measures to end the illegal flow of arms in the subregion.<sup>38</sup> The Sudan International Commission of Inquiry (SICI) was created in September 2004 to investigate reports of violations of international humanitarian law and human rights in Darfur and to determine whether acts of genocide had occurred.<sup>39</sup> The Commission's findings induced the Council to take the unprecedented step of referring the Darfur situation to the International Criminal Court (ICC).<sup>40</sup> The findings have also wielded considerable influence over the evolution of the 1556 Sudan sanctions regime. The UN International Independent Investigation Commission (UNIIC) was established in April 2005 in order to assist the Lebanese authorities with the investigation into the Hariri bombing and to identify the bombings' perpetrators, sponsors, organisers and accomplices.<sup>41</sup> Its activities prompted the establishment of the Hariri sanctions regime and have also led to the recent creation of the Special Tribunal for Lebanon.<sup>42</sup>

### 3.2 *Monitoring mechanisms, groups and teams*

The Security Council has established a range of monitoring mechanisms, groups and teams. These monitoring bodies have tended to conduct their

work from a base at UN Headquarters. They have thus been able to form a closer relationship with their relevant sanctions committee than the other expert bodies described below in Section 3.3, which visit New York only when they begin their mandate and subsequently when they submit their written report to the Security Council via the relevant sanctions committee. In other respects, 'monitoring' and 'expert' bodies have very similar mandates. They generally report to the Council via the relevant sanctions committee, with the Chairman of that sanctions committee forwarding or presenting regular written and oral reports to the Council on their behalf.

### 3.2.1 Monitoring mechanisms

The Security Council initially floated the idea of a sanctions-related monitoring mechanism in October 1991, when it requested the 661 Iraq Sanctions Committee to develop a mechanism to monitor sales or supplies to Iraq of items that could be used for the production or acquisition of weapons, in contravention of the sanctions against weapons of mass destruction.<sup>43</sup> It took almost five years to realise this idea, however, with the Council eventually establishing such a mechanism in March 1996.<sup>44</sup> The monitoring mechanism consisted of a Joint Export/Import Monitoring Unit established by UNSCOM and the International Atomic Energy Agency (IAEA).<sup>45</sup> All states were required to notify the mechanism if their nationals planned to export to Iraq any items or technologies that might have 'dual-use' potential.<sup>46</sup> When the Council established UNMOVIC, it requested the Executive Chairman of UNMOVIC and the Director-General of the IAEA to establish a unit that would assume the monitoring mechanism's responsibilities and update the lists of contraband items and technology.<sup>47</sup> After the adoption of the Goods Review List (GRL) by the Council in May 2002,<sup>48</sup> the unit's work increased substantially as it became involved in the process of reviewing applications to export humanitarian supplies to Iraq under the OFFP to ensure that the items or technologies proposed to be supplied to Iraq did not feature on the GRL.<sup>49</sup>

The Security Council has established two other monitoring mechanisms: the UNITA Monitoring Mechanism and the Afghanistan/Taliban/Al-Qaeda Monitoring Mechanism. These monitoring mechanisms have had a less specific focus than the Iraq monitoring mechanism, with more general mandates to monitor and recommend improvements in sanctions implementation. The UNITA Monitoring Mechanism was established in April 2000 to investigate allegations of violations of the UNITA

sanctions.<sup>50</sup> The Taliban/Al-Qaeda Monitoring Mechanism was established in July 2001 to monitor sanctions implementation, provide assistance to states bordering the territory of Afghanistan under Taliban control to increase their capacity for sanctions implementation and to gather information on and make recommendations for addressing sanctions violations.<sup>51</sup>

### 3.2.2 Monitoring teams

In January 2004 the Security Council replaced the Taliban/Al-Qaeda Monitoring Mechanism with an Analytical Support and Sanctions Monitoring Team.<sup>52</sup> The Monitoring Team's initial mandate was not dissimilar to that of the Monitoring Mechanism, but it has grown in complexity.<sup>53</sup> Among the Team's additional responsibilities were conducting sanctions implementation case-studies;<sup>54</sup> reporting on the listing, de-listing and exemptions processes for the Afghanistan/Taliban/Al-Qaeda sanctions, including specific recommendations for improved implementation and possible new sanctions;<sup>55</sup> cooperating closely with the expert bodies assigned to the UN Counterterrorism Committee (CTC) and the 1540 Weapons of Mass Destruction Committee;<sup>56</sup> consulting with the intelligence and security services of UN member states in order to share information and strengthen sanctions enforcement;<sup>57</sup> and enhancing cooperation with Interpol.<sup>58</sup>

### 3.2.3 Monitoring groups

The Security Council has also established a monitoring group in connection with the Somalia sanctions regime. The Somalia Monitoring Group was established in December 2003, following the final mandate of the Somalia Panel of Experts.<sup>59</sup> The Monitoring Group's mandate has included investigating violations of the arms embargo;<sup>60</sup> making recommendations for strengthening the embargo's implementation;<sup>61</sup> reviewing the national customs and border control regimes of states in the region;<sup>62</sup> compiling a list of embargo violators both in and outside Somalia;<sup>63</sup> identifying how to strengthen the capacity of states in the region to facilitate embargo implementation;<sup>64</sup> and investigating activities generating revenue used to violate the embargo.<sup>65</sup>

## 3.3 *Panels, groups, committees and teams of experts*

The third and biggest category of sanctions monitoring bodies consists of those with the term 'experts' in their title, including panels, groups,

committees and teams of experts. Expert bodies are generally established to serve for short periods, ranging from a matter of weeks to a number of months. They report to the Council via the relevant sanctions committee.

### 3.3.1 Committees and teams of experts

There is little material difference between panels and groups of experts. However, the terms 'committee' and 'team' of experts have been used to describe initial bodies of experts established to undertake preparatory monitoring activities prior to the subsequent establishment of a panel or group of experts or another type of monitoring body. In the case of the 1267 Afghanistan/Taliban/Al-Qaeda sanctions regime, the Council initially established a committee of experts,<sup>66</sup> before later creating a monitoring mechanism and then a monitoring group. In the case of the 733 Somalia sanctions regime the Council established a preparatory team of experts,<sup>67</sup> before proceeding to create a panel of experts and then a monitoring group.

### 3.3.2 Panels and groups of experts

The Council's initial experiments with a group and panels of experts each related to the Iraq sanctions regime. These experiments differed from more recent examples of groups and panels of sanctions experts, however, in that they were not mandated to focus explicitly on improving the implementation of sanctions. The Iraq Group of Experts was established in June 1998 with the aim of determining whether Iraq was able to export the amount of petroleum and petroleum products permissible under the Oil-for-Food Programme (OFFP).<sup>68</sup> In January 1999 the Council established three ad hoc panels connected with the Iraq sanctions regime.<sup>69</sup> These panels were to make recommendations on: re-establishing an effective disarmament monitoring and verification regime in Iraq; the humanitarian needs of the Iraqi people; and outstanding issues relating to prisoners of war and Kuwaiti property.<sup>70</sup>

The first example of an expert body with a clear mandate to monitor and recommend improvements in sanctions implementation was the UNITA Panel of Experts, which was established in May 1999.<sup>71</sup> The Security Council initially intended to create two panels of experts, but when the experts first convened, they decided that it would be more efficient to act as one panel.<sup>72</sup> The mandate of the UNITA Panel included: (1) collecting information relating to violations of the arms, petroleum, diamond and financial sanctions; (2) identifying those committing or facilitating the violations of those sanctions; and

(3) recommending measures to end such violations and to improve sanctions implementation.<sup>73</sup>

Since the establishment of the UNITA Panel, other panels of experts have been created to monitor the 1132 Sierra Leone, 1343 and 1521 Liberia, 733 Somalia and 1556 Sudan sanctions regimes, while Groups of Experts have been formed to monitor the 1493 DRC and 1572 Côte d'Ivoire sanctions regimes.<sup>74</sup> These subsequent bodies of experts have been endowed with similar mandates to that of the UNITA Panel. Among the more innovative responsibilities assigned to panels have been: investigating the link between the trade in natural resources and the trade in arms that fuel conflict;<sup>75</sup> conducting an independent audit of a target government's compliance with sanctions;<sup>76</sup> reporting on the potential economic, humanitarian and social impact of sanctions;<sup>77</sup> assessing the capacity of states in the region to implement sanctions fully;<sup>78</sup> reporting on sources of financing for the illicit trade of arms;<sup>79</sup> recommending how to strengthen the capacity of states in the region to implement sanctions;<sup>80</sup> and compiling a list of sanctions violators.<sup>81</sup>

#### 4. The governance and accountability of UN sanctions expert bodies

As the previous section illustrates, the Security Council has approached sanctions monitoring in an ad hoc, flexible manner, rather than pursuing a general, strategic approach. In December 2006, the Security Council's own Informal Working Group on General Issues of Sanctions ('Sanctions Working Group') made the remarkably frank admission that the working methods of expert groups had 'developed through a system of trial and error'.<sup>82</sup> The Working Group proceeded to take the extraordinary step of outlining recommendations designed to improve the 'integrity' of the reporting habits of sanctions expert groups.<sup>83</sup> This was a clear indication that the independent sanctions expert model was not working in the manner anticipated by the Security Council.

The Sanctions Working Group's confession raises a number of basic questions relating to governance and accountability. In terms of governance, what structures are in place to govern the activities of the expert bodies? Which actors are responsible for overseeing their work? In terms of accountability, what steps do these actors take to meet their responsibilities? If it is indeed true, as the Sanctions Working Group concluded, that the integrity of expert reports is questionable, whose fault is it?

## 4.1 Governance

Before exploring questions of accountability, it is important to understand the governance structure that theoretically regulates the activities of sanctions monitoring bodies. The key actors involved in the governance of sanctions expert bodies are the Security Council, its sanctions committees, the UN Secretariat and the expert bodies themselves.

### 4.1.1 The Security Council

As described in Section 2, the UN Charter does not provide explicit guidance on how to conduct sanctions monitoring. Rather, it bestows upon the UN Security Council the primary responsibility to maintain international peace and security, including the power to apply sanctions and create subsidiary bodies to support the Council's work. When the Council decides to establish an expert body to monitor a sanctions regime, it determines what the body's mandate should be. The details are articulated in a Security Council resolution, which provides for the size of the body, its mandate in substantive terms and the duration for which it is created. The Council requires each expert body to report to it, through the appropriate sanctions committee, at the conclusion of its mandate. If the mandate of the body is longer than three months, then the Council would normally require it to provide an interim report at the half-way point of its mandate.

Once an expert body is established, day-to-day oversight falls upon the relevant sanctions committee and the UN Secretariat, as outlined below. Unless something unusual occurs, the Council will not hear from the expert body until it receives its report, which is submitted through and filtered by the appropriate sanctions committee. At that point the Council will consider the body's report, decide which of its recommendations should be acted upon, and determine whether to extend the body's mandate.

### 4.1.2 Sanctions committees

As outlined above, when the Security Council creates a new sanctions regime it usually establishes a sanctions committee to oversee that regime's administration. If a decision is made to create a sanctions expert body, that body reports to and through the sanctions committee, rather than directly to the Security Council. If the expert body is field-based, it will generally meet with the relevant committee at the beginning of its mandate and then again towards the end of its mandate, when the time

comes for the committee to review the body's report. This process of reviewing expert body reports can be time-consuming, as sanctions committee members scrutinise the draft report for anything that might be considered inaccurate, offensive or impolitic.

Once the expert body's report is approved by the sanctions committee, it is forwarded to the Security Council by the Chairman of the sanctions committee for consideration by the Council. At this point the report becomes a public document. The issuance of the report as a public document usually coincides with the periodic review of the sanctions regime in question by the Council. Thus the Council meets to decide whether to make modifications to the sanctions regime, based on the recommendations of the expert body. The Council will also decide whether to extend the mandate of the expert body and, if so, whether modifications are required to the body's mandate.

#### 4.1.3 The UN Secretariat

The UN Secretariat, and in particular the Security Council Subsidiary Organs Branch of the UN's Department of Political Affairs, plays a role in support of both sanctions committees and sanctions expert bodies. When the Security Council decides to establish a new sanctions expert body, the Secretariat takes the necessary steps to identify suitable candidates and makes arrangements for their appointment. When the body begins functioning, the Secretariat provides it with administrative support.

#### 4.1.4 Expert bodies

The governance structure within sanctions expert bodies is relatively simple. One member of each expert body is appointed Chairman. This member becomes responsible for official contact between the body and other entities. A major responsibility of the Chairman is to coordinate the preparation of and sign off on official correspondence and reports.

### 4.2 *Accountability*

As the discussion above indicates, the Security Council stands at the apex of a multi-layered governance structure for sanctions monitoring. Below the Security Council are the sanctions committees, through whom the expert bodies report. Within the expert bodies themselves, the Chairman is responsible for overseeing decision-making. At the same time, the UN Secretariat also plays an important role in support of both sanctions committees and expert bodies.



This multi-layered governance structure suggests that there should be a similarly multi-layered system of accountability. Assuming that the powers vested in the sanctions bodies are legitimately delegated by the UN Security Council, primary accountability for the activities of the expert bodies would rest with the expert bodies themselves. Proceeding up the structure, the UN Secretariat, the sanctions committees and the Council itself should each have the opportunity and the responsibility to reinforce accountability by scrutinising the activities of expert bodies to ensure that they are acting in accordance with their mandates.

#### 4.2.1 Accountability of expert bodies

Within the expert bodies themselves, the issue of accountability largely arises with respect to the preparation of reports. A common approach of expert bodies has been to name and shame individuals involved in sanctions-busting, as well as the countries from which sanctions violations have emanated. This approach has sometimes drawn a fierce response from those alleged to have engaged in sanctions violations, some of whom have pursued litigation against sanctions expert bodies.<sup>84</sup> Bodies of experts are increasingly aware of the need to ensure that they are drawing upon reliable evidence when outlining their findings and making recommendations. Indeed, expert body reports often begin with a disclaimer on standards of verification, outlining the methods they followed in an attempt to ensure that the facts they present are 'irrefutable'.<sup>85</sup>

Nevertheless, at times dubious information does make it into expert body reports. The Panel on the Illegal Exploitation of Natural Resources of the Congo, although not directly concerned with sanctions monitoring, published provocative findings without being able to substantiate the evidence upon which they were based.<sup>86</sup> Concern about the reliability and quality of evidence gathered by sanctions expert bodies has led the Security Council to request some expert bodies to bring allegations to the attention of states concerned and allow them 'the right of reply'.<sup>87</sup> The Sanctions Working Group has also outlined a range of proposals for ensuring that expert bodies share common methodological standards<sup>88</sup> and employ a standard format for written reports.<sup>89</sup> The Group has also recommended that expert bodies should: identify the sources of their information where possible;<sup>90</sup> ensure that their information is as transparent and verifiable as possible;<sup>91</sup> and emphasise impartiality and fairness when drafting reports, including by making available to relevant parties evidence of wrongdoing for their comment and response.<sup>92</sup>

Another dimension of accountability within expert bodies relates to ownership and protection of the information they collate. Although expert bodies are purportedly independent, any documentary information or evidence they collect becomes UN property. Members of expert bodies have a responsibility to ensure that such information and evidence remains confidential and is not tampered with or destroyed. The protection of information became an issue in early 2004, during the transition from the Taliban/Al-Qaeda Monitoring Team, whose mandate had been terminated, to the newly created Taliban/Al-Qaeda Monitoring Group. The outgoing Monitoring Team refused to hand over to either the UN Secretariat or its successor, the Monitoring Group, the information database it had created during its two and a half-year tenure.<sup>93</sup>

Another interesting question is the relationship between the purported independence of the expert bodies and their accountability. Does this independence enhance or undermine accountability? Arguably, the independence of expert bodies should enable them to engage in robust monitoring and analysis, without fear or favour. It should also encourage creative and innovative thinking, promoting freedom to explore the best possible solutions. Independent expert bodies should not get mired down in second-guessing the politics of the Security Council and sanctions committee decision-making processes. They should be free to focus on making their analysis and recommendations as strong as they can possibly be.

From the viewpoint of the Security Council, independence should also encourage accountability in the sense that experts be vetted for competence and expertise in advance. Moreover, the fact that independent expert bodies are hired for a temporary, fixed period should promote accountability since if individual experts turn out to be less accountable, productive or technically proficient than anticipated, there is no need to maintain or rehire them beyond their existing, short-term mandate. This stands in stark contrast to the often cumbersome hiring procedures of the UN Secretariat, where recruitment can take many months and is subject to both in-house politics and the requirement of equitable geographic representation. Thus, it can be difficult for managers to recruit those whom they consider best qualified for a specific position.

In practice, however, expert bodies are not necessarily as independent as they are purported to be. Their monitoring costs are borne by the UN and travel plans and budgeting requests must be channelled through the appropriate UN avenues. Official correspondence is also routed through

the UN Secretariat. In the field, expert bodies often rely on UN peace operations, programmes and agencies for logistical support, including transport, accommodation and travel. Moreover, expert bodies generally emphasise their link to, rather than their independence from, the UN in order to secure interviews with influential figures and gain access to useful information. The fact that an expert body has been established by the UN Security Council is sometimes highlighted to illustrate the gravity of the body's mission. In Liberia local media referred to the Liberia Panel of Experts as being both a 'UN Panel' and 'from New York'.<sup>94</sup>

The blurring of lines in terms of the appearance of independence would not be problematic if expert bodies remained independent in substance. But in some instances the short-term nature of expert appointments has had the ironic effect of fostering a form of expert *dependence*. Although experts initially accept assignment to an expert body on the understanding that it is on a short-term basis, the longer they undertake expert duties, the less easy it is to maintain another, more permanent position. Many experts thus come to rely on the possibility of gaining a further assignment to an expert body as a means of career security. It is not by chance that one of the most common recommendations by expert bodies is that their mandate be extended.<sup>95</sup> The longer certain individuals serve on an expert panel, the more likely it will become that they will develop a form of career dependency. With the onset of this dependency, it becomes less likely that experts will engage in genuinely critical analysis, thus undermining one of the key rationales for having independent expert bodies.

#### 4.2.2 Accountability of the UN Secretariat

Questions concerning the accountability of the Secretariat arise largely in respect of the appointment process for experts. In the early days of sanctions expert bodies, there were few ground rules relating to what experience or expertise was necessary to qualify as an expert. Although appointments to expert bodies were made by the UN Secretary-General, there was nothing to prevent pressure from being brought to bear upon the Secretariat by influential members of the Security Council.<sup>96</sup> However, over the course of time various checks and balances have evolved. An internal UN handbook stipulates that in order to serve on an expert body an individual should be 'an authority or specialist in an area directly related to the mandate of the expert group on which he or she is recruited to serve'.<sup>97</sup> The UN Secretariat maintains a roster of individuals fitting required expert profiles to assist in the selection

process of experts when the Security Council establishes a new expert group. The roster contains basic information about rostered experts, including their name, date of birth, nationality, fields of expertise, regions of expertise, languages, degrees and work experience.<sup>98</sup>

The process for selecting experts is initially conducted by the UN Secretariat, through the UN Security Council's Subsidiary Organs Branch.<sup>99</sup> When the Security Council establishes a new expert body, the Secretariat consults the roster for individuals with the required expertise. In this recruiting process the Secretariat seeks to achieve broad geographical and gender representation. The Secretariat conducts interviews and selects its preferred candidates. A list of those selected is then circulated to the appropriate sanctions committee, via the 48-hour no-objection procedure. If a single committee member objects to a proposed selection, then the individual concerned is struck from the list. However, if there is no objection after 48 hours, then the Secretariat's selections are considered approved. The experts are then appointed to the relevant expert body by the UN Secretary-General.

The UN Secretariat has thus made some effort to ensure that individuals selected to serve as experts meet high standards of technical expertise and professionalism. The maintenance of a roster of qualified experts theoretically helps to avoid the risk that pressure will be brought to bear upon the Secretariat to hire unrostered, potentially unqualified individuals. The involvement of the sanctions committee in vetting proposed experts arguably adds another layer of scrutiny to the recruitment process, although it could also be contended that this reintroduces politics into the selection process.

#### 4.2.3 Accountability of sanctions committees

The main role of the sanctions committees is to serve as the filter between the expert bodies and the Security Council. They do this by reviewing the draft reports of the expert bodies before transmitting them to the Council. This process involves a two-way responsibility. On the one hand, sanctions committees have a duty to ensure that the reports do not contain inaccurate information. On the other hand, they should also ensure that the Council receives all information that is relevant to its own process of reviewing sanctions regimes.

The process of filtration between the expert bodies and the Security Council is somewhat artificial. As sanctions committees are committees of the whole of the Security Council, the very same countries that sit on the sanctions committees also sit on the Council. Hence, the members of

the Council have ample opportunity to review expert body reports before they are transmitted to the Council as formal documents. Unfortunately, the review process is sometimes used by committee members to censor references that might reflect poorly on their own country. For example, in March 2003 the Panel of Experts on Somalia 'named and shamed' a number of African countries, including Yemen and Djibouti, through which arms transited, but it failed to mention the countries in which the arms originated, one of which was Bulgaria.<sup>100</sup> The Chairman of the Somalia Sanctions Committee at the time, whose responsibility it was to forward the report to the Council, happened to be the Ambassador of Bulgaria.

#### 4.2.4 Accountability of the Security Council

Ultimately it is the Security Council that must take responsibility for the performance of expert bodies. The critical moments in terms of ensuring accountability in sanctions expert bodies are at their creation, when mandates are articulated, and at the end of their tenure, when the Council has the opportunity to review performance and decide whether to extend, modify or terminate their mandates. The Council can take the lead in promoting accountability by articulating clear, unambiguous, achievable mandates at the point of establishment, and then during the review process by carefully evaluating the extent to which expert bodies have fulfilled their mandate.

Another important dimension of accountability relates to the way the Security Council responds to the recommendations of its expert bodies. In theory, if the sanctions expert body is tasked with undertaking a set of specified activities and reporting to the Council with recommendations for improving sanctions implementation, it would be reasonable to expect that the Council would respond by implementing not necessarily all but at least some of those recommendations. On occasion the Council has acted decisively and swiftly in response to recommendations by a sanctions expert body. In late 2000, the Sierra Leone Panel of Experts produced a sophisticated report outlining numerous concrete recommendations for action to address violations of the Sierra Leone sanctions and UN sanctions in general.<sup>101</sup> The Security Council subsequently acted upon many of these recommendations, including by applying targeted sanctions against Charles Taylor's regime in Liberia.<sup>102</sup> But this level of responsiveness from the Council is rare. More frequently, expert body reports contain dozens of recommendations that are not taken up by the Council.

### 5. An alternative vision of sanctions monitoring

The Security Council's delegation of sanctions responsibilities to independent expert bodies amounts to outsourcing its peace and security responsibilities. While the UN founders stopped short of prescribing a precise framework for sanctions implementation in order to give the Council maximum flexibility in determining how to exercise its sanctions powers, it is unlikely that they would have envisaged that the Council would choose to outsource such tasks in such an ad hoc manner. The delegation of public responsibilities to independent or private actors should not necessarily undermine governance and accountability.<sup>103</sup> Indeed, Timothy Mitchell has shown persuasively that a system that provides for a 'rule of experts' can be an efficient, if not necessarily principled, way to promulgate and implement policy.<sup>104</sup> However, as Angus Francis demonstrates in his analysis of the Australian Howard government's policy of intercepting asylum seekers on the high seas and sending them to Nauru, when public responsibilities are bestowed upon private actors, there is a danger that principles of governance and accountability can be diluted, potentially amounting to an abdication of basic public legal obligations.<sup>105</sup> It is thus important to have checks and balances in place to ensure that the delegation of important public responsibilities does not lead to diminished accountability.

Almost a decade has passed since the Security Council first ushered in a new generation of sanctions monitoring by establishing the UNITA Panel of Experts. Although informal checks and balances have gradually evolved in the governance and accountability of sanctions expert bodies, they remain rudimentary and unsophisticated. It is time to reassess the Security Council's ad hoc, reactive approach to sanctions monitoring. This approach has contributed to a proliferation of sanctions expert bodies, which each consume valuable financial and logistical resources and require considerable support from the UN Secretariat, as well as from UN funds, programmes, agencies and peace operations in the field. The prevailing approach undermines efforts to construct a more strategic, accountable approach to sanctions monitoring, based upon building institutional memory, capacity and procedures.

If the UN Security Council genuinely considers sanctions monitoring to be important, it should revisit its current approach of leaving it to the experts. Independent expert bodies are not the only model available to the Security Council to pursue improved sanctions monitoring. One obvious alternative would be to task the UN Secretariat with sanctions monitoring.

The Council could thus create a central monitoring mechanism in the UN Secretariat. Or it could request the UN Secretary-General to appoint a Special Representative for Sanctions, with responsibility for monitoring the implementation and impact of sanctions. Another option would be to create a Sanctions Monitoring Commission, akin to the commissions surveyed in Section 3.

The decision to locate sanctions monitoring outside the UN Secretariat was no doubt motivated by a desire to avoid the bureaucratized, rigid, costly nature of creating new sanctions monitoring machinery within the Secretariat. Yet the attempt to avoid the practical operational frustrations of an existing bureaucracy by outsourcing sanctions monitoring responsibilities to independent, outside actors has created frustrations of its own, as expressed by the Sanctions Working Group in relation to the integrity of expert body reporting.<sup>106</sup> Moreover, by creating a mechanism within the UN Secretariat, the Council would not have had to reinvent the wheel from a governance and accountability perspective. Each of the three alternative options floated above – a central monitoring mechanism, a Special Representative of the Secretary-General on Sanctions or a Sanctions Monitoring Commission – would be subject to the existing UN Secretariat rules and regulations relating to UN staff conduct, thus requiring minimum levels of professionalism, governance and accountability.<sup>107</sup>

The Security Council should give serious consideration to establishing a permanent, well-resourced sanctions monitoring body within the UN Secretariat. The staffing model should be flexible, enabling the monitoring body to respond to surges and lulls in sanctions activity. It should contain experts who focus on cross-cutting issues that affect multiple sanctions regimes. Provision should also be made for the mechanism to hire country-specialists on a short-term basis, in order to conduct fact-finding field missions.

## 6. Conclusion

This chapter has traced the development of sanctions expert bodies and explored their governance and accountability. It has illustrated how the Security Council's approach to sanctions monitoring, as with its approach to sanctions in general, has been ad hoc and reactive. Mechanisms for governance and accountability are thus rudimentary, where they exist at all. The chapter's primary argument is that the Security Council should adopt a more strategic, coherent approach to

sanctions monitoring. One way to do this would be to create permanent sanctions monitoring machinery within the UN Secretariat. The governance and accountability of sanctions monitoring are not well-served by the current approach of leaving it to the experts.

### Notes

1. One exception is Alex Vines, 'Monitoring UN Sanctions in Africa: The Role of Panels of Experts' in Trevor Findlay (ed.), *Verification Yearbook 2003* (2003) 247.
2. Charter of the United Nations art. 24.
3. *Ibid.* art. 39–51.
4. *Ibid.* art. 40.
5. *Ibid.* art. 41.
6. *Ibid.* art. 42.
7. *Ibid.* art. 41.
8. SC Res 232 (16 December 1966), [2]; SC Res 253 (29 May 1968), [3]–[6].
9. SC Res 418 (4 November 1977), [2].
10. For a list of all UN sanctions regimes established up until the end of 2006, see Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (2007) 468–9 (Appendix 3, Table B). For a summary of each sanctions regime, see 247–463 (Appendix 2).
11. David Cortright and George Lopez (eds.), *Smart Sanctions: Targeting Economic Statecraft* (2002); Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options. Results from the Stockholm Process on the Implementation of Targeted Sanctions* (2003).
12. Charter of the United Nations art. 25.
13. *Ibid.* art. 29.
14. *Provisional Rules of Procedure of the Security Council*, UN SCOR, 2410th mtg, r 28, UN Doc S/96/Rev. 7 (1982).
15. Charter of the United Nations art. 7.
16. *Ibid.* ch XV (arts. 97–101).
17. For general discussion of UN sanctions committees, see Farrall, above n 10, 147–57.
18. This was the case with the 661 Iraq, 748 Libya, 841 Haiti, 864 UNITA, 918 Rwanda, 1132 Sierra Leone, 1160 FRY, 1267 Afghanistan/Taliban/Al Qaida, 1298 Eritrea and Ethiopia, 1343 Liberia, 1521 Liberia, 1572 Côte d'Ivoire, 1636 Hariri, 1718 North Korea and 1737 Iran committees.
19. This was the case with the following committees (relevant sanctions regime listed in brackets): 253 Southern Rhodesia (232 Southern Rhodesia regime), 421 South Africa (418 South Africa regime), 724 former Yugoslavia (713 former Yugoslavia, 757 FRYSM and 820 Bosnian Serb regimes), 751 Somalia (733 Somalia regime), 985 Liberia (788 Liberia regime), 1518 Iraq (661 and 1483 regimes), 1533 DRC (1493 DRC regime) and 1591 Sudan (1556 Sudan regime).
20. Farrall, above n 10, 147, 353–7.
21. Records of the early meetings of the 661 Iraq Sanctions Committee did find their way into the public domain. See: Daniel Bethlehem and Elihu Lauterpacht,



- The Kuwait Crisis: Sanctions and their Economic Consequences* (1991). There has been no subsequent publication of the records of any other sanctions committees.
22. In May 1999, the then Chairman of the 864 UNITA Sanctions Committee, Canadian Ambassador Robert Fowler, led the first field mission by a sanctions committee. See: UN Doc S/1999/644 (4 June 1999).
  23. *Index to Proceedings of the Security Council for 1979* (1980) United Nations, New York, 2 (listing the meetings held by the Committee during the period leading up to its dissolution).
  24. *Ibid.* 273.
  25. *Ibid.* 348.
  26. *Ibid.* 331–2.
  27. UN Doc S/1995/234 (29 March 1995) [1].
  28. See, e.g., UN Doc S/1997/1028 (31 December 1997).
  29. See, e.g., the final report by the 724 Former Yugoslavia Committee: UN Doc S/1996/946 (15 November 1996).
  30. SC Res. 687 (3 April 1991) [9], [13].
  31. For a list of all sanctions expert bodies established up until the end of 2006, see Farrall, above n 10, 487–90 (Appendix 3, Table G).
  32. For general discussion of sanctions expert bodies, see *ibid.* 157–80.
  33. SC Res 687 (3 April 1991) [9], [13].
  34. For UNSCOM's mandate, see: SC Res 687 (3 April 1991) [8]–[13].
  35. For a summary of UNSCOM's activities, see: UN Doc S/1999/356 (30 March 1999) Annex I.
  36. SC Res 1284 (17 December 1999) [1]–[2].
  37. For further information on UNMOVIC's activities, see [www.unmovic.org](http://www.unmovic.org).
  38. SC Res 1013 (7 September 1995) [1]–[2].
  39. SC Res 1564 (18 September 2004) [12].
  40. SC Res 1593 (31 March 2005) [1]. For the SICI's report, see: UN doc S/2005/60 (1 February 2005).
  41. SC Res 1595 (7 April 2005) [1].
  42. SC Res 1757 (30 May 2007) [1] and Annex.
  43. SC Res 715 (11 October 1995) [7].
  44. SC Res 1051 (27 March 1996) [1].
  45. *Ibid.* [5].
  46. *Ibid.*
  47. SC Res 1284 (17 December 1999) [8].
  48. SC Res 1409 (14 May 2002) [2]–[3].
  49. See, e.g., *Ninth Quarterly Report of the Executive-Chairman of UNMOVIC*, UN Doc S/2002/606 (31 May 2002) [20]–[21]; *Tenth Quarterly Report of the Executive-Chairman of UNMOVIC*, UN Doc S/2002/981 (3 September 2002) [28].
  50. SC Res 1295 (18 April 2000) [3].
  51. SC Res 1363 (30 July 2001) [3].
  52. SC Res 1526 (30 January 2004) [6].
  53. For the initial mandate of the Monitoring Team, see: SC Res 1526 (30 January 2004) [7] and Annex.
  54. SC Res 1617 (29 July 2005) Annex I [(a)]; SC Res 1735 (22 December 2006) Annex II [(a)].

55. SC Res 1617 (29 July 2005) Annex I [(c)]; SC Res 1735 (22 December 2006) Annex II [(c)].
56. SC Res 1617 (29 July 2005) Annex I [(e)]; SC Res 1735 (22 December 2006) Annex II [(e)].
57. SC Res 1735 (22 December 2006) Annex II [(l)].
58. *Ibid.* Annex II [(o)].
59. SC Res 1519 (16 December 2003) [2].
60. *Ibid.* [2(a)]; SC Res 1558 (17 August 2004) [3(a)]; SC Res 1587 (15 March 2005) [3(a)].
61. SC Res 1519 (16 December 2003) [2(b)]; SC Res 1587 (15 March 2005) [3(c)].
62. SC Res 1519 (16 December 2003) [2(d)].
63. *Ibid.* [2(e)].
64. SC Res 1587 (15 March 2005) [3(g)]; SC Res 1630 (14 October 2005) [3(g)]; SC Res 1676 (10 May 2006) [3(g)]; SC Res 1724 (29 November 2006) [3(g)].
65. SC Res 1630 (14 October 2005) [3(b)]; SC Res 1676 (10 May 2006) [3(b)]; SC Res 1724 (29 November 2006) [3(b)].
66. SC Res 1333 (19 December 2000) [15].
67. SC Res 1407 (3 May 2002) [1].
68. SC Res 1153 (20 February 1998) [12].
69. See: *Note by the President of the Security Council*, UN Doc S/1999/100 (30 January 1999). For the reports of the panels, see: UN Doc S/1999/356 (30 March 1999).
70. *Ibid.*
71. SC Res 1237 (7 May 1999) [6].
72. *Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA*, UN Doc S/2000/203 (10 March 2000) [8].
73. *Ibid.*
74. For the resolutions establishing, extending and/or re-establishing these bodies, see Farrall, above n 10, 487–90 (Table G).
75. Sierra Leone Panel of Experts: SC Res 1306 (5 July 2000) [19(a)]; 1343 Liberia Panel of Experts: SC Res 1343 (7 March 2001) [19(c)].
76. 1343 Liberia Panel of Experts: SC Res 1395 (27 February 2002) [4].
77. *Ibid.*
78. Somalia preparatory Team of Experts: SC Res 1407 (3 May 2002) [1].
79. 1521 Liberia Panel of Experts: SC Res 1731 (20 December 2006) [4(a)]; Côte d'Ivoire Panel of Experts: SC Res 1584 (1 February 2005) [7(b)].
80. 1521 Liberia Panel of Experts: SC Res 1731 (20 December 2006) [4(f)]; DRC Group of Experts: SC Res 1533 (12 March 2004) [10(c)].
81. Côte d'Ivoire Panel of Experts: SC Res 1584 (1 February 2005) [7(g)].
82. S/2006/997 (22 December 2006) [9]. For the establishment and mandate of the Working Group, see: UN Doc S/2000/319 (17 April 2000).
83. *Ibid.* [8]–[12].
84. Vines, above n 1, 259.
85. See, e.g., *Report of the Panel of Experts concerning Liberia*, UN Doc S/2005/360 (13 June 2005) [7].
86. Vines, above n 1, 259.
87. This directive was addressed to the 1343 Liberia Panels of Experts: SC Res 1343 (7 March 2001) [20].
88. UN Doc S/2006/997 (22 December 2006) [17]–[32].

89. Ibid. [33]–[54].
90. Ibid. [21].
91. Ibid.
92. Ibid. [28].
93. Confidential interview conducted with a UN Secretariat staff member, July 2004.
94. See, e.g., ‘Liberia’s “Big Fish” In Tax Evasion’, *The Analyst* (Monrovia) 1 July 2005, 1.
95. Vines, above n 1, 258–9.
96. Vines alludes to the political nature of early selections to expert bodies. ‘Over time the appointment of experts has become less politically driven’: Ibid. 258.
97. *Handbook for members of Panels/Groups of Experts and Monitoring Groups/Mechanisms/Teams Established by the Security Council to Monitor Compliance with Sanctions Regimes* (2006) unofficial UN document on file with author, [12].
98. Ibid. [7].
99. Ibid. [9]–[10].
100. UN doc S/2003/223 (25 March 2003) [80]–[85].
101. UN Doc S/2000/1195 (20 December 2000) [1]–[18], [65]–[150].
102. SC Res 1343 (7 March 2001) [5]–[7].
103. See Jody Freeman, ‘Extending Public Accountability Through Privatization: From Public Law to Publicization’ in Michael Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (2006) 83–111.
104. Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (2002).
105. See Angus Francis, ‘Removing Barriers to Protection at the Exported Border: Visas, Carrier Sanctions, and International Obligation’ in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 378.
106. UN Doc S/2006/997 (22 December 2006) [8]–[12].
107. For discussion of these principles and their questionable application in the Oil-for-Food Programme, see 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* 334.

## PART IV

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### The place of corporations



# The nexus between human rights and business: Defining the sphere of corporate responsibility

JUSTINE NOLAN

## 1. Introduction

It is no longer a revelation that companies have some responsibility to uphold human rights. The interesting questions concern which rights and to what extent. In 2005, the then United Nations Commission on Human Rights put the issue of corporate responsibility front and centre when it adopted a resolution<sup>1</sup> requesting the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG). The appointment of Professor John Ruggie to this position in July 2005<sup>2</sup> signalled a strategic re-engagement by the UN with the ongoing struggle to marry human rights with business. Recognition of the relationship between business and human rights is one thing, delineating its boundaries is another. In seeking an answer to the recurring question of how, in practice, can corporate compliance with international human rights standards be improved, one must begin by clarifying the boundaries of corporate responsibility for human rights. What is it we are asking corporations to assume responsibility for and how far does that responsibility extend?<sup>3</sup>

The mandate of the SRSG on business and human rights recognises a variety of attempts that have been employed to apply human rights standards to corporations. The mandate seeks identification and clarification of the standards of corporate responsibility and accountability including the nebulous concept of a corporation's 'sphere of influence': a non- (or perhaps pre-) legal concept that is being increasingly used to attempt to place practical limits on corporate accountability for human rights.<sup>4</sup> As the calls become more strident for corporations to be made responsible for the human rights consequences of their actions, the absence of, and the need for, an unambiguous legal basis for both differentiating and delineating corporate responsibility for human rights is increasingly apparent. As a

first step, we need to clarify and accept the body of human rights that have a clear nexus to business, and second, seek to define the limits of both the state's and the corporation's 'sphere of responsibility' for those rights.<sup>5</sup>

## 2. What nexus? The emergence and acknowledgment of the relationship between human rights and business

Recognition of the interconnection of human rights with business activities has progressed slowly but steadily from the fringe to become a mainstream position.<sup>6</sup> The last three decades have witnessed an evolution in societal notions of corporate responsibility with a recognition that with the power of corporations on the rise, an increase in their level of responsibility must follow. It is clear that few companies today do not confront human rights problems of some sort, but the willingness to address them and explore the limits of such boundaries vacillates broadly between the principal stakeholders in the debate, including companies, governments and civil society. However, a gradual acknowledgement of the clear nexus between certain human rights and the business community has emerged, and continues to emerge, in a variety of spheres.<sup>7</sup>

### 2.1 *Human rights treaties and their interpretation*

The drafters of the Universal Declaration of Human Rights (UDHR)<sup>8</sup> could not have foreseen in 1948 that select states' powers might one day be dwarfed by corporate power. Accordingly, the emphasis in the UDHR, and in international human rights law generally, is on the responsibility to protect and respect human rights owed by states rather than by non-state actors such as corporations. This does not mean, however, that other actors have no obligations. The preamble to the UDHR states that 'every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'.<sup>9</sup>

Increasingly, human rights activists draw on this statement as a basis for arguing that corporate responsibility should be transformed into 'corporate accountability' that holds companies legally liable for protecting human rights. However, the UDHR is a declaration and thus non-binding. While morally persuasive it does not provide a legal basis for attributing responsibility to either states or corporations for the enumerated rights.

Further arguments attempting to extend the moral, if not legal, authority of the UDHR rely on article 29 which acknowledges that '[e]veryone [including non-state actors] has [non-specific] duties to the community' and article 30, which prohibits 'any State, group or person' from engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms in the Declaration. Ultimately, it is difficult to avoid the conclusion that the provisions in the UDHR express no more than a desire that business might 'strive' to promote respect for human rights, rather than impose any binding legal obligation.<sup>10</sup>

In the nearly 60 years since the drafting of the UDHR, international human rights law has continued to emphasise the primary responsibility of states to protect human rights, while remaining at least partially blind to the opportunity to speak more directly to powerful non-state actors such as corporations. While the major human rights treaties that followed and legalised many of the provisions of the UDHR<sup>11</sup> do not explicitly address a state's obligation regarding business, later treaties and occasionally now treaty bodies have begun to refer more directly to the role of states in specifically guarding against abuse of human rights by corporations. For example, the recently adopted Convention on the Rights of Persons with Disabilities states clearly that states parties have an obligation 'to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or *private enterprise*'.<sup>12</sup> In 2004, the UN Human Rights Committee, when commenting on the nature of a state's legal obligations with respect to the International Covenant on Civil and Political Rights (ICCPR),<sup>13</sup> affirmed that an obligation 'will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities',<sup>14</sup> thus acknowledging a growing need to include corporations within the rubric of the human rights protection framework. Such commentaries and interpretations of fundamental human rights treaties continue to acknowledge the primary role of states in protecting against abuse of human rights by non-state actors, at least where protective action is required within state borders.<sup>15</sup>

However, the UN Committee on Economic, Social and Cultural Rights, which oversees the implementation of the International Covenant of Economic, Social and Cultural Rights (ICESCR)<sup>16</sup> (the body of rights with arguably the strongest nexus to business activities), has on a number of occasions clearly acknowledged the threat business



may pose to human rights. In 1999 the Committee noted that, while states bear the primary responsibility in realising the right to adequate food, other members of society, including the business sector, also have responsibilities.<sup>17</sup> Continuing with this theme and extending it further, in 2000 the Committee commented that the subsequent protection obligation a state assumes in the face of such a threat may extend extraterritorially. In its General Comment concerning the right to the highest attainable standard of health, the Committee noted in 2000 that:

States parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means.<sup>18</sup>

Similarly, two years later, the Committee noted that this extraterritorial protection obligation may also extend to states with respect to protecting the human right to water.<sup>19</sup> However, the vision of human rights protection is not always commensurate with practice and it is evident that some states, while welcoming the investment offered by corporations, have been unwilling or unable to react to corporate human rights abuses or heed the advice of the UN treaty bodies in pursuing their protection obligations.

## *2.2 International law: Isolated examples of direct engagement with business*

International law refers to the rights and obligations that govern and emanate from relations between states. This much is undisputed. The extent to which international law can or should be employed in governing the relationship not only between states but also non-state actors invokes greater dissent. By necessity, international law has been employed, in isolated areas such as labour law, environmental pollution and anti corruption, to speak more or less directly to, or at least about, business. Such direct engagement with business has been brought about by the incontrovertible nexus between the subject matter, the state and the principal stakeholder involved – the business sector.

The overarching international obligations with respect to labour rights are set out in the eight fundamental conventions of the International Labour Organization (ILO).<sup>20</sup> These conventions are legally binding on those states that have ratified them. Obligations then exist at a national level to ensure enforcement of these rights by corporations; they do not

directly bind companies. However, it is widely acknowledged that these, along with the International Labour Organization's Tripartite Declaration on Fundamental Principles and Rights at Work<sup>21</sup> provide a framework and operational guidance for how and why corporations should respect labour rights. Without corporate involvement, the protection of labour rights would be a farce and indeed, some might argue, this remains a major problem. The development of numerous codes of conduct – whether by companies, stakeholder groups or international bodies – is, in part, an attempt to address the accountability deficiency between international standards of protection and their enforcement. The degree of success with which they achieve this is debatable.<sup>22</sup>

Holding third parties directly responsible for pollution is one area in which international law has been willing to engage business directly.<sup>23</sup> There are a number of environmental treaties that directly impose responsibility on polluters (i.e., corporations) but employ the machinery of domestic courts to enforce them. For example, both the International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment directly impose liability on legal persons including corporations.<sup>24</sup>

Beyond labour and environmental law, international law has focused on corporations with respect to discrete economic activities. Corruption undermines the enjoyment of human rights. It weakens democracies, harms economies, impedes sustainable development and can undermine respect for human rights by supporting corrupt governments with widespread consequences. In 1997, the Organisation for Economic Cooperation and Development (OECD) developed its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires state parties to criminalise the bribery of foreign public officials in their domestic law and to enforce that law in a manner which shall 'not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved'.<sup>25</sup> The OECD Convention makes it clear that such criminal liability extends to corporations.<sup>26</sup> The UN Convention Against Corruption has a number of specific provisions relating to the need for state parties to take steps to prevent corruption involving the private sector and to criminalise bribery in the private sector.<sup>27</sup> While still speaking directly to states, it is clear that with respect to this particular subject, international law is willing to recognise the clear causal nexus between corporate behaviour and corruption and is willing, and indeed asked, to 'regulate' business in respect of it.

### 2.3 *United Nations sanctions*

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. The most common examples cited are the pleas of the General Assembly to business during the South African apartheid era to respect the sanctions it had recommended.<sup>28</sup> More recently, the Security Council, in dealing with sanctions violations in Sudan, recognised the need for states to engage with 'all non-governmental entities' in order to prevent them obtaining or supplying weapons to the conflict.<sup>29</sup> However, again the key issue is enforcement of such sanctions. The responsibility for enforcing particular sanctions generally falls on the state party in which the corporation is incorporated.<sup>30</sup> 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. The AWB inquiry report found evidence that the Australian company, AWB, paid approximately US\$224 million in 'kickbacks' to the regime of Saddam Hussein in direct breach of UN sanctions.<sup>31</sup> In the sanctions context, either via direct targeting or more general engagement and cooperation, the UN acknowledges the nexus and necessity of engaging business in the task of protecting human rights while relying on state enforcement.

### 2.4 *Soft law developments*

Since the 1970s, a number of attempts have been made to draft voluntary guidelines, declarations and codes of conduct to regulate the activities of trans-national corporations. The most notable of these (at an intergovernmental level) are the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises,<sup>32</sup> the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>33</sup> and the ILO's Tripartite Declaration on Fundamental Principles and Rights at Work.<sup>34</sup> Many of these initiatives have a very broad coverage with only brief references to human rights. Generally, while such 'codes' encourage companies to promote and protect internationally recognised human rights, there are no effective, independent enforcement mechanisms to ensure they do so. Decisions cannot be enforced directly against a company and the power of such instruments to compel behavioural changes remains subject to the political will and ability of national governments.<sup>35</sup>

In 2000, the UN ventured boldly back into the arena of the corporate responsibility movement (trying to put past failures behind)<sup>36</sup> and established the Global Compact (Compact), whereby the then UN Secretary-General, Kofi Annan, called on world business leaders to voluntarily 'embrace and enact' a set of ten principles relating to human rights, labour rights, the protection of the environment and corruption. The human rights principles ask business to 'support and respect the protection of internationally proclaimed human rights' within their sphere of influence. However, the Compact does not specify the exact human rights that business should support and respect nor the jurisdictional limits of how far a company should extend its 'influence' to protect such rights. The lack of conceptual clarity within the Compact's standards has left a wide margin of appreciation to business regarding the interpretation of these principles and their application.<sup>37</sup> In spite of, or more likely because of this, the Compact has been successful in attracting a large number of business participants, now estimated at more than 4,700.<sup>38</sup> This attempt to build such a broad and inclusive tent with a diverse range of corporate participants has resulted in a diminution of its overall effect.

Aside from these high-level intergovernmental efforts, the last 20 years has seen a vast increase in the number of codes of conduct developed by companies, trade organisations, non-governmental organisations (NGOs) and multi-stakeholder bodies. These have been largely aimed at delineating business's responsibilities with respect to specific human rights and environmental issues. Levi Strauss & Co was one of the early adopters in 1991 with the development of its ethical code, and was followed soon after by multi-stakeholder approaches to the development of consensus on code standards, guidelines and monitoring mechanisms.<sup>39</sup> Codes of conduct have been one of several tools used by activists to try and hold companies accountable for activities throughout their entire supply chain, thus implicitly acknowledging a broader corporate sphere of responsibility than the company might claim itself. Some corporations now make express claims as regards human rights. For example, a 2006 survey of Global Fortune 500 firms conducted by the SRSG on business and human rights, found that a high percentage of respondents report having an explicit set of human rights principles or management practices in place although the particular human rights highlighted varied between respondents.<sup>40</sup> The development of the codes has largely focused on multinational corporations that potentially bear responsibility, either directly or via their supply chain or business network, for the protection and promotion of human rights. While the

proliferation of codes of conduct in the last decade – whether company specific or as part of a multi-stakeholder initiative – has meant that hundreds of companies have now publicly committed to upholding basic human rights, the challenge remains to ensure the standards espoused in codes or guidelines adopted by business are consistent, comprehensive and implemented.

It is this precise challenge that the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms)<sup>41</sup> attempted to address when it burst onto the scene in 2003. The Norms were an attempt to develop an overarching framework with consistent and comprehensive standards that might counter the cacophony of opportunistic standard setting that has so far marked the code of conduct debate and worked to confound consensus building on human rights issues. The Norms comprise a set of human rights obligations directed at companies and ask them ‘within their respective spheres of activity and influence ... to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national laws’.<sup>42</sup> Objections to the Norms from both businesses and states were many and varied and included claims that the Norms privatised human rights and were extraordinarily vague and overreaching.<sup>43</sup> The non-governmental sector was equally vocal in its defence of the Norms. The SRSG has subsequently declared that the Norms are ‘dead’, but clearly not the issues that gave rise to their birth.<sup>44</sup>

Like the Global Compact before it, the Norms embraced the concept of a ‘sphere of influence’ to delineate corporate responsibility for human rights but also failed to take up the challenge to define more precisely its boundaries. Such imprecision was seized upon by the SRSG in 2006 when he noted that ‘neither the text of the Norms or the Commentary offers a definition, nor is it clear what one would look like that could pass legal liability tests’.<sup>45</sup> In the SRSG’s 2008 report to the UN Human Rights Council, he seeks to draw a clear distinction between corporate ‘influence’ and ‘responsibility’ for rights and notes that ‘asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another’.<sup>46</sup> Thus for the moment the extent of the sphere of influence or perhaps more precisely, responsibility of a company for human rights, remains a concept in search of a definition with the major stakeholders in the debate at loggerheads on the direction in which the search party should be sent.<sup>47</sup>

### 3. Sphere of responsibility for human rights: States

Before embarking on a mission to delimit the potential boundaries of corporate responsibility for human rights, one must first appreciate the start and finish lines for determining state responsibility for protecting such rights from abuse by third parties, including corporations. As noted in the opening section of this chapter and reiterated in numerous documents, including the Norms, '[s]tates have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law.'<sup>48</sup> The traditional vision of international human rights law is that it focuses on and binds only states, as states have long been viewed as the principal protagonists of human rights abuses. However, with the rise in the number and power of corporations in recent decades, fundamental questions are now legitimately being asked about how responsibility for the protection, promotion and fulfilment of human rights should be apportioned between state and non-state actors.<sup>49</sup> Such dialogue calls into question traditional assumptions that government is the only actor of substance in this arena.

While international law does not (or rarely does) directly address corporations,<sup>50</sup> the state's duty to protect against non-state human rights abuses (including such abuses by corporations) *within their jurisdiction* is firmly enshrined in international law.<sup>51</sup> However, the critical question is under what circumstances states may or should exercise extraterritorial jurisdiction to hold corporations (domiciled in their jurisdiction) accountable for human rights abuses they commit overseas? The multi-jurisdictional nature of multinational corporations poses complex scenarios for regulating adherence to human rights standards. Generally, human rights and environmental standards of companies are traditionally regarded as matters for the host state (the state in which a particular investment is made or where the activities of the multinational take place). However, where the host state is unwilling or unable to react to corporate abuses of human rights, the home state (the state of incorporation of the parent company) may have an important role to play.

In a report by the SRSG submitted to the UN Human Rights Council in 2007 he suggested that international human rights law is more ambiguous in regard to home states employing such extraterritorial jurisdiction.<sup>52</sup> The Report suggested that while human rights treaties do not *require* states to exercise extraterritorial jurisdiction over corporate human rights abuses, nor do they *prohibit* a state from doing so.<sup>53</sup> For

example, in interpreting a states' duty under article 2(1) of the ICCPR to respect and ensure the covenant rights to all individuals within 'its territory and subject to its jurisdiction', the Human Rights Committee has interpreted this as applying to 'anyone within the power or effective control of that State Party even if not situated within the territory of the State Party'.<sup>54</sup> However the Human Rights Committee has not specifically considered this in the context of regulating extraterritorial corporate acts, the basis for exercising such jurisdiction, nor the nature of the subject matter that might justify such action (e.g., is protection justified for all corporate human rights abuses or just the most egregious?). Thus the issue can be seen in two parts: (1) what is the jurisdictional basis of the home state for (over)reaching extraterritorially to protect, prevent or redress corporate human rights abuses; and (2) what types of human rights abuses will justify such action?

### 3.1 *Jurisdictional basis for extraterritorial protection*

Traditionally, international law's jurisdictional principles are generally regarded as being designed to protect not human rights but the territorial sovereignty of the states.<sup>55</sup> Habitually, extraterritorial encroachments are justified by one or more of the established principles such as: the 'nationality' principle, the 'universality' principle or the 'effects' doctrine. None have been extensively examined from the viewpoint of justifying extraterritorial regulation of corporations.<sup>56</sup> Briefly, the nationality principle provides that states may regulate their nationals, even as regards their conduct abroad. For example, the antibribery provisions of the US Foreign Corrupt Practices Act of 1977<sup>57</sup> make it unlawful for a US person, and certain foreign issuers of securities, to make a payment to a foreign official for the purpose of obtaining or retaining business whether such action occurs within or outside of the United States. As will become apparent, such regulation might be justified as falling with the 'nationality' basis for extraterritorial regulation, but equally by another of the principles as well.

Under the principle of universality, states are seen to be acting under an obligation to exercise extraterritorial jurisdiction 'in order to contribute to the universal repression of certain international crimes'.<sup>58</sup> One might argue that the increasingly narrow extraterritorial reach of the US Alien Torts Claims Act (ATCA) (as interpreted by the US Supreme Court in *Sosa v. Alvarez-Machain*) reaffirms the employment of the universality exception for international crimes.<sup>59</sup> Despite the hype that

surrounds ATCA, its potential reach is seriously confined by both the connections of the company to the US and the type of human rights violations that fall within it. It is a rarity among human rights tools and its effects should not be overstated.

The 'effects' doctrine whereby a state may seek to regulate extraterritorial activities that have a substantial, direct and foreseeable effect upon or in its national territory may be more controversially applied to offshore business activities.<sup>60</sup> The doctrine is contentious because, as noted by one commentator, 'economic effects can be remote and general, [and] an unlimited acceptance of extraterritorial jurisdiction based on economic effects could clearly lead to extensive interference in the internal affairs of other States'.<sup>61</sup> While the effects doctrine has been justified in terms of its application to competition law, it is unlikely to be so accepted in relation to justifying extraterritorial regulation of human rights standards.<sup>62</sup>

Each of these jurisdictional bases is sufficiently broad and arguably sufficiently ambiguous to at least justify extraterritorial regulation of business. At a minimum, such extraterritorial jurisdiction should be exercised in a 'due diligence' manner, to prevent human rights abuses. However, assuming such abuses do occur, international law's extraterritorial arm should also be employed to provide redress to the victims. While legally, acceptance of such extraterritorial encroachment can be justified, whether it will in fact be exercised is likely to be heavily influenced by the type of human rights abuses that are allegedly occurring.

### 3.2 *What type of human rights abuses matter?*

Extraterritorial regulation of corporate activities is most easily defended in respect of a state acting to combat particularly heinous crimes such as genocide, war crimes, crimes against humanity, torture and forced disappearances. Many states are already under obligations to act to combat such crimes on the basis of international treaties. Arguably, all states are under such an obligation on the basis of customary international law. However, this obligation, whether customary or conventional, is generally directed to individuals and not corporations. While the current prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, has indicated that officials of corporations could be held accountable before the ICC for directly or indirectly facilitating conduct that leads to violations of international law, the Court's jurisdiction does not yet extend to corporations themselves.<sup>63</sup> The seriousness of the violation is directly connected to the likelihood of states acting to protect potential victims



and recognising the role corporations can play in human rights abuses. For example, in July 2002 Australia amended its Criminal Code<sup>64</sup> to allow for prosecution of genocide, crimes against humanity and war crimes and the jurisdiction of Australian courts for these crimes extends not only to individuals but also to corporations. The involvement of corporations in such crimes is most likely to occur in an 'accomplice' role.<sup>65</sup>

However, in a world of over 75,000 multinational corporations,<sup>66</sup> while involvement in such heinous human rights violations (amounting to international crimes) clearly does occur it remains relatively uncommon when compared against the number of corporations in existence. However, corporate involvement or complicity in human rights abuses that do not amount to international crimes is more common and therein lies the problem. As noted by de Schutter, there exists no general obligation imposed on states, under international human rights law, to exercise extraterritorial jurisdiction to protect and promote internationally recognised human rights outside their national territory.<sup>67</sup> Despite the rhetoric and the vehement theoretical claims to the contrary, it appears that the international community has not heeded the call to 'treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.<sup>68</sup> For example, the recent run of allegations levelled at American technology companies such as Google and Yahoo!, accused of acting in complicity with the Chinese government to censor and track Internet usage and restrict individual rights to privacy and freedom of expression, raises questions about how and if such companies should be held accountable.<sup>69</sup> At least in the case of extraterritorial regulation of corporate abuses, rights to freedom of expression and privacy along with a much larger raft of economic, social and cultural rights seem to be regarded as ones that may not (yet) justify extraterritorial encroachment.<sup>70</sup> While states are not prohibited from exercising such jurisdiction over violations of international human rights standards that do not amount to international crimes, it appears they will continue to require reminding that silence can indeed be interpreted as acquiescence and be actively encouraged via UN treaty bodies and through the universal periodic review conducted by the UN Human Rights Council to act to protect, prevent and provide redress for any human rights violations.

#### **4. Sphere of responsibility for human rights: Corporations**

Given the limited likelihood of states embarking on a widespread programme of extraterritorial protection of human rights, the question has

arisen as to whether corporations should step into the void to assume any level of responsibility for protecting human rights with which they have a particular and relevant relationship? While it is not reasonable or feasible to assume that corporations have responsibility for the litany of rights set out in the UDHR, there is an argument that non-state actors, such as corporations, have some level of responsibility to protect rights that have a strong nexus with their operations. The UN Global Compact asks business to 'support and respect the protection of internationally proclaimed human rights' within their sphere of influence.<sup>71</sup> The UN Norms note that states have the primary responsibility to protect rights but that corporations also have a protection obligation 'within their respective spheres of activity and influence'.<sup>72</sup>

However the concept of companies assuming a 'sphere of responsibility' for human rights predates these two initiatives in a practical sense. In 1996 when the US television network CBS' 48 Hours programme broke news alleging sweatshop conditions in Nike's contracted factories in Vietnam,<sup>73</sup> the company's first reaction was not to assume immediately direct responsibility for conditions in a factory that it did not own and for workers that were not direct employees of Nike. However the publicity backlash that ensued soon ensured Nike's acceptance of a broader sphere of influence or responsibility for itself than would otherwise flow from legal liability.<sup>74</sup> In 1995 when Ken Saro-Wiwa and eight others were executed in Nigeria – after a trial that violated international fair trial standards and dealt with alleged offences arising out of their campaign against environmental damage by oil companies, including Shell – Shell refused to criticise the trial. A Shell executive commented at the time, 'Nigeria makes its rules and it is not for private companies like us to comment on such processes'.<sup>75</sup> The public criticism that followed subsequently resulted in Shell embarking on developing new human rights policies that embraced a much broader notion of what human rights issues it might assume some level of responsibility for.

In 2000, Amnesty International's publication *Is it any of your business?*<sup>76</sup> implicitly introduced the concept of a sphere of influence to the business and human rights agenda in the form of popular concentric circles illustrating the nexus between a company and its contractors, the community and society generally. The codes of conduct which were developed at a consistent pace since the mid-1990s are illustrative of the gradual acceptance of a broader notion of how and when a company might use its influence to protect human rights and of the idea that business owes duties that extend beyond its immediate employees.<sup>77</sup> The

Business Leaders Initiative on Human Rights (BLIHR) has been proactive in pursuing practical efforts to test the confines of a company's sphere of influence by accepting a broader notion of corporate responsibility than pure legal analysis might discover.<sup>78</sup>

Precisely what falls within the sphere of activity and influence of a corporation is debatable and may be influenced by both moral and legal responsibility that will help determine if a company is complicit in human rights violations.<sup>79</sup> As argued by Lehr and Jenkins, the notion of influence is broad and does not provide a clear basis for attributing human rights responsibility to companies.<sup>80</sup> In attempting to refine the concept further and perhaps relabel it as a 'sphere of responsibility', both the nature of obligations and the question of to whom those obligations are owed should be considered.

### 4.3 *The nature of the obligation*

The obligations placed on business via the Norms, for example, are to 'promote, secure the fulfilment of, respect, ensure respect of and protect human rights'.<sup>81</sup> The terminology used suggests that business is seen as having an obligation to do more than simply refrain from acting in a way that constitutes a violation of rights: they have a positive duty to prevent violations of rights and to play a proactive role in promoting the specified rights. That is, they are an active duty holder with respect to certain human rights. Traditional interpretations of human rights may emphasise only the state as a duty holder despite the reality that the rights of individuals give 'rise to not only a variety of duties but also a variety of duty holders'.<sup>82</sup> However, surely human rights law does not preclude an evolving list of duty holders? As argued by Joseph Raz, 'one may know of the existence of a right ... without knowing who is bound by the duties based on it or what precisely are those duties'.<sup>83</sup> To accept such flexibility in the law is to acknowledge the developing nexus between business and human rights and to understand and accept that changing circumstances and the ever increasing role of corporations in all aspects of our lives permit, or even require, a departure from the view of the state as the only duty holder with respect to human rights.

#### 4.1 *To whom is the obligation owed?*

The question of who or what falls within the sphere of responsibility of a corporation, that is, to which stakeholders the obligations to protect,

promote, respect and secure the fulfilment of human rights are owed, may not turn on restrictive legal principles alone. A legalistic interpretation could limit a company's sphere of responsibility to those with whom it has a direct relationship, such as employees and shareholders. However, a more contemporary view may be to look beyond a company's contractual relationships in defining its stakeholders and consider those with whom it has a particular political, economic, geographical *or* contractual relationship: it is this broader relationship that is already acknowledged by some companies via their codes of conduct and is emerging in some jurisdiction's company law reform packages.<sup>84</sup> One of the key considerations is to determine the *proximity* of the company to the individual whose right has been violated. Establishing proximity may involve geographical considerations (particularly relevant for pollution) but may also give rise to relationship proximity questions. For example, Chinese Internet users affected by American company censorship tactics are geographically distant from the company's immediate operations but still fall within its sphere of responsibility.

Taking a 'bottom up' approach, a strong case could be made for a relevant connection existing between a company and its workers (not just direct employees, but including workers in its supply chain who may have no direct contractual relationship to the company), consumers and its host community (those who live near, or are directly impacted by, its operations, such as those living downstream from a mining operation). Looking at it from the 'top down', a company could also have a relevant connection (based on political, economic, geographical or contractual factors) with business partners (including, but not limited to, its contractors, subcontractors, suppliers, licensees and distributors), the company's host or home government or with armed militia who exert control over the territory in which they operate.<sup>85</sup> Clearly there is a sliding, and at this point in time still largely undefined, scale of responsibility between a company and the victim or violator of the human rights abuses. The more direct the connection, the greater the responsibility placed on the company to prevent or protect from such abuse.

#### 4.2 *When is the obligation owed?*

This final question involves an examination of some of the same factors that states should bear in mind when considering when to act to prevent third party human rights violations. From the perspective of establishing a corporate sphere of responsibility, relevant factors to consider are:

(1) *type* – the type of human rights abuse alleged; and (2) *causation* – the role of the company in causing the violation including which company committed or was complicit in the commission of abuse. This will involve examining the control framework of the company.

As to the type of violation that matters, much of the same rhetoric can be expected regarding the universality and importance of defending all human rights, but the reality is that not all rights are, or will ever be, protected equally. The greater the shame and media attention that can be brought to bear exposing the violation, the more likely it is to be embraced within a company's sphere of responsibility. Beyond negative publicity is the basic issue of the nexus between the specific right and the company. An apparel company, for instance, is more likely to embrace responsibility for labour rights because of the direct connection with its product, whereas a resource company may affirm its connection with environmental rights but be reluctant to act to protect freedom of speech.<sup>86</sup>

Causation is a key issue in determining responsibility but is often unclear or indirect for reasons of the violation occurring within the company's supply chain, or perhaps because the company is accused of being complicit rather than directly engaged in the violation. While there is no definitive judicial definition of what amounts to complicity in such a case, the *Unocal* test of 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime' is perhaps the closest to it.<sup>87</sup> Causation involves examining the impact of the company on the enjoyment of particular rights and leads into the final question of control.

Where a company did not directly commit the human rights violation, one issue is the extent to which the company could or did control the actions of the violator. This may involve an examination of the corporate framework within which the company operates. Most of the current litigation arising out of the US ATCA attempting to hold corporations accountable for human rights violations focuses on trying to attribute blame to the corporate parent for the actions of its subsidiary or even an agent in a developing country.<sup>88</sup> The parent company is eager to claim a lack of control over its subsidiary or agent and thus a lack of liability for the violation. In order to track liability for the violation to the parent company, it may require a 'piercing of the corporate veil', which serves to establish a separate juridical personality for a corporation and protect shareholders from liability.<sup>89</sup> Courts may be more willing to pierce the corporate veil where the parent company can be seen to exercise a strong

or 'extreme' degree of control over its subsidiary or agent though to date there is no consistent cases between jurisdictions for when the veil will be pierced.<sup>90</sup>

## 5. Conclusion

There is no doubt that the ever-increasing nexus between human rights and business and the accompanying vagueness of such concepts as a company's 'sphere of influence' can, and has, created anxiety amongst companies. Calling for the outright rejection of the concept because of lack of precision in the term is an extreme reaction. The reality is that a 'sphere of responsibility' for certain human rights is being thrust upon companies and it is a concept – non-legal at this stage, or perhaps more accurately pre-legal – that needs to be nurtured and developed in parallel with efforts to further clarify the limit of a states' jurisdictional protection of human rights.

There is no doubt that the inability of the international legal framework to keep pace with the rise of the corporation as a significant non-state actor has resulted in the emergence of an accountability gap for corporate human rights abuses. The many and varied voluntary frameworks that have arisen to affirm the human rights responsibilities of companies are useful but insufficient. 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. The other half of the puzzle lies with the willingness of states to devise or adapt mechanisms to ensure that corporations understand, respond and participate in the protection of human rights. This may require states to step outside their comfort zone and protect human rights from corporate abuses even when occurring outside of their territory.

## Notes

1. Human Rights and Transnational Corporations and other Business Enterprises, UN Commission on Human Rights Res 2005/69, UN Doc E/CN.4/2005/L.10/Add.17 (2005).
2. United Nations, 'Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises' (Press Release, 28 July 2005) [www.un.org/News/Press/docs/2005/sga934.doc.htm](http://www.un.org/News/Press/docs/2005/sga934.doc.htm) at 9 June 2007.

3. Beyond theory there is also a practical question of enforcement, not fully explored in this chapter.
4. See, eg, the actions of the group of companies involved in the Business Leaders Initiative on Human Rights (BLIHR) [www.blihr.org](http://www.blihr.org) at 19 November 2008.
5. For a discussion of why the term 'sphere of responsibility' is preferable to 'sphere of influence' see Amy Lehr and Beth Jenkins, 'Business and Human Rights – Beyond Corporate Spheres of Influence' *Strategic Corporate Citizenship (SCC) Newsletter*, November 16, 2007.
6. See, e.g., Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006) xiii.
7. See generally S. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *The Yale Law Journal* 443, 475–87.
8. Universal Declaration of Human Rights, GA Res 217A(III), UN Doc A/Res/217A (10 December 1948).
9. *Ibid.* final preambular para.
10. David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 948.
11. See, e.g., International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
12. Convention on the Rights of Persons with Disabilities, art. 4(e), UN Doc A/61/611 (2006) (entered into force 3 May 2008).
13. ICCPR, above n 11.
14. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, [8], UN Doc CCPR/C/21/Rev.1. Add.13 (2004) (General Comment 31).
15. In most jurisdictions there is a competent body of domestic law that focuses on the legal regulation of corporate activities *within* that jurisdiction that affect human rights in areas such as labour rights, anti-discrimination law, environmental protection and criminal law. Most commonly, such laws do not apply extraterritorially. See David Kinley 'Human Rights as Legally Binding or Merely Relevant?' in Stephen Bottomley and David Kinley (eds.), *Commercial Law and Human Rights* (2002) 25.
16. ICESCR, above n 11.
17. United Nations, Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right Adequate Food (Article 11 of the International Covenant of Economic, Social and Cultural Rights)*, [20], UN Doc E/C.12/1999/5 (1999).
18. United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant of Economic, Social and Cultural Rights)*, UN Doc E/C.12/2000/4 (2000) [39].
19. United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (Articles 11 and 12 of the International Covenant of Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11 (2002) [33].

20. Forced Labour Convention (No 29) (adopted 1930); Freedom of Association and Protection of the Right to Organise Convention (No 87) (adopted 1948); Right to Organise and Collective Bargaining Convention (No 98) (adopted 1949); Equal Remuneration Convention (No 100) (adopted 1951); Abolition of Forced Labour Convention (No 105) (adopted 1957); Discrimination (Employment and Occupation) Convention (No 111) (adopted 1958); Minimum Age Convention (No 138) (adopted 1973); Worst Forms of Child Labour Convention (No 182) (adopted 1999).
21. International Labour Organization, Declaration on Fundamental Principles and Rights at Work, 86th session, Geneva, June 1998.
22. See further Section 2.4.
23. See Ratner, above n 7, 479–81. Ratner postulates that the reason such direct liability is ‘tolerated’ by international law is because the method of enforcement is via domestic courts categorised as civil liability, and thus still complies with the traditional paradigm of states assuming primary responsibility for such pollution.
24. Kinley and Tadaki, above n 10, 944–7.
25. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997). art. 5. At the time of writing, there are thirty-eight parties to the Convention, including all thirty OECD countries as well as seven non-OECD countries (Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, Slovenia and South Africa).
26. Ibid. art. 2. Participating countries must take measures to establish the liability of companies (‘legal persons’) that engage in bribery acts.
27. United Nations, Convention Against Corruption, UN Doc A/58/422. The Convention was adopted by the General Assembly of the United Nations on 31 October 2003 and entered into force on 14 December 2005. It currently has 136 states parties.
28. GA Res 2671 UN GAOR, 25th session, Supp No 28, 33–4, UN Doc A/Res/2671 (1970).
29. SC Res 1556, UN GAOR, 5053 mtg, [7], UN Doc S/Res/1556 (2004).
30. See Sara Seck, *Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities* (Doctorate of Philosophy dissertation, York University, 2007) 103 noting that ‘determining corporate nationality is a state practice but that state practice diverges, with common law countries tending to accord nationality on the basis of incorporation within their territory regardless of where the business management is carried out, while civil law countries confer nationality on the basis of where the company has its seat of management’.
31. Commonwealth of Australia, The Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme, *Final Report* (2006) vol 1, xii, lxiii. See also Vivian 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* 289, 290.
32. Organisation for Economic Co-Operation and Development, *Organisation for Economic Co-Operation and Development Guidelines For Multinational Enterprises* (2000).
33. International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (3rd edn, 2001).



34. International Labour Organization, above n 21.
35. Justine Nolan 'With Power comes Responsibility: Human Rights and Corporate Accountability' (2005) 28 *University of New South Wales Law Journal* 581, 587.
36. In 1975, the UN established a Centre on Transnational Corporations, which by 1977 was coordinating the negotiation of a voluntary *Draft Code of Conduct on Transnational Corporations*. Negotiations lingered until the early 1990s but no final agreement was concluded.
37. See Surya Deva, 'Global Compact: A Critique of the UN's "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law & Commerce* 107; Justine Nolan 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24 (2) *The University of Queensland Law Journal* 445.
38. *UN Global Compact Participants* (2008) [www.unglobalcompact.org/ParticipantsAndStakeholders/index.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html) at 2 December 2008.
39. Levi Strauss & Co, *Social Responsibility/Sourcing Guidelines* (2005) [www.levis.com/responsibility/conduct/index.htm](http://www.levis.com/responsibility/conduct/index.htm) at 19 November 2008. See also Kathryn Gordon and Maiko Miyake, 'Deciphering Codes of Corporate Conduct: A Review of their Contents' (Working Paper No 1999/2, OECD, 2000) 12.
40. John Ruggie, 'Human Rights Policies And Management Practices Of Fortune Global 500 Firms: Results Of A Survey' (Working Paper No 28, Kennedy School of Government, Harvard University, 2006).
41. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th session, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).
42. *Ibid.* [A(1)].
43. See Nolan, above n 35, 593–9.
44. John Ruggie, (Speech delivered at a forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics, Bamberg, Germany, 14 June 2006).
45. United Nations, *Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, [67], UN Doc E/CN 4/2006/97 (2006) (Interim Report).
46. John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, [69], UN Doc A/HRC/8/5 (2008).
47. David Kinley, Justine Nolan and Natalie Zerial 'Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Companies and Securities Law Journal* 30.
48. Norms, above n 41, [A(1)].
49. Interim Report, above n 45, [10]–[19].
50. See above Section 2.2.
51. John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, section 1, UN Doc A/HRC/4/035 (2007).

52. Ibid.
53. Ibid. [15].
54. *General Comment 31*, above n 14, [8].
55. Jennifer Zerk, *Multinationals and Corporate Social Responsibility; Limitations and Opportunities in International Law* (2007) 135.
56. These principles are discussed only very briefly here and a more detailed discussion can be found in Olivier de Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (Paper presented at the seminar organised by the UN High Commissioner for Human Rights on Human Rights, Transnational Corporations and Other Enterprises, Brussels, 3–4 November 2006).
57. 15 USC §§ 78dd-1.
58. de Schutter, above n 56, 24.
59. The Alien Tort Claims Act 28 USC §1350 (1789) was passed as part of s. 9 of Judiciary Act (1789). While the case of *Sosa v. Alvarez-Machain* 542 US 692 (2004) did not deal with corporate violations of human rights under ATCA, it did provide a sense of a narrowing of the category of human rights violations that will be viewed as falling within the confines of the Act.
60. For a discussion of the recent history of the effects doctrine see de Schutter, above n 56, 22.
61. Peter Roth, 'Reasonable Extraterritoriality Correcting the Balance of Interests' (1992) 41 *International Comparative Law Quarterly* 267, 285. Cited in de Schutter, above n 56, 23.
62. See Zerk, above n 55, 110.
63. Michael Chertoff, 'Justice Denied', *The Weekly Standard* (Washington), 12 April 2004, 28. The ICC is a permanent tribunal that investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity and war crimes. Regarding the failure of the ICC to include corporations within its jurisdiction, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 244–6.
64. Criminal Code 1995 (Cth). Div 268 enacts within Australian federal criminal legislation the crimes of genocide, crimes against humanity and war crimes. Section 12.1 of the Code provides that 'This Code applies to bodies corporate in the same way as it applies to individuals.'
65. The role of corporate complicity in human rights violations is a key issue but is only referred to briefly in this chapter. For a fuller discussion see Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity In Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339.
66. Interim Report, above n 45, [9].
67. de Schutter, above n 56, 18.
68. *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, [5], UN Doc A/CONF.157/23 (1993).
69. Amnesty International, *Undermining Freedom of Expression in China* (2006); Human Rights Watch, *Race to the Bottom: Corporate Complicity in Chinese Internet Censorship* (2006).
70. However see legislative bills under discussion: in Europe see Jules Maaten *et al.*, *Proposal for a Directive of the European Parliament and Council Concerning the EU Global Online Freedom Act* (2008) [www.julesmaaten.eu/\\_uploads/EU%](http://www.julesmaaten.eu/_uploads/EU%20)

20GOFA.htm at 19 November 2008; and in the US see HR 275, Global Online Freedom Act of 2007.

71. UN Global Compact, *Ten Principles* www.unglobalcompact.org at 26 November 2008.
72. Norms, above n 41, [A(1)].
73. CBS News, *48 Hours*, 17 October 1996, www.saigon.com/~nike/48hrfmt.htm at 25 November 2008.
74. See Amnesty International, *Business and Human Rights in a Time of Change* (2000) 65.
75. Ibid. 1.
76. Amnesty International and Prince of Wales Business Leaders Forum, *Is it Any of Your Business?* (2000).
77. See, e.g., Fair Labor Association, *Workplace Code Of Conduct* (2005), which states: 'Any Company that determines to adopt the Workplace Code of Conduct also shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code in accordance with the Principles of Monitoring and to apply the higher standard in cases of differences or conflicts.'
78. www.blihr.org
79. International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies Main Report* (2002) 99–102, 136 www.ichrp.org/files/reports/7/107\_report\_en.pdf at 26 November 2008.
80. Lehr and Jenkins, above n 5.
81. Norms, above n 41, [A(1)].
82. Ratner, above n 7, 468.
83. Joseph Raz, *The Morality of Freedom* (1986) 171. Cited in ibid 468.
84. See Nolan, above n 35. See also s 172 of the Companies Act (UK 2006) which imposes a new potentially broad duty on company directors to have regard to the impact of a company on the community and the environment.
85. ICHRP, above n 79, 139.
86. See discussion in Section 4.
87. *Doe v. Unocal Corporation*, 2002 US App LEXIS 19263 (9th Cir, 2002). This case was eventually settled in 2005 and the decision vacated. The later decision of *Church of Sudan v. Talisman Energy Inc.*, 453 F Supp 2d 633 (2006) raises some points of difference with the Unocal test.
88. See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 129–43.
89. Ibid. 129.
90. Ibid. 130.

## At the intersection of international and municipal law: The case of Commissioner Cole and the Wheat Export Authority

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[T]he corpus of international law ... has been transformed; being no longer exclusively concerned with relationships between nations, it now penetrates formerly sacrosanct national borders and concerns itself with domestic affairs ... For Australia this dual transformation, of our federation and international law, now brings international law into intimate relationship with the structure and working of our federation.<sup>1</sup>

### 1. Introduction

The global economy is becoming increasingly integrated thanks to developments in technology, the reduction of trade barriers and the increase in direct foreign investment, particularly in developing states. Law, in the broadest sense of that term, has not integrated in the same way. This is, in our view, demonstrated starkly by the Oil-for-Food scandal. The transference of obligations from international to domestic legal systems has been settled for a long time. Ascertaining at what level responsibility attaches for monitoring compliance, investigating cases of apparent non-compliance and, where necessary, imposing sanctions remains unsettled, as this case study demonstrates.

Between 1999 and 2003, a private Australian company, AWB Limited (AWB Ltd), through its subsidiary AWB International Limited (AWB(I)), engaged in dealings with the Iraqi government, which undermined a United Nations sanctions regime that the Australian government was legally obligated to implement. The subsequent inquiry into the sanctions evasion was headed by an eminent Australian lawyer who, in his recommendations, drew attention to the failure of a small regulatory

body to prevent the company's misbehaviour. In this chapter we argue that a fresh approach needs to be taken to understanding and explaining the legal framework in which obligations established under international law are imposed on private, non-state actors. We use the Oil-for-Food Programme (OFFP) and the AWB scandal as a case study to demonstrate why this fresh approach is necessary.

Areas of law can be classified in a number of ways (public/private; civil/criminal; international/domestic). The classification of law into international law and domestic law results in a demarcation of competence. In international law, states are the ones with competence (*inter alia*, through the UN) to hold themselves and each other accountable for complying with obligations under international law. If that obligation must, in fact, be carried out by a private, non-state actor, (as was the case with the OFFP), this can only be achieved if the international obligation is given effect under domestic law, a responsibility of the individual state. The difficulties this demarcation presents are also considered in other contributions to this volume (see, for example, the work of Kevin Boreham, Angus Francis and Justine Nolan).

In this chapter we argue that this demarcation, in certain instances, is an obstacle to achieving the effective implementation of obligations and ensuring appropriate compliance by and accountability of those on whom these obligations are imposed. If 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.

This becomes as much a political/policy question as it does a legal one. Once the sanctions have been determined under international law, domestic legislators and policy makers must determine how best to give effect to those obligations when they are ultimately obligations of private, non-state actors rather than of the state itself. It is in this specific context – holding private, non-state actors accountable for obligations determined under international law – that it is necessary to identify the most appropriate agency for regulating that compliance. We suggest that that appropriate agency will be one established under domestic law, such as the Australian Securities and Investment Commission (ASIC), the Australian Prudential Regulation Authority (APRA) or the Australian Competition and Consumer Commission (ACCC). These domestic agencies would, in turn, need to have an understanding of the

international implications of the obligations they are monitoring and enforcing. In this regard, scholarship in the field of regulation, particularly international regulatory coordination, is particularly useful.

The chapter is structured as follows. We begin with a discussion of the conventional understanding of the connection between international and municipal law, including some consideration of the concept of regulation. The chapter applies these ideas to the case study of the Cole Inquiry and the role of the Wheat Export Authority in monitoring the activities of AWB during the OFFP. We then reflect on the aftermath of the inquiry and the resulting domestic legislative arrangements intended to give effect to Commissioner Cole's recommendations. Our conclusion highlights issues the examination of which would further our understanding of regulation at the intersection of international and municipal law.

## 2. Domestic regulation and international obligations

The 'orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'.<sup>2</sup> UN obligations, such as the imposition of sanctions, are addressed to states, Australia among them. However it is not generally the state that is involved in business or other dealings that are the target of the sanctions, but private companies and individuals. They bear the costs of sanctions and are also largely responsible for their success or failure. These private actors are not directly impacted by international law. In order for states to meet their obligations, they need to take steps to ensure their citizens comply with the terms of those commitments. As Renwick argues, the observance of sanctions 'depends to a large extent on the vigor with which governments are prepared to follow up suspected breaches by persons and companies within their jurisdiction'.<sup>3</sup> This raises some important issues, particularly when sanctions fail or, as in the case of the OFFP, are severely undermined.

One of the problems in analysing these questions is the fact that domestic law and international law are regarded, especially in dualist states, as being separate legal systems. This international/domestic, public/private dichotomy resonates in the opening quote of this paper from Opeskin and Rothwell. It is 'state-centric' – traditionally, states are the actors in international law and, looking inward, the state is the source of regulatory power, accountability and governance. In the public/private context, the 'private' is defined by reference to the state, the 'public'. 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', is to consider both public and private, domestic and international as part of a single legal system. This is not a new approach: Cane points out that as far back as 1885, for example, A. V. Dicey 'rejected both a substantive distinction between public and private law and an institutional arrangement under which the two bodies of law would be administered'.<sup>4</sup> The international/domestic perspective is also not so sharply delineated in monist legal systems where international law is regarded as part of domestic law.

Dicey's focus was the public/private distinction developing within domestic law, influenced in part no doubt by developments in French law.<sup>5</sup> In this context, as Cane indicates, Dicey was conceiving the public/private distinction in 'institutional terms'. Further comments made by Cane are just as applicable to the international/domestic distinction as they are to the public/private distinction:

[P]olitical and legal developments of the last 25 years have seriously undermined the institutional understanding of the public/private distinction. We now see clearly that non-government institutions are implicated in various ways in governmental tasks ('governance') and, conversely, that government participates in various ways alongside its citizens in social and economic life. One result has been a shift from conceiving the public/private distinction in institutional terms to thinking about it in functional terms.<sup>6</sup>

This point is equally valid if we substitute 'international/domestic' for 'public/private' and consider the international/domestic relationship as analogous to the relationship between national government and non-governmental organisations.

Cane's discussion, and Dicey's arguments canvassed in that discussion, are directed largely towards issues of judicial adjudication. The expression 'regulated by law'<sup>7</sup> is used in the narrower context of regulated by the courts (i.e., judicial review), as opposed to the broader context of the legal framework that regulates the structure and development of our social and economic life.

Regulation itself is not a settled concept. The term has no single, agreed meaning, 'but rather a variety of definitions in usage which are not reducible to some platonic essence or single concept'.<sup>8</sup> Indeed, most writing on the subject begins with a disclaimer or qualification that the term is 'contestable'<sup>9</sup> and defined in different ways across disciplines<sup>10</sup> and within disciplines.<sup>11</sup> Regulation has developed into a distinct field

of academic inquiry but 'it is often difficult to obtain a holistic sense of its contours and the nature of its terrain'.<sup>12</sup>

Among those writers focusing on regulation within a state, the work of Gunther Teubner and Julia Black is particularly valuable in developing a theory of regulation that matches and explains the reality of contemporary society. As Black notes,<sup>13</sup> Teubner's work on autopoiesis and reflexive law seeks to explain the nature of law in the regulatory and post-regulatory state. Teubner's work is largely theoretical. Black's work, by contrast, has a practical dimension. She contributes to the development of regulatory theory but also tests it in specific, practical contexts.

One of Black's most important contributions to regulatory theory is the concept of 'decentred regulation'. She has developed the concept drawing on the scholarship of Michel Foucault and Carl Offe, defining 'decentring' as 'the reduction of the governance role of the state but without resulting in the dominance of any one other system. ... Decentring involves a shift from state regulation to other, multiple, locations, and the adoption of indirect or negotiative strategies of regulation.'<sup>14</sup> Approaching regulation from this decentred perspective, Black offers the following as a definition of regulation:

Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.<sup>15</sup>

She herself favours this 'essentialist' definition as it:

delimits 'regulation' as an intentional, systematic attempt at problem-solving, so marking it out as a specific site of social activity and thus of investigation. ... Regulation is an activity that extends beyond the state, thus regulation may on the basis of such a conceptualisation embrace a variety of forms of relationship between state, law and society. It thus enables the identification, creation and analysis of regulatory arrangements that involve complex interactions between state and non-state actors, and enables each to be identified as both regulators and regulatees.<sup>16</sup>

This definition 'sees regulation as a form of intentional, problem-solving activity, distinguished from other problem-solving activities ... in that it attempts to alter the behaviour of others using a range of mechanisms'.<sup>17</sup> The particular value of Black's 'decentred regulation' is that it recognises the reality of non-state actors in controlling and influencing the conduct of others.



Another thread of regulation scholarship, which we feel is useful in grappling with the issue at hand, examines international regulatory coordination. At the centre of this scholarship is the coordination of activities that national regulatory authorities are engaged in and the development of regulatory networks. The actors in the regulatory networks that are developing are largely, although not exclusively, creatures of domestic legislation.<sup>18</sup> Their responsibility is to regulate certain conduct of particular entities in the domestic sphere. These regulators are not intended to regulate conduct at an international level. Indeed, that is one of the reasons for the growth in regulatory networks: the growth of the transnational corporation, assisted by developments in technology, has meant that the regulators have had to develop strategies to regulate effectively in the new, transnational environment.

This literature is, perhaps, most fully developed in the area of competition law. National competition regulators found that they needed to work more closely with each other and to coordinate their activities in order to keep pace with the growth and development of transnational corporations.<sup>19</sup> While the institutions of international law, particularly the World Trade Organization, consider whether and how to include the regulation of global competition on their agenda, the national agencies have, in the meantime, been getting on with the task of managing that regulation.

Drawing on this scholarship, we could consider regulatory coordination, not so much between the regulators of states, but between the international institutions, and the relevant state regulators – which is to say, the appropriate regulatory bodies *within* a state that could logically be charged with overseeing compliance with these international obligations, obligations *external* to the state. In Australia, that regulatory authority could be ASIC, APRA, ACCC or even a combination of these bodies.

It is here that Black's work on 'decentred regulation' would be useful. Hitoshi Nasu, in his chapter, has noted that Black's work on 'decentred regulation' could be useful in the context of regulating the institutions of international law, specifically, the institutions of the UN. We suggest that her work could also be useful in identifying *at the intersection of international and municipal law* which bodies – be they creatures of international law (such the Security Council, for example), or of municipal law (such as ASIC, APRA or ACCC) or, indeed, non-state actors (such as Human Rights Watch, Greenpeace and *Médecins sans Frontières*) – could be useful in regulating compliance by non-state

actors with a state's international obligations. Black's work removes the state from the centre of a consideration of regulation, making the relevant question: who regulates whom and why?

If we take Black's definition of regulation and apply it to the OFFP we are, we suggest, 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*. In responding to the Cole Report, the government introduced legislation which we argue still fails to deal with the preliminary question of who is responsible for monitoring compliance with these obligations. We could take some guidance from the scholarship on corporate governance regarding compliance, disclosure and accountability – this might similarly occur, as Justine Nolan advocates in her chapter, in respect of monitoring corporations for compliance with their social responsibilities.

### 3. Case study: Commissioner Cole and the role of the Wheat Export Authority

A good example of the difficulties and misunderstandings that arise from a state-centric approach to these issues is provided by the role attributed, in our view incorrectly, to the Wheat Export Authority (WEA) by Commissioner Cole in his 2006 report to the Australian government following the Oil-for-Food scandal. Cole interpreted the role of the WEA as that of a regulator and then argued that in that role the Authority had failed. The OFFP was set up to alleviate the suffering of the Iraqi people resulting from the imposition of the sanctions regime against the Iraqi government. While the aims were laudable, the way in which the programme was set up left it exposed to the risk of abuse and corruption.<sup>20</sup> In 2003, the UN established an inquiry into the operation of the OFFP, and the inquiry's findings, tabled in the Volcker Report identified a range of companies that had cooperated with the Iraqi government in bypassing sanctions. To the embarrassment of Australia, the greatest offender was AWB Ltd through the activities of its wholly-owned subsidiary AWB(I).

AWB Ltd is the privatised successor to the statutory Australian Wheat Board and understanding the context of that privatisation process and the rationale for the establishment of the WEA is important when assessing the effectiveness of the WEA. Following the revelations in the Volcker Report, the Australian Government commissioned the Honourable Terence Cole, a retired Federal Court judge, to inquire into

‘[c]ertain Australian Companies in relation to the UN Oil-for-Food Programme’. Commissioner Cole’s fifth recommendation was that ‘there be a review of the powers, functions and responsibilities of the body charged with controlling and monitoring any Australian monopoly wheat exporter. A strong and vigorous monitor is required to ensure that proper standards of commercial conduct are adhered to’.<sup>21</sup>

This recommendation assumes a particular role for the WEA or its successor, which was never intended by the Parliament and which does not recognise the political context within which the WEA was established.

The case study begins with a brief overview of wheat marketing arrangements in Australia, focusing on the privatisation of the former Australian Wheat Board and the establishment of the WEA as part of the new arrangements after 1999. It discusses the role of the WEA and then sets out the regulatory aftermath of the Cole Inquiry before drawing some conclusions about the challenges of regulating across the international-municipal divide.

### *3.1 The privatisation of the Australian Wheat Board*

Debate over government policy towards the wheat industry dates back to the beginning of wheat cultivation in Australia. Attempts at price setting and various forms of protection were employed sporadically to secure supply of this staple foodstuff and to ensure adequate income for wheat growers.<sup>22</sup> In 1915 a war time wheat pool was established and run by an Australian Wheat Board made up of the Prime Minister and a minister from the wheat growing states.<sup>23</sup> The powers of the wartime Board lapsed in 1920. In 1930 the Australian wheat industry faced very low prices. In response the Scullin government unsuccessfully attempted to establish a permanent Australian Wheat Board with powers of compulsory acquisition and a guaranteed minimum price. War time measures were again instituted in 1939 and then from 1940 a ‘temporary’ scheme of stabilisation, guaranteed minimum pricing and pooling was established. In 1948, the arrangements were consolidated with the passage of the Wheat Industry Stabilization Act 1948, which set up the statutory Wheat Board with a fixed price for wheat based on costs of production underpinned by a stabilisation fund. Domestic wheat prices were higher than the export price in order to fund the stabilisation component.<sup>24</sup> The legislation was reviewed every three years and the arrangement renewed without serious challenge.

By the late 1980s government intervention in all areas of the economy was coming under increasing scrutiny, including agricultural regulation. Two inquiries into the wheat industry in 1988 proved pivotal: the Royal Commission into Grain Storage, Handling and Transport and the Industries Assistance Commission report into the Wheat Industry. Following these reports, the Commonwealth introduced the Wheat Marketing Act 1989 which effectively deregulated the domestic wheat market and ended the guaranteed minimum price. The Australian Wheat Board retained the export monopoly with the quid pro quo that it act as receiver of last resort to ensure a market for all wheat delivered to the Board that met its standards. In order to provide growers with a significant first payment on wheat delivered to the pool, the Wheat Board needed to borrow substantially. The Board's borrowings were guaranteed each year by the government. This guarantee was subject to review within five years. The legislation also established a levy-based Wheat Industry Fund (WIF) to replace wheat taxes that had been raised for research and development purposes.

In 1992 the legislation was amended to continue the single desk arrangements, to extend the government guarantee of Wheat Board borrowings until June 1999 and to allow for the continued accumulation of the WIF until June 1999. The continuing growth of the Fund was intended to provide a capital base for the Wheat Board to provide working capital for its trading activities and to fund advances once the borrowing guarantee ran out, and for investment in value adding.<sup>25</sup> By the time the Australian Wheat Board was privatised, the WIF contained around AUS \$650 million in grower equity.

The 1989 domestic deregulation occurred largely against the wishes of the grains industry. However, it was clear by 1991 that the pressure for change in industry structures had not ended with the domestic deregulation. The Grains Council of Australia, a commodity council of the National Farmers' Federation, determined that any further changes should not be introduced without grains industry involvement. In 1991 the Council convened the Grains 2000 Conference, which set up a strategic planning process to consider the future of the grains industry 5, 10 and 20 years into the future. This process included consideration of the marketing of milling wheat and the future structure of the Australian Wheat Board. The publication of the Inquiry into National Competition Policy (the Hilmer Report) in 1993 put further pressure on the grains industry as the Inquiry Committee devoted a section to the anti-competitive impact of statutory marketing arrangements in

agriculture<sup>26</sup> and a chapter to public monopolies.<sup>27</sup> The report was explicit in relation to the privatisation of monopolies:

While the Committee recognises that privatisation may offer efficiency benefits, there is a risk that privatisation without appropriate restructuring may entrench the anti-competitive structure of the former public monopolies, making structural reform even more important.<sup>28</sup>

From 1993 to 1997, the grains industry debated the issues around export marketing with most of the deliberations being undertaken through a working group of the Grains Council, the Australian Wheat Board and the Department of Primary Industries and Energy. During the process, five key objectives for the Wheat Board restructure were identified by the Grains Council:

1. Retention of the AWB's single export desk;
2. Grower control and/or ownership of the AWB with the ability for growers to access their equity in the AWB;
3. An adequate capital base to ensure a strong commercial entity with the ability to maintain adequate first advance payments;
4. A commercial structure that reflects market signals, provides commercial flexibility and maximises returns to growers; and
5. Industry self-determination, and certainty and efficiency in structural arrangements.

These objectives, which were the grains industry's key objectives for the restructure process, thereby provided the parameters for the models that the Working Group considered. After much internal debate a final model, known as the 'grower corporate model', was announced by Primary Industries Minister John Anderson on 17 April 1997. The grower corporate model comprised a statutory authority which managed the single desk and a privatised company that would manage the pooling and marketing associated with the export monopoly. The details of the share structure for the privatised body were not finalised at the time of the Minister's announcement, nor was it clear how the WIF would be converted into shares.

The legislation giving effect to the model reflected the ongoing disagreement within industry about the nature of the privatisation. It was divided into two parts with the first, the Wheat Marketing Amendment Act 1997 (Cth), setting up transitional arrangements to set the framework for the final privatisation, the details of which had not yet been finalised. The 1997 legislation authorised the statutory

Australian Wheat Board to establish subsidiary companies to take over certain of its functions. The functions of the old Board were split, leaving the Board with responsibility for 'management of the export monopoly, management of the wheat industry fund, and overseeing the activities of its subsidiary, the holding company'.<sup>29</sup> This was foreshadowed to cease on 1 July 1999 when responsibility for the export monopoly would pass to an 'independent regulatory mechanism ... established to manage and monitor the performance of the export monopoly'.<sup>30</sup> The holding company was set up as a 'commercial company operating under Corporations Law' with 'overarching responsibility for the pooling and commercial operations of the ... Australian Wheat Board, including trade in wheat and grain and value adding activities'. The pool was to be operated by a subsidiary company 'company B'.<sup>31</sup> The purpose of the transitional arrangements was to provide the holding company with the opportunity to establish a commercial track record before being transferred to full grower ownership and control on 1 July 1999.<sup>32</sup>

In 1998 the second phase of the legislation was passed, transforming the statutory Australian Wheat Board into the Wheat Export Authority (WEA). The legislation also finalised the privatisation process, converting equity in the Wheat Industry Fund into shares in AWB Ltd, the former holding company. 'Company B' became AWB(I), a wholly owned subsidiary of AWB Ltd with responsibility for running the export pool for wheat. In order to provide grower control of the newly privatised entity, the legislation established two classes of shares. Class A shares were provided on the basis of one per wheat grower. Class A shareholders elect the majority of the members of the board of AWB Ltd but receive no dividends. Class B shares were allocated on the basis of WIF equity and became tradeable on the Australian stock exchange after AWB Ltd listed on 22 August 2001. Class B shareholders elected the minority of the board of AWB Ltd and had a right to receive dividends. The changes included in the 1998 legislation came into effect on 1 July 1999.

### 3.2 *The role of the Wheat Export Authority*

The new WEA was given limited functions. The final legislation did not deliver the 'independent regulatory mechanism' foreshadowed in 1997, rather the role of the WEA was set out in Section 5(1) of the Wheat Marketing Act 1989 (Cth) (as amended):

- (a) to control the export of wheat from Australia;
- (b) to monitor nominated company B's performance in relation to the export of wheat and report on the benefits to growers that result from that performance.

The Act required that a permit be sought from the WEA to export wheat from Australia – wheat is a prohibited export under the Customs (Prohibited Exports) Regulations 1958 (Cth). However, until amended in December 2006 in light of the Cole Inquiry, the Wheat Marketing Act 1989 (Cth) exempted AWB(I) ('nominated company B') from the requirement to obtain such a permit. Further, the legislation stated that the WEA 'must not give a bulk-export consent without the prior approval in writing of nominated company B'<sup>33</sup> to ensure that no proposed exports undermine the effectiveness of the wheat pool in maximising returns to growers. This mechanism in effect gave AWB a veto over exports by other companies. From 1999 until 2006, AWB did not agree to the issuing of any permits for bulk wheat exports under this mechanism except for one which it advised the WEA was an 'error'.<sup>34</sup>

In his fifth recommendation (quoted above), Commissioner Cole conflates the two roles of the WEA as set out in its legislation: namely that of controlling wheat exports and of monitoring the monopoly wheat exporter. Until December 2006, AWB(I) was exempt from the 'control' part of the WEA's function as it did not require a WEA permit in order to export. In relation to AWB(I), WEA's role was to monitor its performance and report on that performance to growers. This gave the Authority little or no role as a monitor of AWB(I)'s commercial conduct and arguably no powers to enforce the UN sanctions.

As noted above, when the first phase of the restructure was presented to Parliament in 1997, the second reading speech foreshadowed the establishment of an 'independent regulatory mechanism' in relation to the management of the single export desk. The speech did not elaborate what this regulatory mechanism might be and indicated only that its role would be 'to manage and monitor the performance of the export monopoly'. The second reading speech for the 1998 legislation, which established the WEA, referred to the body as an 'independent statutory authority' with no reference to a regulatory function. The speech stated that the WEA was set up to 'manage' the wheat export monopoly and also to provide 'oversight [of] the pool subsidiary's use of the export monopoly to ensure it is being used in accordance with the intentions of parliament'.<sup>35</sup> Because section 57 of the legislation exempted AWB(I)

from the requirement to obtain an export permit from the WEA, the company's activities fell outside the WEA's role of managing the wheat export monopoly.

The WEA's interpretation of its role can be gleaned from various public documents and its statements in appearances before Senate Estimates Committees. In 2006 WEA Chairman Tim Besley explained the role of the WEA as follows:

The only control we exercise over wheat that is exported is for non-AWB(I) exporters who need to have a permit. Before they get that permit, we have to talk to AWB(I) and take their comments on board; also listen to and take on board the advice we have got from other places, like Austrade; and apply our own market knowledge and so on. We then decide independently whether or not to issue that permit. So that is the control side.

...

The other function we have is to monitor, not to audit, the way that AWB(I) manages the single desk for the benefit of the growers. That is a fairly limited role. People think that we have much more of an investigative or audit role, which we do not have. We have to monitor it.<sup>36</sup>

He went on with a plea that 'anyone who is changing the act ..., for goodness sake, make it clear precisely what role the Wheat Export Authority or its successor body may have'.<sup>37</sup> The WEA's Annual Report for 2005–2006 also reflects this retrospective, monitoring role – as opposed to the functions of an industry regulator. The Authority's mission was 'to facilitate the operations of the existing wheat export arrangements and to inform Government and growers of outcomes'.<sup>38</sup> The Annual Report identifies three business goals:

1. 'To create and maintain a wheat export consent system that is effective, efficient and objective, and to manage export compliance with the terms of consents';
2. 'To effectively monitor, examine and accurately report to stakeholders on the export performance of AWB(I) and the resulting benefits to growers'; and
3. 'To effectively manage the operations of the WEA and raise stakeholder awareness of achievements, consistent with Australian Government Corporate Governance principles'.<sup>39</sup>

In relation to the second of these goals, the Annual Report states that the 'WEA's analysis is focused on AWB(I)'s export performance in managing the National Pool from the perspective of maximising



grower returns'. It notes that 'the manner in which AWB(I) conducts its business resides with the Board of AWB(I) and is governed by AWB(I)'s constitution and an established corporate governance framework'.<sup>40</sup> This latter point is reinforced in the Chairman's report which directly challenges Commissioner Cole's suggestion that the WEA (or any replacement body) should monitor performance of proper standards of commercial conduct of the monopoly exporter. In the Annual Report Besley notes that '[t]he WEA does not agree that this is a role for the WEA and is properly a matter for the Directors of AWB(I) and AWB Ltd. It is not for the WEA to shadow those Directors' responsibilities'.<sup>41</sup>

In October 2007 the WEA became the Export Wheat Commission and in 2008 was replaced by Wheat Exports Australia under legislation which ended the export monopoly arrangements. The changes to the agency and to the legislation do not affect the matters under consideration in this chapter. The WEA comprised a chairman, two members nominated by the Grains Council, a government member and one other member.<sup>42</sup> Its functions and powers were set out in section 5 of the Wheat Marketing Act 1989 (as amended). Section 5A stipulated that:

(1) In performing its function of controlling the export of wheat from Australia, the Authority must seek to complement any objective of nominated company B to maximize net returns for pools operated by that company, while at the same time seeking to facilitate the development of niche and other markets where the Authority considers that this may benefit both growers and the wider community.

The Authority was required to prepare an annual report to the Minister and to growers in relation to AWB(I)'s performance in respect of two things: the export of wheat for the year and the benefits to growers that resulted from that performance.<sup>43</sup>

The powers of the Authority (and, after October 2007, the Commission) to obtain information were set out in section 5D. The powers under this section were quite limited: the Authority was empowered only to obtain information or documents (or copies of documents) that the Authority considered relevant to 'the operation of pools mentioned in section 84 (including the costs of operating the pools and the returns to growers that result from the pools)'.<sup>44</sup> In order to obtain this information the WEA was required to issue a direction in writing specifying the information or documents that were required.<sup>45</sup> So, the WEA only had the power to ask

for and receive information or documents that it considered relevant to the operation of the wheat pools, nothing more.<sup>46</sup> The Act, and hence Parliament, clearly did not envisage the role of the WEA as a general 'watch-dog' of AWB(I).

Like many jurisdictions, Australia has an array of regulatory bodies and structures. Three of the most important regulators are the Australian Competition and Consumer Commission (ACCC),<sup>47</sup> the Australian Securities and Investments Commission (ASIC),<sup>48</sup> and the Australian Prudential Regulation Authority (APRA).<sup>49</sup> They each play a supervisory and regulatory role, overseeing and regulating the conduct of corporations, for the most part. The ACCC, for example, has among its responsibilities the task of investigating and prosecuting possible breaches of the Trade Practices Act 1974 (Cth).

The WEA was not this type of institution. It was not established to carry out the sort of supervisory or regulatory role with which ASIC, the ACCC or APRA have been charged. Its purpose, as noted above, was to manage the grain industry monopoly, the single desk. It was an industry body responsible for the collective representation of members of a particular domestic industry in overseas markets.<sup>50</sup> As with bodies such as the Australian Wine and Brandy Corporation, and Meat and Livestock Australia, the WEA was set up for a particular purpose under special legislation.

By contrast with these industry bodies, APRA, ASIC and the ACCC have extensive investigatory powers. Part 3 of the Australian Securities and Investments Commission Act 2001 (Cth), for example, sets out extensive powers of investigation and information-gathering. ASIC has the power to compel a person to provide information that ASIC reasonably believes to be relevant to a matter it is investigating.<sup>51</sup> It also has similar powers under other pieces of legislation.<sup>52</sup> APRA also has powers of investigation, although these are set out in legislation other than the Australian Securities and Investment Commission Act 2001 (Cth) and the Australian Prudential Regulation Authority Act 1998 (Cth). Section 54 of the Insurance Act 1973 (Cth), for example, empowers APRA, or its authorised inspector, to enter the land or premises of an entity under investigation and examine books there that relate to that entity. Section 55 sets out further powers of ASIC and its inspector and section 56 makes it an offence for a person to refuse to comply with a requirement under section 55. Similarly, the ACCC has considerable powers of investigation. These are set out in Part XIX of the Trade Practices Act 1974 (Cth).

The ACCC, ASIC and APRA are arguably the most significant regulatory bodies under domestic law. The foregoing discussion shows that it was never the intention of Parliament, or the grain-growing industry for that matter, for the WEA to be a regulator in the mould of these three authorities. In addition to this, given the responsibilities of APRA, ASIC and the ACCC, we would argue that it is inappropriate to try and convert the WEA into a similar regulatory body. In principle, there is no reason why adhering to ‘proper standards of commercial conduct’<sup>53</sup> cannot be ensured by the three existing regulatory authorities.

Commissioner Cole’s fifth recommendation<sup>54</sup> suggests that the WEA or its successor should be given additional powers that would align it more closely with these three bodies. The issue became moot in 2008 when the new Rudd government introduced legislation ending the export monopoly arrangements and AWB(I)’s privileged role therein. The new Wheat Export Marketing Act 2008 (Cth) established a system of accreditation for wheat exporters managed by the new Wheat Exports Australia. The simplified version of the Act sets out its purpose as follows:

This Act sets up a system for regulating exports of wheat (other than wheat in bags or containers).

- Exporters of wheat must be accredited under the wheat export accreditation scheme.
- An exporter will not be eligible for accreditation unless the exporter is a company that satisfies the eligibility criteria set out in the scheme.
- The eligibility criteria include being a fit and proper company.
- An accredited wheat exporter must comply with conditions of accreditation (including reporting conditions).
- Wheat Exports Australia (WEA) will administer the wheat export accreditation scheme.
- WEA has power to: (a) obtain information from accredited wheat exporters; and (b) direct the audit of an accredited wheat exporter.
- The Minister may direct WEA to carry out an investigation.
- WEA will report to growers on an annual basis.<sup>55</sup>

This is worth including in its entirety as it illustrates that once again the government does not see the role of a wheat export regulator in a similar light to the ACCC, ASIC and APRA.

#### 4. The regulatory aftermath of the Cole Inquiry

In response to Commissioner Cole’s report, the Howard Government introduced the International Trade Integrity Act 2007 (Cth), which

gives effect to the first three of the Commissioner's recommendations. This Act clothes the 'CEO of a designated Commonwealth entity'<sup>56</sup> with investigative powers similar to those granted to ASIC, APRA and the ACCC. It also appears that the Government, after a fashion, heeded Commissioner Cole's fifth recommendation as well.<sup>57</sup> It is not clear from the Act who, if anyone, is responsible for actively monitoring compliance with UN-sanctions and, to that extent, the question of supervision raised implicitly in Commissioner Cole's fifth recommendation remains unanswered. As Margaret Doxey has argued '[f]ar-reaching exemptions undermine the effectiveness of ... sanctions'.<sup>58</sup> In these circumstances, clear monitoring and compliance regimes are essential.

To an extent, the problem will remain 'subject specific'. In other words, the question of who is responsible for the supervision of compliance with UN sanctions will depend on the nature of the sanctions and the kind of examination required to monitor compliance. Cole did not call for measures to be adopted to ensure a 'strong and vigorous monitor' of UN sanctions regimes. The third recommendation, which is given effect in the International Trade Integrity Act 2007 (Cth), does not call for such a monitor; it recommends that 'there be conferred on an appropriate body power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth'. The recommendations are silent as to who is to oversee compliance with sanctions regimes and notify this 'appropriate body' if such evidence and information needs to be obtained. No doubt the presumption underlying the International Trade Integrity Act 2007 (Cth) is that, in the first instance, permitted derogations from sanctions regimes will be managed and monitored at the UN level. According to the Australian Department of Foreign Affairs (DFAT), the amendments to the Charter of the United Nations Act 1945 (Cth) (set out in the International Trade Integrity Act 2007 (Cth)) will introduce an investigatory power 'for agencies that administer UNSC sanction regimes in Australia, such as the Department of Foreign Affairs and Trade'.<sup>59</sup>

As the inquiries into the OFFP have shown (both the Cole Inquiry and the Volcker Inquiry), it was assumed that the active oversight for compliance with the UN sanctions would take place at the UN level. DFAT saw its role in the implementation of the scheme as barely more than a courier service, delivering relevant documents to the UN. DFAT never understood its role to be that of a regulatory agency in the mould of ASIC, APRA or the ACCC. Indeed, Commissioner Cole's

fifth recommendation implicitly supports rather than detracts from this interpretation. The conduct of AWB(I) and its officers may have contravened law that was already in place in Australia.<sup>60</sup> The basis on which the offending parties could be brought before a court was existing domestic law. Although such legislation was not brought into existence for the specific purpose of ensuring compliance with Australia's international obligations, it could nevertheless be applied, to an extent, in that context. The broader obligation not to breach the UN sanctions was, as set out earlier, an obligation of Australia, not its citizens. This situation changed on 24 March 2008 when the provisions in Schedule 1 of the International Trade Integrity Act 2007 (Cth) entered into force.<sup>61</sup> What will remain unchanged, however, is the question of who will monitor any given sanctions regime to ensure compliance on the part of states and their citizens.

## 5. Conclusion

Commissioner Cole's fifth recommendation raises the issue of the appropriateness of requiring the regulatory authorities of a state to undertake a supervisory role in respect of international legal apparatuses such as the OFFP. It fell to private, non-state actors, to give effect to Australia's international obligations. The regulatory regime in place to monitor and facilitate the OFFP in Australia was clumsy and, ultimately, ineffective in holding those actors to account.<sup>62</sup> This can in part be explained or accounted for by the sharp division in Australia and other dualist states between the domestic and the international spheres. When the state was the primary actor in the international arena, such a demarcation may have been natural and understandable. In the context of increasing global integration in which there are significant non-state actors, this demarcation is an inappropriate frame of reference for developing mechanisms to give domestic effect to international obligations.

The AWB case highlights the need for a fresh approach to the implementation of international agreements where meeting the obligation falls not on the state that is party to the commitment but in fact on that state's citizens (legal or natural). The state then must ensure its citizens will meet the obligations contained in the international instrument. As the Cole Inquiry revealed, the Australian government failed to do this and, as argued above, it is doubtful that the International Trade Integrity Act 2007 (Cth) effectively addresses this failure.

Emerging strands in the regulation literature suggest that thinking beyond hierarchy and establishing relationships between international organisations and *appropriate* regulatory agencies within states may be more successful mechanisms for addressing this gap at the intersection of international and municipal law.

### Notes

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2. Hersch Lauterpacht, *International Law: Collected Papers* (1975) vol. 2 489. Cited in Malcolm Shaw, *International Law* (4th edn, 1997) 139.
3. Robin Renwick, *Economic Sanctions* (1981) 79.
4. Peter Cane, 'Accountability and the Public/Private Distinction', in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-layered Constitution* (2003) 247, 253.
5. *Ibid.*
6. *Ibid.* 254.
7. *Ibid.* 261.
8. Robert Baldwin, Colin Scott and Christopher Hood, *Reader on Regulation* (1998) 2.
9. See, e.g., Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007) xiii; *Ibid.* 1; Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 2.
10. See, e.g., Morgan and Yeung, above n 9, xiii; Baldwin, Scott and Hood, above n 8, 1; Black, above n 9, 2; Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; T. C. Daintith, 'A Regulatory Space Agency?' (1989) 9 *Oxford Journal of Legal Studies* 534, 536.
11. *Ibid.*
12. Baldwin, Scott and Hood, above n 8, 1.
13. Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103, 106 fn 3 and accompanying text.
14. Julia Black, 'Proceduralizing Regulation Part I' (2000) 20 *Oxford Journal of Legal Studies* 597, 601.
15. Black, above n 9, 26.
16. *Ibid.* 26–7.
17. *Ibid.* 27.
18. See, e.g., Imelda Maher, 'Competition Law in the International Domain: Network as a New Form of Governance' (2002) 29 *Journal of Law and Society*, 11; Michael Barr and Geoffrey Miller, 'Global Administrative Law: The View from Basel' (2006) 17 *European Journal of International Law* 15.
19. See Maher, above n 18.
20. See, e.g., United Nations, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Management of the Oil-for-Food Programme* (2005) (Volcker Report); Jeffrey Meyer and Mark Califano, *Good Intentions Corrupted: The Oil-for-Food Scandal and the Threat to the UN* (2006); 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* 334.
21. Commonwealth of Australia, The Inquiry into Certain Australian companies in relation to the UN Oil-for-Food Programme, *Final Report* (2006) lxxxv (Cole Report).
  22. Edgars Dunsdorfs, *The Australian Wheat-Growing Industry 1788-1948* (1956).
  23. Greg Whitwell and Diana Sydenham, *A Shared Harvest: The Australian Wheat Industry 1939-1989* (1991) 41. A wheat pool is essentially a financial product. A wheat grower sells their wheat to a pool provider who pays all contributors to that pool a common per tonne (or per bushel) price minus handling, transport and other administrative costs. It has the effect of spreading risk across wheat growers and is a form of cross-subsidisation.
  24. Geoff Cockfield and Linda Botterill, 'Deregulating Australia's Wheat Trade: From the Australian Wheat Board to AWB Limited' (2007) 2(1) *Public Policy* 44.
  25. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 October 1992 (Simon Crean, Minister for Primary Industries and Energy).
  26. F. Hilmer, M. Rayner and G. Taperell, The Independent Committee of Inquiry into a National Competition Policy, *National Competition Policy* (1993) 139-43.
  27. *Ibid.* 215-38.
  28. *Ibid.* 215.
  29. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 June 1997, 6475 (Bruce Scott, Minister for Veterans' Affairs).
  30. *Ibid.*
  31. *Ibid.*
  32. *Ibid.*
  33. Wheat Marketing Act 1989 (Cth) s. 57(3B).
  34. Senate Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Estimates (Budget Estimates)* (24 May 2006) RRA&T65.
  35. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 May 1998 (John Anderson, Minister for Primary Industries and Energy) 3332.
  36. Senate Rural and Regional Affairs and Transport Legislation Committee, above n 34, RRA&T65-RRA&T66.
  37. *Ibid.* RRA&T66.
  38. Wheat Export Authority, *Annual Report 2005-06* (2007).
  39. *Ibid.* iii.
  40. *Ibid.* 35.
  41. *Ibid.* 3.
  42. In 2007 the WEA changed from being an agency pursuant to the Commonwealth Authorities and Corporations Act 1997 (Cth) to a statutory commission pursuant to the Financial Management and Accountability Act 1997 (Cth). It was renamed the Export Wheat Commission. Under the new provisions, the Commission today consists of a Chairman and at least three and not more than five other members: Wheat Marketing Act 1989 (Cth) s. 6(1).
  43. *Ibid.* s. 5C.
  44. The 2007 amendments to the legislation do not substantially alter this situation: see *Ibid.* ss. 5D-E.
  45. *Ibid.* s. 5D(2).

46. The situation has not changed in respect of the Export Wheat Commission.
47. Established under the Trade Practices Act 1974 (Cth) s. 6A.
48. Established under the Australian Securities and Investments Commission Act 1989 (Cth) s. 7. It continues in existence pursuant to s. 261 of the Australian Securities and Investments Commission Act 2001 (Cth).
49. Australian Prudential Regulation Authority Act 1998 (Cth) s. 7.
50. This remains the case for the Export Wheat Commission.
51. Australian Securities and Investments Commission Act 2001 (Cth) s. 19. It is an offence under s. 63 of the Act to fail to comply with this requirement.
52. See, e.g., Insurance Contracts Act 1984 (Cth) ss. 11C, 11D.
53. Cole Report, above n 21.
54. See section 3 above.
55. Wheat Export Marketing Act 2008 (Cth) s. 4.
56. Defined in s. 2 as (a) an agency (within the meaning of the Financial Management and Accountability Act 1997 (Cth)); or (b) a Commonwealth authority (within the meaning of the Commonwealth Authorities and Companies Act 1997 (Cth)).
57. The power to require information or documents to be provided to the CEO of a designated Commonwealth entity, as defined by the Act, is set out in s. 30. The CEO can require information and documents to be provided 'for the purpose of determining whether a UN sanction enforcement law has been or is being complied with'. Failure to comply with a notice issued pursuant to s. 30 is an offence carrying a penalty of 12 months' imprisonment: s. 32.
58. Margaret Doxey, *International Sanctions in Contemporary Perspective* (2nd edn, 1996) 106–7.
59. Australian Department of Foreign Affairs and Trade, *United Nations Security Council Sanctions: International Trade Integrity Act 2007* [www.dfat.gov.au/un/unsc\\_sanctions/international\\_trade\\_integrity\\_act.html](http://www.dfat.gov.au/un/unsc_sanctions/international_trade_integrity_act.html) at 12 October 2007.
60. In 2007, ASIC commenced civil penalty proceedings against six former directors and officers of AWB Ltd for contraventions of ss. 180 and 181 of the Corporations Act 2001 (Cth). At that time, the Australian Federal Police and the Victoria Police commenced investigations into criminal breaches of both Commonwealth and Victorian law: ASIC, 'ASIC launches civil penalty action against former officers of AWB' (Press Release, 19 December 2007) [www.asic.gov.au](http://www.asic.gov.au) at 4 April 2008. On 12 November 2008, however, Justice Robson of the Victorian Supreme Court stayed the civil proceedings against five of the six men. The reason for the stay of proceedings was that, as there was a real possibility of criminal charges being filed, it would be unfair to them to duplicate their defences for both civil and criminal proceedings. Should criminal proceedings be filed, the civil proceedings would, in any event, be automatically stayed. (Milanda Rout, 'Civil Charges Stayed for Ex-AWB Bosses', *The Australian* (Canberra), 15 November 2008).
61. The provisions in sch. 1 of that Act amend the Charter of the United Nations Act 1945 (Cth) and introduce in it, among other things, offences for bodies corporate: See item 16, sch. 1, of the Act.
62. As we have argued elsewhere, the nature of the OFFP created opportunities for evasion and the incentives facing the companies responsible for that evasion were perverse, at best. See Linda Botterill and Anne McNaughton, 'Laying the Foundations for the Wheat Scandal: UN Sanctions, Private Actors and the Cole Inquiry' (2008) 43 *Australian Journal of Political Science* 583.





## PART V

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### The role of lawyers



# International legal advisers and transnational corporations: Untangling roles and responsibilities for sanctions compliance

STEPHEN TULLY\*

## 1. Introduction

The legal advisers employed by foreign affairs departments, and the advice they provide, are increasingly the subject of public scrutiny. US lawyers, for example, reportedly interpreted the Convention against Torture to enable interrogation<sup>1</sup> and their English counterparts controversially identified a legal basis for military force against Iraq.<sup>2</sup> The latter issue also arose in Australia,<sup>3</sup> similarly attracting debate,<sup>4</sup> as did a legal memorandum concerning the maritime interception of asylum seekers.<sup>5</sup>

Such circumstances give rise to several questions, particularly the relationship between government legal advisers and the executive branch of government, for which there are various solutions.<sup>6</sup> This chapter examines the circumstances where national corporations receive advice concerning prospective sanctions compliance from their Foreign Ministries, and the potential application of administrative law principles in such cases. This discussion springs from correspondence identified by the Cole Inquiry in which the Australian Department of Foreign Affairs and Trade (DFAT) could see ‘no reason from an international legal perspective’ why the Australian Wheat Board (AWB) should not proceed with proposed arrangements involving Jordanian trucking companies under the UN’s Oil-for-Food Programme (OFFP).

Section 2 outlines the classical function of international lawyers employed by governments, posing the question whether advising corporations on sanctions compliance heralds a departure from that role. Section 3 reviews the unique regulatory framework Australia employed to implement sanctions against Iraq under the OFFP. Although these administrative arrangements have since been superseded, this

historical case study nonetheless offers several generalisable lessons for contemporary discussion of the role of legal advisers and their interactions with national corporations. Section 4 considers the extent to which administrative law principles could apply in two specific contexts: first, in relation to foreign ministerial advice to corporations, second in respect of corporate engagement with UN sanctions committees. It will be suggested that administrative law considerations will encounter appreciable limits when purporting to link distinctly 'public' institutions with transnational actors.

## 2. International legal advisers and their clients

However labelled, Foreign Ministries typically enjoy access to internal legal expertise when conducting international affairs. These international legal advisers occupy 'very much the same' field of responsibility across different states and the tasks performed 'correspond to a great extent'.<sup>7</sup> The multiplicity of clientele, and the mode of interaction, produces a range of challenges.

### 2.1 *The Foreign Ministry and its Minister*

The Foreign Minister and other decision-makers within the Department are advised on legal matters arising in the context of their work.<sup>8</sup> Functions include conducting intergovernmental and domestic litigation, responding to advice requests concerning a states' international obligations, overseeing treaty-implementing legislation and participating in treaty negotiations. International legal advisers also attend international conferences and discharge mandated legislative responsibilities.<sup>9</sup>

The 'constant, regular and ready interplay' between a Foreign Ministry's work and its legal advisers includes obtaining advice where appropriate before adopting particular courses of action.<sup>10</sup> Legal opinions may occasionally be 'controlling' reasons for departmental decision-makers.<sup>11</sup> Furthermore, even if avoided during initial deliberations, legal advisers are 'always called in to pick up the pieces'.<sup>12</sup> It is accordingly 'extremely important that the legal adviser should maintain close and informal contact with the political or functional departments which it is his duty to advise'.<sup>13</sup> Rather than passively waiting for advice requests, advisers should be actively involved at early stages.<sup>14</sup>

## 2.2 *The executive branch*

International legal advisers advise the executive branch on the consistency of proposed measures with national and international law. The pressure to 'bend' legal opinions in support of policy initiatives by incumbent administrations 'may be intense'.<sup>15</sup> Legal advisers can be bypassed and advice ignored.<sup>16</sup> This advice need not be impartial. Sir Gerald Fitzmaurice observed that '[w]hat governments want is accurate and judicious legal advice (which is not quite the same thing)' from individuals 'whose awareness of the background and imponderabilia of the situation enables them to give their advice with a knowledge of all its implications that no outside lawyer could normally have'.<sup>17</sup>

Nevertheless, government lawyers have a 'heavy responsibility' to ensure that their advice contains alternative views.<sup>18</sup> An aggressive advisory role may be warranted to highlight considerations of legality.<sup>19</sup> Professional independence is frequently emphasised.<sup>20</sup> Sir Arthur Watts, for example, observed that 'the legal adviser should at all times give advice with a proper sense of professional responsibility and integrity'.<sup>21</sup> Put another way, 'never say no when you could say yes; and never say yes when you must say no'.<sup>22</sup> Government lawyers 'must say no' when required by national law, public service obligations, documentary responsibilities,<sup>23</sup> professional standards and ethical duties. Furthermore, lawyers should also uphold human rights standards in certain circumstances.<sup>24</sup>

## 2.3 *Government departments*

Foreign affairs departments may interact with other national institutions depending upon issue complexity. Each agency has its own 'in-house' counsel.<sup>25</sup> Formally allocating responsibility and coordinating interdepartmental interaction is accordingly necessary to ensure a consistent quality and content in international legal advice across government. In Australia during the 1970s, for example, the Attorney-General's Department rivalled the then Department of External Affairs for Australian representation at treaty conferences. 'Public international law work' is currently 'tied' to three legal service providers: the Office of International Law of the Attorney-General's Department, the Australian Government Solicitor (AGS) and DFAT.<sup>26</sup> The Office of International Law may express legal or policy perspectives where any government agency requests advice on a public international legal issue from the AGS. The Office of General Counsel also seeks to ensure

international legal compliance by Australia and avoid inconsistent positions arising from portfolio-specific approaches.

#### 2.4 *Private individuals and corporations*

Foreign Departments are responsible for developing national trade in an orderly fashion, facilitating exports and promoting national commercial interests in overseas markets. Private actors call upon them for non-confidential, technical information that is not readily available<sup>27</sup> and may receive consular assistance or diplomatic protection. Mutual information exchange occurs when jointly addressing international legal questions including expropriation, discriminatory treatment<sup>28</sup> and, as considered further below, prospective sanctions compliance.

#### 2.5 *The resulting role for international legal advisers*

Given the range of clients, legal advisers can be alternately characterised as technicians, apologists and visionaries. As technicians assessing the correctness of legal processes or outcomes, they are both 'players' and 'umpires' within the international legal system.<sup>29</sup> Legal advisers act as 'judge' to express legal views for their political colleagues and as 'advocates' when representing their state.<sup>30</sup> Their unique position and experience allows them to anticipate and address factual situations for which there may be little or no legal certainty,<sup>31</sup> with political differences between states impeding the development of international law.<sup>32</sup> Legal advisers accordingly demonstrate a 'tendency to view [the] ... law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order'.<sup>33</sup> That may render them apologists for sovereign authority, with certain questions beyond law's province over which they cannot purport to advise.<sup>34</sup> Legal advisers must also take a 'long view' insofar as 'arguments and approaches must be acceptable in a range of situations and over long periods of time'.<sup>35</sup>

Foreign Ministry legal advice has a 'special significance' for developing international law and the integrity of the international system.<sup>36</sup> Increasing interdependency has reputedly added several 'new aspects' to the role of international legal advisers.<sup>37</sup> In particular, the challenges associated with implementing Security Council resolutions are of 'universal concern'.<sup>38</sup> The interpretation of such instruments must be sufficiently predictable so that legal advisers are 'better equipped' to provide accurate advice.<sup>39</sup> A 'new load of specific legal and administrative work' is also created at national levels.<sup>40</sup>

This 'new load' is usefully illustrated by the sanctions regime instituted by Australia against Iraq, the forensic investigation conducted by the Cole Inquiry and, as evidenced by the statutory declarations of former and current officers, the practices and systems employed by DFAT.

### 3. Australian implementation of sanctions against Iraq

From 1990, UN member states were required to prevent the sale or supply of commodities by their nationals or from their territories to any person or body in Iraq except for medical supplies and, in humanitarian circumstances, foodstuffs.<sup>41</sup> A further exemption for foodstuffs was created in 1991, permitting entry into Iraq of foodstuffs notified to the '661 Committee', the Security Council body responsible for monitoring sanctions implementation.<sup>42</sup>

Potential Australian suppliers of humanitarian goods under the OFFP received written information prepared and disseminated by DFAT. Corporations also received guideline documents, templates for various UN forms and information concerning the OFFP's approval mechanism. DFAT's website also outlined its understanding of the OFFP and corporations were referred to UN websites for comprehensive instructions.

DFAT was responsible for advising those commercial entities wishing to export to Iraq whether proposed arrangements were permissible under national law and Security Council resolutions. Potential exporters contacted designated DFAT officers located on geographical desks to inquire whether contemplated transactions complied with requirements imposed by the 661 Committee. DFAT officers responded orally or in writing and attended face-to-face meetings.

Issues of law, the UN process or the OFFP's operation were regularly and routinely referred to either the UN section or the International Legal Division (ILD) within DFAT. The ILD coordinated sanctions implementation under Australian law with relevant government agencies and provided advice to individuals and organisations located both within and outside DFAT. DFAT sections requiring advice would submit written requests to the ILD, commonly by email. An ILD desk officer would prepare a written minute of advice on the facts as provided, cite relevant UN resolutions or Australian regulations, provide the author's conclusion and submit the document to senior officers for final clearance. Advice was provided electronically or orally depending on the nature of the request and circumstances. Requesting officers would then take that advice into consideration when formulating responses to enquiries. Legal analysis could be



wholly or partially summarised or reproduced within reply letters and only occasionally did legal officers communicate directly with enquirers.

Legal questions were also channelled upwards to Australia's permanent mission to the UN in New York (UNNY). UNNY monitored the status of export applications, liaised with corporate nationals concerning the OFFP's operation and arranged meetings upon request with UN officials including sanctions committee members. Information derived from intergovernmental contacts was reconveyed downwards for subsequent incorporation into an advice.

Legal questions for which advice was sought included the legality of certain payment methods including letters of credit, conversion of humanitarian gifts into recoverable debts, discharge payments for Iraqi port agents and amendment of previously-approved supply contracts. Most controversially, the question of engaging a Jordanian trucking company to alleviate port delays in breach of UN sanctions was the subject of the Cole Inquiry.

AWB claimed to have previously notified DFAT in 2000 of an arrangement concluded with a Jordanian trucking company and pointed to the existence of DFAT correspondence evidencing approval under the OFFP. Commissioner Cole concluded there was no basis for this assertion. Initial AWB correspondence was a 'charade' and a 'disingenuous attempt' to demonstrate to DFAT that trucking fees were UN-approved.<sup>43</sup> AWB's claim that 'it was customary ... to make sure that DFAT was comfortable with the terms' of its correspondence to DFAT also went against the weight of evidence.<sup>44</sup>

Nonetheless, DFAT's reply of 2 November 2000 to AWB was in the following terms:

You therefore propose to enter into discussions with the Jordan trucking companies with a view to agreeing to a commercial arrangement in order to ensure that there are enough trucks available to enable the prompt discharge of Australian wheat cargoes when they arrive.

We have examined, at your request, this proposed course of action and can see no reason from an international legal perspective why you should not proceed. That is, this would not contravene the current sanctions regime on Iraq.

International Legal Division has been consulted in the preparation of this response.<sup>45</sup>

Although one DFAT officer observed that certain textual indications suggested the existence of a legal advice, others could not recollect the relevant events and extensive searches failed to locate one. There were

other inconsistencies and unexplained evidentiary gaps, the totality of which 'reflect on the reliability of the documentary systems within DFAT' and 'raise a concern that AWB's request for advice and the response may not have been dealt with in the ordinary course'.<sup>46</sup> That said, DFAT's correspondence was not improper, did not purport to authorise activity outside the sanctions regime and could not be construed as an advice.<sup>47</sup> Nor did Commissioner Cole accept AWB's evidence that DFAT had orally indicated that it had investigated the proposed arrangement.<sup>48</sup> AWB's explanation lacked credibility and contemporaneous documentation.<sup>49</sup> Nor did AWB's conduct conform to DFAT's reply, notwithstanding that a subsequent contract for sale contemplated increased inland transportation and after-sales-service fees.<sup>50</sup>

In Commissioner Cole's view, the 'real reason' why AWB wrote its original letter was to create a paper trail of government approval upon which it could rely in the event that payments were queried.<sup>51</sup> The evidence did not support a finding that, in the context of AWB's request and DFAT's reply during 2000, AWB had informed DFAT that inland transportation fees were incorporated into contract prices.<sup>52</sup>

Others have expressed contrasting views. For example, it was queried whether DFAT routinely 'gives advice on something as incredibly sensitive and important as this, of which there is absolutely no record, no-one knows who gives it, no-one knows who they give it to, no-one knows what it is and there is no record of it at all'.<sup>53</sup> Although DFAT's practices are unlikely to be reviewed,<sup>54</sup> the Australian Securities and Investments Commission initiated civil proceedings against six former AWB individuals for breaching management and supervision requirements<sup>55</sup> and causing harm, including reputational damage, to AWB Ltd.<sup>56</sup> A shareholder action claiming damages for breaching continuous disclosure obligations and investigations into criminal breaches of the corporations law remain ongoing although criminal proceedings have been abandoned in other contexts.<sup>57</sup> Given overlapping legal regimes, do the circumstances considered by the Cole Commission offer opportunities for the application of administrative law considerations?

#### 4. Administrative law's potential and the role of legal advisers

Establishing links between distinctly public institutions and transnational private actors may occasion a blurring of respective roles and responsibilities concerning sanctions compliance. Corporations ordinarily assess risk through diligent management, close consultation with

their own legal counsel and periodic interaction with foreign affairs departments. This collaboration has been characterised as self-regulation 'in the shadow of hierarchy', 'co-regulation' and 'controlled delegation'.<sup>58</sup> However, 'incomplete liaison' between government decision-makers may lead to 'curial sanctions' initiated by actors whose rights, interests or legitimate expectations have been inadequately considered.<sup>59</sup> A 'transformative' vision of public law that promotes participation, transparency and information access is one means of enhancing public and private sector accountability.<sup>60</sup> This section considers the potential operation of these considerations to the provision of advice to corporations by Foreign Ministries at the national level and, at the international one, to corporate engagement with UN sanctions committees.

#### *4.1 Linking public institutions with transnational actors*

Conducting trade within the parameters of a sanctions framework – effectively a captured market regulated by the Security Council – may prove profitable. Foreign Ministries and corporations share a mutual interest in exploiting the available commercial opportunities. Security Council Resolution 986 (1995), for example, ring-fenced oil revenue for corporations providing humanitarian products to Iraq. The ability to predict political trends informed prospective commercial arrangements. Political allies also competed for sanctions committee approval for contracts held by corporate nationals. Specific commodities had a history of long-standing antagonism between national exporters and were subject to contemporaneous trade negotiations. Iraq directed trade under the OFFP to corporations from 'friendly' states and excluded competitors jockeyed for market position. Foreign Ministries became involved in crafting executive-level strategies on how corporations could best proceed in the sanctions environment.

One link between public institutions and transnational actors involves the interdependency of corporate and government reputations. The urgency of commercial opportunities (including perishable products, price fluctuations, security risks or infrastructure availability) may be incompatible with carefully evaluating all politico-legal implications. One corporation may jeopardise all future applications for other commercial entities, thereby imperilling market integrity, product quality and supplier reliability. Corporations may indicate their awareness of a state's international obligations or Security Council sensitivities and state that proposed commercial arrangements conform to Foreign Ministry

views. However, such assurances could prove unreliable with Foreign Ministries mistakenly concluding that corporations are unknowingly participating in sanctions violations. These departments must safeguard their reputation for frankness and transparency with the UN system, respect the policy objectives underlying sanctions and preserve international standing.

Mutual information exchange establishes a further link between home governments and corporations. Foreign Ministries must secure corporate cooperation to ensure that documentation submitted to sanctions committees accurately reflects proposed commercial terms. Dialogue springs from well-established symbiotic relationships established at national levels and the unique market rules associated with sanctions regimes. Sanctions committees may defer or veto approval where alerted by the detail of proposed transactions. Corporations exporting humanitarian products may be obliged to disclose sufficient information, including third party identities, to enable Foreign Ministries to ensure compliance with Security Council resolutions. However, information exchange can be incomplete or ineffective, with corporations claiming to lack knowledge or asserting confidentiality to avoid delays in processing export applications. Foreign Ministries may also be prevented from communicating commercially sensitive information to sanctions committees without prior corporate authorisation. Government lawyers may lack the mandate or commercial acumen to appreciate contractual conditions or identify disguised and artificial arrangements.

Are the classical functions of Foreign Ministries, as outlined above, undergoing transformation? Corporations alleviate the political unpredictability of conducting business with states targeted by sanctions by seeking diplomatic and other assistance. Concerted lobbying by Foreign Ministries can bolster weak legal claims and lock-in prospective trade arrangements. Advocacy initiatives include making representations before sanctions committees, presenting technical or economic data and supporting corporate assertions. Foreign Ministry officials routinely provide information to corporations and intervene where intergovernmental processes are or could be unfairly applied. This includes ensuring that corporations receive procedural fairness when investigated (for example, by the Volcker Inquiry) including advance notice of adverse findings and opportunities to comment.

Maintaining an arms-length relationship to safeguard respective roles and responsibilities can prove challenging. Providing politico-economic information or assistance can be distinguished from advice having

international or national legal consequences. For example, the permissibility of humanitarian gifts under Security Council resolutions, as adjudged by a Foreign Ministry, may have tax deductibility implications for national taxation authorities. Appropriate safeguards must be implemented to govern close, operational interaction between Foreign Ministries and corporations, monitor departures from usual practice and document informal communications.

Corporate accountability is classically premised upon state responsibility for entities incorporated under their jurisdiction or control. This model obscures competing cross-jurisdictional dilemmas for flag aircraft or vessels, international financial institutions and cross-border trading corporations. Corporations are indirectly accountable for sanctions compliance through the home state medium and as implemented under national law.<sup>61</sup> If the binding quality of Security Council resolutions remains only an 'emerging trend' for non-UN member states,<sup>62</sup> direct international corporate legal responsibility must necessarily be less so. States typically undertake 'top-down' and *ex post facto* enforcement against those corporations adjudged to breach national law. They are also expected to fully and in good faith implement their international obligations and undertake reasonable enforcement efforts. States are not obliged to scrutinise commercial intentions. Thus a Foreign Ministry's 'duty of care' is conceivably discharged by informing corporations of Security Council requirements and ensuring procedural compliance such as notifying sanctions committees.

The Cole Inquiry reviewed this orthodox enforcement model. The Minister for Foreign Affairs or his delegate granted humanitarian export permission where 'satisfied that permitting the exportation will not infringe the international obligations of Australia'.<sup>63</sup> Export permission was denied if proposed transactions were considered incompatible with Security Council resolutions. Australian exporters were informed of national law and policy on properly observing UN sanctions, departmental contact points were nominated and arrangements falling outside standard procedures invited for discussion. Corporations were counselled to seek DFAT approval prior to concluding commercial arrangements. DFAT, moreover, initiated inquiries with corporations when existing arrangements did not appear to have been notified to the 661 Committee. That said, DFAT enjoyed limited investigative powers with suspected offences referred to other authorities.

Similarly, the UN's Office of the Iraq Programme (OIP) lacked the mandate and resources to investigate corporations at the international

level. It assessed exporter applications on a first-come-first-served basis and could not refer unsubstantiated allegations to the 661 Committee. The OIP refrained from answering commercial inquiries directly with all contact channelled through national missions. That said, corporations affiliated with reputable governments were treated with a discretion not extended to other suppliers. Senior level inquiries were conveyed through national missions where financial arrangements may have exceeded authorised procedures. The OIP readily accepted at face value the plausibility of explanations and categorical denials issued by corporations enjoying home-government support.

In such circumstances a legal adviser's opinion assumes greater significance. Constructing an advice on the acceptability of proposed commercial transactions is challenging. The milieu includes second-guessing the opinions of the UN Office of Legal Affairs (OLA), the evolving practice of sanctions committees, variable state practice and mutating commercial arrangements. The OLA's legal opinions are mindful of commercial concerns. The OLA acknowledges that corporations confront significant practical obstacles to sanctions compliance, and seeks to accommodate this reality when formulating its views.<sup>64</sup> For example, 'reasonable' payments in Iraqi dinars to port agents for discharging humanitarian cargoes were not necessarily inconsistent with Security Council resolutions. However, Iraqi currency was difficult to purchase outside Iraq with the Iraqi Central Bank preferring US dollars. Similarly, the OLA advised that humanitarian gifts could only be provided to Iraqi non-governmental organisations, an onerous exercise given the existing state infrastructure. Furthermore, the OIP was not always able to provide an authoritative, comprehensive and legally-compliant solution when national governments solicited comments on contractual conditions.

Contemporary commercial practices, as disclosed to sanctions committees, informed interpretation of the Iraqi sanctions regimes. The Security Council required notification for each humanitarian export such that similar transactions were not necessarily comparable. However, export applications found to be consistent with Security Council measures established indicative precedents and the likely attitude to subsequent applications. Fluid, fact-specific commercial practices accordingly became crafted around and led the interpretation of Security Council resolutions. Contracts stipulating supplier responsibility for port fees, for example, would not contravene Resolution 661 (1990) where they extrapolated existing arrangements.

Security Council resolutions are not interpreted or applied by states in a consistent or uniform manner. Public policy considerations represent an unwelcome intrusion into commercial decision-making. Increasing transportation costs or war insurance premiums alter a firm's risk management profile. Onerous government control over a limited number of authorised contractors constrains flexibility and sanctions committee deliberations influence contractual negotiations. While corporations are expected to assume all market risks, investment-siting decision-making has longer time-frames than the temporary disruption occasioned by intergovernmental political differences. Practical commercial solutions may be identifiable through direct consultation with local contacts. However, where one party to the transaction is a state targeted by sanctions, corporations may be encouraged to conclude collateral agreements so as to avoid sanctions committee intervention. Depending upon a firm's risk tolerance, options include relinquishing market opportunities, renegotiating contracts to ensure permissible terms and complaining to sanctions committees through home governments if rivals act otherwise.

The partial complementarity between Foreign Ministries and national corporations appears to be accompanied by a decoupling of responsibilities. In addition to national legal compliance, corporations are expected to ensure that proposed commercial transactions conform to Security Council measures ordinarily binding upon states. This self-regulatory responsibility includes additional disclosure obligations. Rather than enforcement authorities investigating whether previous transactions constitute violations, sanctions administering agencies assess proposed commercial transactions 'up front' for compliance in advance of their conclusion.

Commissioner Cole identified a duty of honesty for corporations when engaging with the UN and recommended that contractors certify information accuracy. The government responded with the International Trade Integrity Bill (2007)<sup>65</sup> which 'continues Australia's tough stance' and affirms its 'reputation as a corruption-free trading partner and an important participant in enforcing UN sanctions'.<sup>66</sup> Admittedly, 'legislation alone cannot accomplish this and it falls on Australian businesses to maintain their reputation of ethical dealing and integrity'.<sup>67</sup> The Bill creates novel corporate offences for contravening UN sanctions and invalidates export permissions issued on the basis of false or misleading information.

Several provisions are potentially relevant to advice requests. First, false or misleading information given (including recklessly) to Commonwealth entities in connection with UN sanctions administration would be an offence. However, consistent with policy, liability would not extend to breaching sanctions per se and an honest and reasonable mistake of fact would be a defence for several strict liability offences. Second, Commonwealth officers would be able to use that information, including further disclosure, and would be exempt from liability if acting in good faith. Third, the information-gathering authority of government agencies would be enhanced. Overall, liability would be increased for permit applicants but not advisers and criminal sanctions rather than administrative measures are contemplated. That said, industry consultation is anticipated prior to formulating regulations and in the context of outreach programs conducted on sanctions generally.<sup>68</sup> Contemporary Australian sanctions regimes are also specifically targeted at goods or services in arms and dual use goods associated with weapons of mass destruction, leaving all other trade unaffected. However, commercial actors, confronting increasing national level accountability and emergent international expectations, are likely to press for greater receptivity in relation to their rights, interests and legitimate expectations.

#### *4.2 Administrative law considerations and Foreign Ministry advice for corporations*

Interpreting the operative paragraphs of Security Council resolutions involves considerable judgment. Such instruments cannot be construed in a manner 'tantamount to imposing conditions on the implementation of a UN Security Council Resolution which were not provided for in the text of the Resolution itself'.<sup>69</sup> Their applicability 'is not a precise science' due partly to the discretion residing with officials entrusted with their administration.<sup>70</sup> Proposed transactions may technically conform to Security Council requirements but there may be little prospect of sanctions committees authorising what could be contrary to their underlying intent. During the OFFP, for example, DFAT provided a reasoned assessment of its understanding that the 661 Committee may request humanitarian donor identity or delay issuing no-objection certificates where sceptical of corporate motives. It also encouraged adherence to the terms and spirit of Security Council resolutions, particularly given awareness of attempted circumvention.



The construction of Security Council resolutions may give rise to differences of opinion between corporations and Foreign Ministry officials. Corporations possess in-house legal expertise and recruit well-qualified specialists. The accuracy of a Foreign Ministry opinion may be questioned as overly rigid given another states' position. However, the opinions of private practitioners are not comparable to the authority of a definitive assurance or formal undertaking emanating from a Foreign Ministry. The terms of carefully worded advice requests, and the form and content of correspondence conveyed in reply, warrants attention. A specific form of wording or style may imply that a document constitutes an advice or that one exists. Internally prepared memoranda, provided to corporations for informal guidance or background information, can be utilised for other purposes, even in edited form. Corporations may assert prior authorisation or estoppel, particularly if prospective liability arises in several jurisdictions.

Providing advice can also be differentiated from discharging mandated responsibilities.<sup>71</sup> Government agencies routinely explain licensing requirements or provide regulatory information to assist private actors achieve compliance. However, agencies entrusted with sanctions administration occupy a unique position within the regulatory architecture. Foreign Ministry legal advisers as 'regulators' would herald a novel departure from their classical characterisation, particularly since monitoring, investigation and enforcement functions are more appropriately exercisable by other government institutions. This suggests that remedies available for challenging 'decision-making' by other government departments<sup>72</sup> may not be apposite in relation to 'advice' provided to corporations concerning sanctions implementation, particularly where 'pervasive bureaucratic micromanagement'<sup>73</sup> is best avoided. Internal processes of information gathering and assemblage for the purposes of informing corporations of Australian law implementing UN sanctions need not be any different from DFAT's more mundane administrative functions such as processing passport applications. Furthermore, inasmuch as sanctions administration is simply another set of regulations demanding adherence, then from a corporate perspective the processes typically associated with administrative decision-making may not be desired.

An additional complicating factor is the uncertain basis upon which government employees in Australia undertake the 'practice of law', it being unnecessary, for example, to hold practicing certificates.<sup>74</sup> Nonetheless, legal professional privilege attaches to communications

brought into existence by government officers seeking or giving legal advice concerning the nature and extent of governmental powers.<sup>75</sup> The traditional understanding of legal practice as an analysis and communication of legal rights or duties is especially clouded for Foreign Ministry lawyers.<sup>76</sup> Indeed, they may deliberately inject ambiguity into sanctions design such that 'a careful legal opinion on the current scope of sanctions is therefore no guarantee that the watchful sanctions supporters will not see mileage in catching conduct that is as yet compatible'.<sup>77</sup>

Corporations are encouraged to solicit independent advice before participating within a sanctions framework with Foreign Ministries generally disclaiming any residual responsibility.<sup>78</sup> The US State Department, for example, acknowledges that sanctions locate commercial transactions 'under a cloud of uncertainty'.<sup>79</sup> Any purported 'advice' rendered by government lawyers, albeit influential, is not per se authoritative or binding, even for the executive branch.<sup>80</sup> A sliding scale could be identified: legal memoranda of advice, assessing and interpreting legal information and providing regulatory information upon request. Legal advisers are simply articulating their current beliefs or conditional opinions concerning the permissibility of proposed commercial transactions. Although this determination is made in the first instance by exporting states, the Security Council or sanctions committees may reserve the right to veto transactions.

Foreign Ministry legal advisers have to facilitate efficient administrative practices 'and at the same time to ensure that the rights and liberties of the individuals will not be jeopardized by the activity of the state'.<sup>81</sup> It has been suggested that the 'good working of the public services' prevails over the legitimate rights or expectations of private persons.<sup>82</sup> The US State Department during the 1960s, for example, considered that few dealings with private actors were subject to administrative review because the conduct of foreign affairs did not entail the regulation or adjudication of private rights.<sup>83</sup> Informal administrative checks and 'good faith' were the only safeguards where private rights were implicated. This placed a 'particular burden of responsibility' upon legal advisers 'to see that this discretion ... [was] not abused and that decisions ... [were] reached on a reasonable and impartial basis'.<sup>84</sup> There was no 'realistic alternative to department self-discipline', an unsatisfactory circumstance since:

If the principle of 'government under law' is to be observed, it would seem desirable that the maximum procedural protections consistent with

departmental operations – if only an opportunity to know what is happening and to present views – be afforded wherever possible to private parties in any matter in which their interests are substantially affected.<sup>85</sup>

More recent evidence suggests that a lawyer's competence, care and integrity remain the principal 'safety net'.<sup>86</sup>

The rationale that conducting foreign affairs does not engage the regulation or adjudication of private rights clearly warrants revisiting. The links established between public and private actors during sanctions administration, including prior assessments by Foreign Ministries of proposed commercial transactions for prospective sanctions compliance, have been noted. However, a countervailing self-regulatory responsibility suggests at best full and fair consideration of commercial interests by Foreign Ministries. Further legislative solutions, 'prodded by the disaffection of out-manoeuvred domestic constituencies',<sup>87</sup> may yet be forthcoming. Are the procedural protections afforded to private rights in international sanctions administration context any different?

#### 4.3 *Administrative law considerations and corporate interaction with UN sanctions committees*

The OFFP-specific system of humanitarian exporter notification with UN sanctions committee approval as outlined above is no longer operative. Nonetheless, co-operative and consultative arrangements are incrementally emerging between corporations and the Security Council in designing, implementing and enforcing increasingly complex and detailed sanctions regimes. States have the right to consult the Security Council when confronted with 'special economic problems' arising from enforcement measures.<sup>88</sup> However, UN Charter obligations may prevent them from injecting procedural fairness considerations into Security Council resolutions.<sup>89</sup> States have nonetheless called upon the Council to provide fair and clear procedures when granting humanitarian exemptions.<sup>90</sup> 'Due process' entitles corporations to be informed of sanctions as soon as possible without thwarting their purpose, to be heard within a reasonable time, to receive advice and representation when addressing the Security Council and to access effective remedies from impartial institutions.<sup>91</sup> For example, although the UN Treasury could not be perceived as granting favourable treatment to any particular state or corporation, it welcomed corporate contributions for improving the OFFP.

The challenges of applying administrative law principles to the circumstance where corporations seek authoritative UN perspectives were foreshadowed in section 2. In relation to transparency, sanctions committees need not have formulated detailed guidelines concerning the implementation of Security Council resolutions or the contract approval process. The former raises compliance issues, assessed by reference to their terms, whereas the latter entails administrative procedures amenable to negotiation. Sanctions committees may require governments to first satisfy themselves that proposed commercial transactions do not contravene applicable obligations.

Second, in relation to information access, copies of communications from the 661 Committee were provided to prospective humanitarian suppliers. However, this occurred sporadically and at its initiative. Corporate inquiries through home governments need not yield clarification or expeditious solutions. Conversely, sanctions committees depend upon the accuracy of export notifications and may be put upon inquiry when assessing permissibility.

Third, concerning participation, consensus decision-making enables any sanctions committee member to indefinitely delay action, sustain objections to notifications and reject proposals. Member states also espouse contrasting perspectives. For example, credit arrangements were permissible in the opinion of the 661 Committee, provided that payments did not release frozen Iraqi assets or realise debts before sanctions were lifted. However, the US and UK assumed a more restrictive position concerning letters of credit. Excluded from deliberations, non-member states agonised over the acceptability of commercial methodologies and, before making representations, resorted to informal soundings from interlocutors or secretariat contacts. In short, the OFFP sanctions framework did not evidence those characteristics associated with a 'transformative' version of public law.

## 5. Conclusions

The circumstances reviewed by the Cole Inquiry were limited to the now-defunct OFFP and no longer reflect contemporary Australian or international practice on sanctions administration.<sup>92</sup> However, the case study illustrates the opportunities and risks for government agencies when advisory roles become blurred with regulatory responsibilities. Some of the documentary evidence available to the Cole Inquiry – specifically, the correspondence, records of interview, minutes, statutory declarations,

ministerial submissions, cables and transcripts identified in the Appendix – has been analysed in this chapter to support several conclusions. The procedural protections available to private actors when receiving advice from Foreign Ministries on prospective sanctions compliance remain extremely limited. Nor would Security Council resolutions offer the requisite predictability or clarity with which to establish claims to a right or legitimate expectation in anticipation of transnational business arrangements, even where corporations are specifically nominated under such instruments. Administrative law considerations remain peripheral internationally, notwithstanding that the pragmatic corporate interest in operational security partly coincides with the political objectives of sanctions committees. As for the local sanctions framework, the totality of national law, together with Foreign Ministry advice on the likely permissibility of commercial transactions, will not encapsulate the full gamut of corporate obligations. Only in the event of perceived disparities in the accountability of transnational actors relative to public institutions are administrative measures likely to emerge.

### **Appendix: Additional sources from the Cole Commission of Inquiry**

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*UN Independent Inquiry Committee*

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(23 February 2006); DFT.0013.0157\_R (30 January 2006) & DFT.0013.0176\_R (17 February 2006); DFT.0013.0313 (31 January 2006) & DFT.0020.0620\_R (21 March 2006); DFT.0013.0479 (28 February 2006); DFT.0013.0565\_R (1 March 2006); DFT.0013.0571 (7 March 2006); DFT.0013.0622 (9 March 2006); DFT.0013.0602 (9 March 2006); DFT.0020.0010\_R (10 March 2006); DFT.0020.0548 (13 March 2006); DFT.0020.0169\_R (13 March 2006); DFT.0020.0079 (14 March 2006); DFT.0020.0134\_R (19 March 2006); DFT.0020.0177 (21 March 2006); DFT.0023.0051\_R (24 March 2006); DFT.0023.0312 (22 March 2006); DFT.0023.0265 (22 March 2006), DFT.0023.0157 (24 March 2006) & DFT.0031.0017 (7 April 2006); DFT.0023.0004 (23 March 2006); DFT.0031.0006 (17 April 2006); DFT.0037.0006 (10 May 2006).

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- \* Sincere thanks to all workshop attendees, particularly Mr Peter Scott.
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47. *Ibid.* [20.80].
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72. Compare the compliance regime established for the export of defence and strategic goods under s. 13E, Customs Prohibited Exports Regulations 1958 (Cth), opportunities to review decision-making under s. 273GA, Customs Act 1901 (Cth) and administrative sanctions imposed by the Defence Export Control Office [www.defence.gov.au/strategy/deco/default.htm](http://www.defence.gov.au/strategy/deco/default.htm) at 12 February 2008.
73. Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 369, 374.
74. *Commonwealth v. Vance* [2006] 158 ACTR 47.
75. *Commissioner of Taxation v. Rio Tinto Ltd* (2006) 151 FCR 351.
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77. Thomas Walde, 'Managing the Risk of Sanctions in the Global Oil and Gas Industry: Corporate Response under Political, Legal and Commercial Pressures' (2001) 36 *Texas International Law Journal* 183, 221–2.
78. Department of Foreign Affairs and Trade, 'What are the obligations on persons and entities in Australia, Australian citizens overseas and Australian entities overseas?' [www.dfat.gov.au/un/unsc\\_sanctions/unsc\\_sanctions\\_obligations.html](http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_obligations.html) at 7 March 2007.
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87. Anne-Marie Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies* 347, 362.
88. Charter of the United Nations art. 50.
89. Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Inquiry into the International Trade Integrity Bill 2007* (2007) 14.
90. *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th session, 8th plen. mtg, UN Doc A/Res/60/1 (2005) [109].
91. Bardo Fassbender, 'Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter' (UN Office of Legal Affairs, 2006) [www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf) at 10 June 2006.
92. Thanks to Peter Scott for this point.

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## What is the right thing to do? Reflections on the AWB scandal and legal ethics

VIVIEN HOLMES\*

No one asked, 'What is the right thing to do?'

Commissioner Cole <sup>1</sup>

*Damien Carrick:* [W]hat did Cole have to say about the role of lawyers, AWB's lawyers?

*Catherine Clifford* [ABC journalist]: Well the lawyers have done reasonably well out of this, with the exception of the corporate council [sic], the head lawyer, Jim Cooper, he is among the group of 12 who is going to be further investigated by that special task force ... The more junior solicitors Rosemary Peevy, Jessica Lyons, they were ... exonerated. ... [W]e thought that there might be some findings against the lawyers for misconduct or for certainly not doing the job that they were employed to do. ... [But there were no] such findings against any of them ... although I would imagine it wouldn't have done their careers very much good.<sup>2</sup>

### 1. Introduction

The Cole Inquiry<sup>3</sup> resulted in a five-volume report that extensively details the history of AWB Ltd's dealings with Iraq under the Oil-for-Food Programme (OFFP). In this chapter, I reflect on 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<sup>4</sup> and the public interest. I reflect also on the AWB lawyers' role as counsel for a corporation whose actions had global ramifications. Legal practice today has global reach and I discuss the implications of this for our professional ethical horizons.

Modern psychological research indicates that most of us are influenced by the ethical culture of our workplaces. The AWB culture encouraged sales to Iraq at all costs, sanctions or not; the lawyers went along with this. To withstand unethical workplace 'culture' we often need an outside reference group 'to tell it as it is'. I discuss how traditional forms of professional reference groups in Australia have broken down with the fragmentation of the legal profession, and how the recently launched Australian Academy of Law has given itself the task of redressing the challenges this presents.

I conclude by noting the global nature of the challenges facing humanity, and the nature of legal professionalism called for, if lawyers are to play a constructive role in addressing those challenges.

## 2. The AWB scandal and AWB Legal

In 1995, the UN set up the Iraq OFFP. That programme softened the impact of UN sanctions against Iraq by allowing Iraq to sell its oil and use the income received to buy humanitarian goods. Iraq's oil income was kept in an escrow account controlled and administered by the UN. Purchases by Iraq were paid for out of the escrow account after approval by the UN. Much of the wheat bought by Iraq under this program between 1996 and 2003 was Australian wheat sold to it by AWB.<sup>5</sup> The scandal accompanying these wheat sales was that, while providing food for a hungry nation, AWB paid approximately US\$ 224 million in 'kickbacks' to the regime of Saddam Hussein.<sup>6</sup> These 'kickbacks' purported to be 'transportation fees' and 'after-sales-service fees'. They were factored into the price of the AWB wheat, so that payment to AWB from the UN escrow account covered not only the price of the wheat, but also the fees to Iraq. Because the direct transfer of money to Iraq was in breach of UN sanctions, the fees were paid to a Jordanian trucking company, which transferred the money to the Iraqi regime.

It is worth noting that the UN sanctions against Iraq did not impose obligations on individual companies (as nationals of member states of the UN).<sup>7</sup> The UN resolution imposing the sanctions required states to prevent their nationals from making funds available to the Government of Iraq, or from trading with Iraq, except for the provision of humanitarian goods, including foodstuffs.<sup>8</sup> A substantial part of the payments made by AWB in breach of the sanctions were not proscribed by Australian law at the time AWB paid them to Iraq.<sup>9</sup> Indeed, AWB later learned that the kickbacks paid were a legitimate tax deduction.<sup>10</sup> Only in

2007, in response to Commissioner Cole's recommendations,<sup>11</sup> did the Australian Parliament enact the International Trade and Integrity Act 2007, which created new offences for breaching UN sanctions and further criminalised bribery of foreign officials.

Commissioner Cole found that 'AWB was confronted with the choice of not agreeing to pay the transportation and after-sales-service fees and potentially losing its Iraqi market or agreeing to pay the fees and retaining its market'.<sup>12</sup> It chose to pay the fees, despite knowing that its actions were prohibited by the UN sanctions. It is a moot point as to whether, had domestic law proscribed payments in breach of sanctions, AWB's decision would have been different. It is quite possible that breaches of 'hard' domestic law with its accompanying sanctions would have been taken more seriously by AWB officers (and AWB lawyers) than breaches of 'soft' international law.

In his report, Commissioner Cole lamented that no-one in AWB had stopped to ask 'what is the right thing to do?'<sup>13</sup> 'No-one' included AWB Legal.<sup>14</sup> The AWB lawyers demonstrated, at best, what Simon Longstaff labels a 'thin' conception of ethics; that is, a belief that lawyers owe a duty to the law and the courts, and then exclusively to the client, who is free to do anything except what is proscribed (by domestic law), it not being the lawyer's role to substitute her ethical judgement for that of the client.<sup>15</sup> By contrast, a thick view of ethics understands lawyers to owe a duty to society beyond their duty to the courts and the law. A thick view would take into account principles of international law.

AWB Legal did not have a direct role in most contracts for the sale of wheat to Iraq, which were negotiated, documented and executed by the AWB International Sales and Marketing Division and the Contracts Administration Department.<sup>16</sup> However, in 2003 (by which time the kickback scheme was well established),<sup>17</sup> AWB Legal gave advice on how certain contracts (A1670 and A1680) could be structured so as to conceal payment of compensation to Iraq for (allegedly) contaminated wheat. Those contracts were later found by the Federal Court to be 'deliberately and dishonestly structured so as to ... work a trickery on the United Nations'.<sup>18</sup> Commissioner Cole noted that AWB Legal's

so-called legal opinion was nothing of the sort. It was an attempt to devise a method whereby the payments to Iraq would not be obvious by spreading them thinly over future shipments ... , to hide the fact of payment to Iraq by making the payment to an intermediary rather than [the Iraqi Grain Board] direct and in a country other than Iraq ... and to falsify the nature of the transaction by recording it as a transaction different from payment of



compensation ... This, AWB's lawyers thought, might make it 'at least arguable' that AWB was not 'making funds or financial resources available' to the Iraqi Government, which AWB and its lawyers knew was prohibited by the UN sanctions. This advice was contrary to the clear, specific advice given to AWB by [the Department of Foreign Affairs and Trade] after consultation with the United Nations in November 2002.<sup>19</sup>

Contracts A1670 and A1680 were structured by AWB not only to surreptitiously pay compensation to Iraq, but also to recover from Iraq a debt purportedly owed to Tigris Petroleum Corporation Ltd (Tigris).<sup>20</sup> The money to pay both the compensation and 'debt' was to be extracted from the UN escrow account by way of payment of inflated wheat prices. Payment to Tigris was then arranged by way of a sham agreement between AWB and Tigris whereby Tigris was paid a 'service fee' for (allegedly) assisting AWB to obtain contracts for the sale of wheat to Iraq.<sup>21</sup> AWB's General Counsel (Mr Cooper) facilitated this sham agreement, while Ms Peavy, Ms Lyons (AWB) and external counsel Mr Quennell 'all knew the true facts of the Tigris transaction'.<sup>22</sup>

Mr Cooper, AWB's General Counsel, was the only lawyer referred by Commissioner Cole for further investigation by law enforcement authorities. That referral related to possible offences against the Corporations Act (2001) (Cth), concerning misleading the AWB Board over the Tigris 'debt' arrangements.<sup>23</sup> Commissioner Cole did not address possible breaches by AWB lawyers of professional ethical standards. It seems though, that in relation to the advice given on contracts A1670 and A1680, and in facilitating a sham agreement between AWB and Tigris, AWB lawyers stepped over the ethical line to breach their duties to the law (contracts A1670 and A1680 were 'designed to work a trickery on the United Nations'),<sup>24</sup> the client (their advice/concurrence in these matters was neither independent nor professional) and the public interest.

### 3. Thin and thick conceptions of legal ethics

In a speech entitled 'Lawyers' Duty to the Community',<sup>25</sup> Longstaff contrasts 'thin' and 'thick' views of lawyers' ethics. Drawing on Roscoe Pound's definition of a profession as a group whose primary purpose is the 'pursuit of one's art in the spirit of public service',<sup>26</sup> Longstaff argues that a lawyer who takes the idea of professionalism seriously will not (consciously) act, or assist a client to act, in ways that are contrary to the public interest, but will 'seek to promote or preserve the public

interest'.<sup>27</sup> As Longstaff notes, reduction of ethically significant harms and wrongs is clearly in the public interest. Consequently,

lawyers who are seriously committed to the idea of being members of a profession (rather than, say, just an industry) *do not* have available to them the 'thin' conception [of ethics]. This is because allegiance to such a conception may commit practitioners to acting in ways that will harm the public interest. And to act in ways that might be reasonably foreseen to be against the public interest is, as we have seen, inconsistent with the defining characteristic of a profession.<sup>28</sup>

I suggest that, the 'thinner' one's view of legal ethics, the easier it is to step over the line into unethical behaviour (thereby breaching a lawyer's ethical duties), as the AWB lawyers did. The thinner one's view, the narrower the perspective from which to assess a client's instructions, because those instructions are not considered in the wider context of the rule of law and the public interest.

Of course, there is much debate over what it means for a lawyer to work in ways that preserve the public interest. Some lawyers argue cogently that commitment focused on the rules and the court *is* in the public interest, because therein lies the best guarantee of justice.<sup>29</sup> Others make the case that effects on third parties and the community must be taken into account when considering justice and fairness.<sup>30</sup> But, however we define 'the public interest', the law governing lawyers' ethics in Australia is fairly scant on the notion of professional service in the public interest.<sup>31</sup> Parker and Evans note that the Model Laws developed by the Attorneys-General and the Law Council make no attempt 'to set out what substantive values should animate legal practice, or be reflected in the codes of professional conduct promulgated by the profession'.<sup>32</sup> The Law Council of Australia's *Model Rules of Professional Conduct* (which have been adopted by most jurisdictions in Australia) do, however, contain the following statement:

#### Relations with Third Parties

Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.<sup>33</sup>

Longstaff's contention (which I accept) that lawyers owe a duty to their community relies in part on the fact that the legal profession is a social artefact – lawyers as a profession make a bargain with society to

serve the public interest in return for certain privileges. However, 'community', 'public' and 'society' are contested terms, and all the more so as globalisation causes an 'inexorable integration of markets, nation states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation states to reach around the world farther, faster, deeper and cheaper than ever before'.<sup>34</sup> Globalisation has broken down the traditional barriers between different 'publics', communities and societies, so that the world's people are now interconnected to an unprecedented extent. There are no longer any fixed boundaries around the public whose interest lawyers purport to serve.

#### 4. Global legal practice

Just as globalisation is expanding the boundaries of 'community', 'public' and 'society', so it is shifting the boundaries around legal practice. Indeed, globalisation is a *force majeure*<sup>35</sup> on the legal profession. An increasing number of legal professionals work as practitioners or adjudicators in international and transnational contexts.<sup>36</sup>

It is currently predominantly US and UK firms that offer legal services around the globe, but Australian lawyers are joining in.<sup>37</sup> Gross billings from the export of Australian legal services in 2001 were AUS\$245M.<sup>38</sup> Any copy of *Lawyers Weekly*<sup>39</sup> contains multiple advertisements for legal work overseas. There are job prospects for Australian lawyers in 'leading global' firms with positions in New York, London, Tokyo, Singapore, Hong Kong, Moscow and China. Alternatively, Australian lawyers can stay at home and work for a leading Asia/Pacific firm's Sydney office, or join an Australian firm and work in its overseas offices in locations like Indonesia or Singapore.

Global firms are big firms. For example, Baker & McKenzie has a network of 3,400 lawyers in 38 countries.<sup>40</sup> Global corporations have their own large in-house legal departments. The demand for Australian lawyers to work in these global practices is increasing.<sup>41</sup> In the face of this, there are significant moves in Australia to 'internationalise' the law degree,<sup>42</sup> something well underway in the US.<sup>43</sup> A report by the Commonwealth Government's International Legal Education and Training Committee recommended in 2003 that Australian law schools should be developing a 'genuinely internationalised legal education'<sup>44</sup> that prepares graduates to compete in a global market. This means producing, on the one hand, graduates who will practise law in domestic

firms but deal competently with an increasing number of matters that cross jurisdictional boundaries (e.g., family law as it applies to spouses living in different countries or probate law as it applies to recent immigrants), and on the other hand graduates who will work for global law firms and practise law at the international level. Both types of graduates need to be equipped to work in a world where the practice of law radiates from a local to a global perspective and back again 'with great speed'.<sup>45</sup> Future lawyers will also play a vital role in the development of local, regional and international law, both private and public, and the increasing intersections between them. An education that equips graduates for global legal practice will need to teach them a broader range of skills, within a broader understanding of law, than traditionally taught in law school.<sup>46</sup>

Global law firms service predominantly corporate and commercial clients, corporate/commercial practice being the most globalised area of legal practice today.<sup>47</sup> The 'global lawyers' who work in these firms often have very narrow professional experience and are frequently expatriates, living for long periods in countries other than those in which they grew up and were educated.<sup>48</sup> Daly sounds a warning about this type of 'global lawyer'. Her comments concern the in-house counsel of global corporations whose CEOs (and probably their senior lawyers) think of the corporation first as a global citizen and only second as a nation state citizen. However, I believe her comments are pertinent to other 'global lawyers' in private practice, whose clients include such corporations. She says:

[T]he concept [of the global lawyer] carries with it the danger of professional statelessness, a condition in which lawyers over time become disassociated from the legal profession's fundamental values, such as lawyer independence. ... '[T]he lawyer's special pledge is that he or she will help the legal system remain the centrepiece of our fragile sense of community, help it continue to function within our culture as the crucial mechanism for social cohesion and stability.'<sup>49</sup> ... [This] understanding of the role of lawyers in a democratic society ... is shared with lawyers in the United Kingdom and many civil law countries. Lawyering for a global organization runs the risk of creating a new legal elite whose commitment to this understanding is, at best, tenuous and, at worst, nonexistent.<sup>50</sup>

This caution is echoed by Pfeifer and Drolshammer in their summary of the themes emerging from the growing internationalisation of the practice of law.<sup>51</sup> They recognise that, as the world becomes smaller, there

will be an increasing need for professionals skilled in nurturing transactions and mediating disputes between different national, economic, ethnic and cultural groups. But they also raise some pertinent questions: 'Is the globalized practice of law good for the law? Is it good for society? Is it good for the international community? [And] [h]ow will a globalized practice of law deal with the issue of "professionalism vs commercialism"?'<sup>52</sup>

### 5. Professionalism and commercialism

'Commercialism' is defined by the Oxford Dictionary as an 'emphasis on the maximising of profit'. Commercialism amongst lawyers is seen by some as a significant threat to legal professionalism. In the Australian context, Bret Walker has commented:

The useful service of mercantile interests, in the public interest, poses conflicts and embarrassment for the legal profession, in ways that are not new but are newly urgent. Traditional restraint and constraints are freshly needed, but may not be adequate in their traditional forms. Imitation of clients is universally rejected when lawyers represent criminals, but is massively growing in the case of lawyers advising on and representing the interests of money, that is money lawfully obtained and used. ... Excessive proximity to business clients, and their money, seems to have produced elements of imitation unlikely to enhance professionalism.<sup>53</sup>

Also commenting on the Australian profession, Weisbrot has noted that over the past few decades lawyers have responded to competition and consumer policy requirements that they be 'more businesslike', but that this has put 'tremendous pressure on the "service ideal" that traditionally distinguished "professions" from businesses'.<sup>54</sup>

At the international level, the Council of the International Bar Association was concerned enough about commercialism to adopt in 2000 a Resolution on Professionalism versus Commercialism. That Resolution defines legal professionalism as 'the strengthening of the public service dimension of a lawyer and the putting of the interest of the public and the client before a lawyer's own interest',<sup>55</sup> and considers that 'the pursuit of commercialism, meaning an excessive and inappropriate emphasis on profit without regard to professionalism, is inconsistent with the role of a lawyer and should be discouraged'.<sup>56</sup>

Commercialism with no balancing ethical considerations was, according to Commissioner Cole, at the root of AWB's downfall:

The question posed within AWB was:

What must be done to maintain sales to Iraq?

The answer given was:

Do whatever is necessary to maintain trade. Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments for they are in breach of sanctions.

No one asked, 'What is the right thing to do?'<sup>57</sup>

Payments of kickbacks, or outright bribes, were part of the culture of doing trade in the Middle East, seen as a way of greasing the wheels of commerce. No one stopped to consider the broader picture: that the UN sanctions were designed to bring the wheels of commerce to a halt, to bring Saddam Hussein's regime to its knees.<sup>58</sup>

## 6. Consequences in a globalised world

The consequences of AWB's pursuit of profit at all costs were, in Commissioner Cole's words, 'immense'.<sup>59</sup> He noted that AWB had lost its reputation, shareholders had lost half the value of their investment and Australian trade with Iraq worth millions had been forfeited. Further, senior executives have resigned, AWB was threatened by law suits both in Australia and overseas and a shadow was cast over Australia's reputation in international trade.<sup>60</sup> However, the Commissioner's description of the fallout from AWB's dealings with Iraq strikes me as too limited, too focused on economic interests. Overington sees the wider ripples: '[T]his was a massive scandal. Money flowed from AWB to Saddam Hussein's regime. That was obviously a disaster. It happened on the eve of a war that most Australian's didn't want to fight (and, indeed, that may have been avoidable if Saddam hadn't rorted the sanctions)'.<sup>61</sup>

AWB's lawyers did not dream up the 'kickbacks' scam. By the time they became involved, the kickback scheme (consisting of agreed contract price inflations intended to extract additional escrow funds without the knowledge of the UN or DFAT) was already well established.<sup>62</sup> However, once the lawyers became aware of the practice, they did not counsel against it, but rather assisted in its continuation and cover-up. They practised law in downtown Melbourne, but their 'legal' work fed into a scheme with worldwide ramifications. While the scale of those ramifications may be unusual, the global reach of the lawyers' actions

was not. Many commercial legal transactions today are transnational in character and consequence.<sup>63</sup> How broad should our professional ethical horizons be, when our legal practice can send ripples across the globe and back again? Renowned medico-legal ethicist Margaret Sommerville, reminds us that:

Common humanity and universal responsibility link us. But much of the time we act as if this is not the case – we are in denial as individuals and societies. In the past, our denial harmed those whose plight we ignored. Today it harms everyone, which is why we, the deniers, can no longer afford it – if indeed we ever could.<sup>64</sup>

## 7. Ethics and workplace culture

AWB's failure as an organisation to question the ethics of its actions, to ask itself about 'the right thing to do' was explained by Commissioner Cole as a failure of its corporate culture. He described the culture at AWB as one of 'superiority and impregnability, of dominance and self importance'<sup>65</sup> and noted that '[a]t AWB the Board and management failed to create, instil or maintain a culture of ethical dealing'.<sup>66</sup>

There is increasing recognition in the field of psychology of the effect workplace culture has on the behaviour of individuals. In *The Lucifer Effect*,<sup>67</sup> Zimbardo summarises thirty years of research into what makes good people behave unethically. Zimbardo notes that:

In trying to understand ... aberrant behavior, we often err in focusing exclusively on the inner determinants of genes, personality, and character, as we also tend to ignore what may be the critical catalyst for behavior change in the external Situation or in the System that creates and maintains such situations ... [S]ituational power is stronger than we appreciate, and may come to dominate individual dispositions.<sup>68</sup>

So, even if you are a fit and proper person to be a legal practitioner, unless you are fairly ethically astute, it is easy to be influenced by one's 'situation' towards unethical behaviour. For lawyers, this 'situation' is often the workplace itself. Indeed, the workplace is a crucial determinant of lawyers' behaviour.<sup>69</sup>

Part of being ethically astute is having a reference group or network outside your situation. Professional bodies and external colleagues have traditionally played this role of reference group, espousing and (hopefully) modelling the core values of the profession. As we have

seen, one core value is the acceptance of responsibilities to the public interest. But lawyers working in large commercial firms or as in-house counsel can easily lose touch with an external reference group. Francis notes that large law firms are increasingly important sites of socialisation for the professional ethics of large numbers of lawyers.<sup>70</sup> The partners in such firms have a considerable influence on the ethos of the firm's lawyers. In turn, the 'race for partnership' has an unavoidable impact on the context within which ethical decisions are made. In addition, increasing specialisation within large firms can mean that the 'collegial community of a lawyer may be even more concentrated than simply the lawyers in her firm'.<sup>71</sup> Add to this isolation the long hours that many lawyers work and there may be little opportunity for ethical reflection, either by oneself or with outside colleagues. At the extreme end of this scenario is Daly's 'global lawyer' who is professionally stateless, cut off from any external points of ethical reference.

Another example of an ethically isolated lawyer might be Ms Lyons, the junior AWB lawyer who wrote the 'legal' advice later derided by Commissioner Cole as a 'so-called legal opinion [which] was nothing of the sort'.<sup>72</sup> It seems that Ms Lyons had some concerns about the advice soon after it was given. She discussed those concerns with her supervisor, General Counsel Mr Cooper, suggesting that the Government should be made aware of the course of action proposed in her advice. It seems however that Mr Cooper provided no ethical leadership, but simply told Ms Lyons to seek instructions from management: 'to not leave it on legal division's shoulders to be responsible for this transaction, to push it upstairs to the business managers who would make the decision whether to proceed'.<sup>73</sup>

Many in-house counsel today perform the role of compliance professionals. Parker's study of corporate compliance professionals (including in-house counsel) shows convincingly that the traditional ideal of the aloof, 'independent' in-house corporate lawyer advising on legal compliance is too simplistic.<sup>74</sup> Rather, Parker recognises the intimate inter-relationship between a compliance adviser and their employer. Ideally, compliance advisers will be committed to understanding and identifying with business goals in order to align them with social and ethical concerns. This requires corporate structures that protect the compliance officer's independence and clout, but also participation by the adviser in an external network of compliance professionals, regulators and community groups. Parker notes that, in drastic



circumstances, compliance professionals may have to whistle-blow to top management, the Board or even an external regulator. It is clear that the AWB lawyers failed to take this step. Rather than objecting to the payment of kickbacks, or the sham agreement with Tigris, the lawyers went along with these schemes. Identifying too closely with the perceived interests of the client, and unable to see the bigger picture, the lawyers stepped over the ethical line. In doing so, they forsook what is surely one of in-house counsel's important roles: that of advising with the company's *long-term* interests in mind, a role that requires 'consideration of broad moral and ethical issues and ... potential future reaction to current corporate practices'.<sup>75</sup> As Sampford and Blencowe note, 'long-term self interest is strongly correlated to ethics'.<sup>76</sup>

### 8. Ethical reference points

As noted, traditional collegial ties across the legal profession once made participation in a relevant outside reference group easier than it is today for many lawyers. The current range of legal workplaces means that the legal profession is increasingly fragmented. Lawyers are found in small rural practices, throughout the public service, in mid-sized city firms, in NGOs and in global mega-firms. This fragmentation has resulted in a loss of connection between lawyers in different practice areas. Since traditional collegiality was to some extent built on networking between Caucasian males to the exclusion of others,<sup>77</sup> this loss of collegiality among members of the legal profession should not be grieved too deeply. But increasing diversity and fragmentation have challenged the profession's 'claimed ideal of core ethical values and the capacity of ... professional association[s] to articulate and regulate a uniform detailed ethical code'.<sup>78</sup>

The newly formed Australian Academy of Law (AAL) has come into being partly in recognition of the challenges posed by fragmentation of the Australian legal profession. Its establishment was recommended in the Australian Law Reform Commission's *Managing Justice Report*, which noted that the:

growth and fragmentation [of the Australian legal profession] presents [sic] serious challenges to the maintenance of coherent professional identity, and render difficult the maintenance of traditional collegiate

approaches. Without positive action the single 'legal profession' could become a multiplicity of 'legal occupations', none of which see itself as part of a whole.<sup>79</sup>

Commenting on the launch of the AAL in August 2007, Weisbrot said: 'we now desperately need to rethink and rearticulate the core ethics and principles that bind lawyers together. I don't think that it's overly dramatic to say that we need to fight for the soul of the profession'.<sup>80</sup>

It may be that the time is ripe in Australia for a profession-wide discussion about the values that underpin legal practice. The Australian community, it seems, would welcome this. Parker notes the 'plethora' of reform proposals in Australia that evidence the public's desire for a legal profession that fulfills 'its public role in the administration of justice and delivery of legal services by reference to consumer and justice concerns'.<sup>81</sup> But as well as articulating values, the AAL would do well to consider how the regulation of the legal profession in Australia encourages or undermines those values,<sup>82</sup> and how to build workplace cultures that nurture them.

Lawyers, it is hoped, will also welcome a discussion about values and legal practice. In a 2006 editorial,<sup>83</sup> the President of the Law Institute of Victoria listed the issues on the agenda of the Institute and other law societies. Those issues include: high levels of dissatisfaction among the younger members of the profession, especially women; unhappiness within law firms, even at partner level; documented high levels of stress, long hours, and boring and repetitive work; and finally, increasing rates of depression, substance abuse and suicide within the legal profession. While particularly prevalent among lawyers, these problems are not unique to lawyers and it is important that cross-disciplinary insights<sup>84</sup> are incorporated into discussion of these issues, remembering that lawyers' work satisfaction and mental health impact significantly on their ability to practice ethically. Indeed, cross-disciplinary insights are indispensable if we are to create working cultures in which ethical behaviour is facilitated rather than discouraged. As Rhode and Patron commented after the Enron scandal in the US: 'the ethical challenges that confront those in professional roles cut across subject-matter boundaries. An effective response to corporate abuses requires collaboration among professionals from diverse backgrounds such as law, management, economics, organizational behaviour, and public policy'.<sup>85</sup> There is still much research to be done on the most effective way of promoting ethical behaviour within organisations.<sup>86</sup>

### 9. Civic professionalism for the future

Cross-disciplinary insights are one of the most important outcomes of the Carnegie Foundation's Preparation for the Professions Program.<sup>87</sup> That program involves research into legal, medical, clergy, nursing and engineering education in the US. Many of its findings concerning legal education are relevant in Australia. The Foundation's *Educating Lawyers* report sees the challenge of legal education as 'linking the interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve – in other words, fostering what can be called civic professionalism'.<sup>88</sup> 'Civic professionalism' corresponds to Longstaff's 'thick' conception of ethics. Commenting on the findings of the Professions Program, one of the researchers has said:

The idea of the professional as neutral problem solver, above the fray, which was launched with great expectations a century ago, is now obsolete. A new ideal of a more engaged, civic professionalism must take its place. Such an ideal understands, as a purely technical professionalism does not, that professionals are inescapably moral agents whose work depends upon public trust for its success. ...

Since professional schools are the portals to professional life, they bear much of the responsibility for the reliable formation in their students of integrity of professional purpose and identity. ... However, the basic knowledge of a professional domain must be revised and recast as conditions change. Today, that means that the definition of basic knowledge must be expanded to include an understanding of the moral and social ecology within which students will practice.<sup>89</sup>

Students who understand 'the moral and social ecology' within which they will practise will understand how workplace culture influences ethics, and how they could contribute to cultures that facilitate ethical behaviour. They will also understand that the broader moral and social ecology within which legal practice operates is now global in its horizons. As Australian ethicist Noel Preston says:

[W]hat is non-negotiable in the twenty-first century is that our perspective, our worldview, our understanding must have global dimensions. ... I speak of our response as individuals, although the character of global citizenship may also be expected of corporate actors.<sup>90</sup>

Preston contends that '[e]nlightened self interest beckons us all to this perspective whether our starting point is ... philosophy or whether it is hard-headed commerce.'<sup>91</sup>

A global perspective reveals huge challenges facing humanity – climate change, peak oil, the escalation of worldwide poverty, international conflict and security and corruption.<sup>92</sup> Law – both public and private – plays a vital role in addressing these challenges. Nagan reminds us that ‘the rule of law is not a national or international luxury, but a critical restraining element in the core global issues of peace, security, human rights and a minimal respect for humanitarian concerns’.<sup>93</sup> Given that the quality of ‘the rule of law’ can depend to a large extent on the lawyers involved, much is at stake in the fight for the soul of our profession.

## 10. Conclusion

Lawyers played a relatively minor role in the AWB scandal. Nevertheless, their role is worth reflecting on because it reminds us of some pertinent lessons. The AWB lawyers identified too closely with the perceived interests of the client, to the exclusion of wider ethical considerations about the client’s best interests, the rule of law and the public interest. Since AWB is a global corporation, the lawyers assisted in unethical actions that had global ramifications. As legal practice is increasingly globalised, the ramifications of legal practice become broader and we need to rethink our professional ethical horizons.

The AWB lawyers’ strong identification with the ‘interests’ of the client illustrates also how workplace culture can influence lawyers to their professional detriment. AWB exhibited a culture of trade at all costs, with no one stepping back to consider the broader picture. The potential for lawyers today to lose sight of professional ideals in the midst of workplace culture is arguably increasing with the fragmentation of the legal profession. As the establishment of the AAL has recognised, we lawyers need to re-articulate the values we share across the multiple sites of legal practice and find ways of nurturing them in the workplace.

While these AWB ‘lessons’ may seem a long way from the international and public law issues raised by the AWB scandal, they are equally important. We now live in a world where everything is connected. Law, both international and domestic, public and private, will play a vital role in addressing the global challenges that face humanity. The quality of the law that will grapple with those challenges will depend to a large extent on the professionalism of the lawyers involved in designing, administering and practising that law. We need to equip ourselves and

future lawyers with a ‘civic professionalism’ that recognises that the flow-on from legal practice can now extend far beyond the horizon, and which is prepared to ask: ‘what is the right thing to do?’

### Notes

- \* Thanks to Professor Peta Spender for her helpful comments on an early draft, and to Trevor Moses for research assistance.
1. Commonwealth of Australia, The Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme, *Final Report* (2006) vol. 1, xii.
  2. ABC Radio National, ‘AWB and the Cole Inquiry’, *The Law Report*, 28 November 2006 [www.abc.net.au/rn/lawreport/stories/2006/1797857.htm](http://www.abc.net.au/rn/lawreport/stories/2006/1797857.htm) at 9 September 2007.
  3. Commonwealth of Australia, above n 1.
  4. The Victorian Professional Conduct and Practice Rules 2005 require legal practitioners to ‘always deal with their clients fairly, free of any interest which may conflict with a client’s best interest’. See section entitled ‘Relations with Clients’. (The AWB lawyers practised in Victoria).
  5. AWB Ltd is the holding company in the AWB group of companies which evolved from the Australian Wheat Board. Most of the Australian Wheat Board marketing and financial functions were transferred to the new company structure by July 1999: see Commonwealth of Australia, above n 1, vol. 2, 1–2 [9.1]–[9.8].
  6. *Ibid.* vol. 1, lxiii. And see vol. 1, 124–6 regarding use of the term ‘kickback’.
  7. *Ibid.* vol. 1, 22 [1.40].
  8. *Ibid.* vol. 1, xiii.
  9. *Ibid.* vol. 5, Appendix 26.
  10. Caroline Overington, *Kickback* (2007) 265; ABC Radio National, ‘ATO Rules AWB Kickbacks Not a Bribe’, *PM*, 20 December 2006 [www.abc.net.au/pm/content/2006/s1815915.htm](http://www.abc.net.au/pm/content/2006/s1815915.htm) at 20 October 2007.
  11. Specifically, recommendations 1–3: Commonwealth of Australia, above n 1, vol. 1, lxxxiii–lxxxiv.
  12. *Ibid.* vol. 1, 83 [3.4].
  13. *Ibid.* vol. 1, xii.
  14. AWB Legal was AWB’s in-house Legal Division. James Cooper was General Counsel from December 2000 until his resignation in April 2006. As General Counsel he was responsible for the Legal Division. Ms Lyons and Ms Peavy are the only other AWB lawyers named in the Cole Report; Ms Lyons in relation to AWB Legal’s advice on contracts A1670 and 1680, and Ms Lyons and Ms Peavy as having known the true facts of the Tigris transaction (along with Mr Cooper and Mr Quennell of then Blake Dawson Waldron). See *ibid.* vol. 2, 19–20 [9.109]–[9.117].
  15. Simon Longstaff, ‘The lawyer’s duty to the community’ (1995) St James Ethics Centre [www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0092.html](http://www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0092.html) at 4 September 2007.
  16. Commonwealth of Australia, above n 1, vol. 2, 12–15, 46. AWB Legal did have a lawyer responsible for matters concerning the International Sales and Marketing Division who met regularly with the manager of that (and other) Division(s) to discuss legal issues confronting them [9.113] but there is no indication in the *Final Report* that AWB Legal were aware of the kickbacks scheme until 2003.

17. *Ibid.* vol. 4, 117 [31.35].
18. *AWB Ltd v. Cole (No 5)* (2006) 234 ALR 651, 711 [229]. The Federal Court found that the price in those contracts was inflated so as to extract money from the United Nations' escrow account and pay it indirectly to the Iraqi regime through a Jordanian trucking company.
19. Commonwealth of Australia, above n 1, vol. 1, lviii–lix.
20. In 1996, BHP Petroleum made a 'humanitarian' donation of wheat worth US\$5 million to Iraq. Iraq was not told that the wheat was a donation. Tigris and AWB later represented to Iraq that the shipment of wheat was paid for by a loan to Iraq of US\$5 million. BHPP assigned to Tigris any rights relating to the shipment. During 2001–2002, AWB assisted Tigris to persuade Iraq to repay the 'loan': *Ibid.* vol. 1, xlvi.
21. *Ibid.* vol. 1, lx.
22. *Ibid.* vol. 3, 282 [27.424]. See also vol. 1, lxi: 'The recasting of the [sham Tigris] transaction was done on the advice of, or with the concurrence of, internal and external lawyers for AWB.' Mr Quennell was a solicitor with the then firm of Blake Dawson Waldron, today known as Blake Dawson.
23. It was submitted to Commissioner Cole that Ms Lyons and Ms Peavy might have committed an offence of aiding or abetting AWB in relation to offences of money laundering arising under contracts A1670 and A1680 (Ms Lyons) and/or falsification of books/documents concerning the Tigris transaction (Ms Lyons; Ms Peavy). However, Cole was not satisfied that AWB had committed these offences. Consequently, Cole made no adverse findings against either Ms Lyons or Ms Peavy. See *ibid.* vol. 5, Appendix 26; *Ibid.* vol. 4, 274 [31.426]; 280–1 [31.443]–[31.445].
24. *AWB Ltd v. Cole (No. 5)* (2006) 234 ALR 651.
25. Longstaff, above n 15.
26. Roscoe Pound, *The Lawyer From Antiquity To Modern Times* (1953) 5. Longstaff traces this definition to: American Bar Association Commission on Professionalism, *In the Spirit of Public Service: a blueprint for the rekindling of lawyer professionalism* (1986) 10.
27. Longstaff, above n 15.
28. *Ibid.* (emphasis original).
29. See e.g., Tim Dare 'Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7(1) *Legal Ethics* 25 and Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2007) 244–5.
30. See, e.g., Donald Nicholson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (1999). Also discussed in Parker and Evans, above n 29, 245.
31. Cf. the Commonwealth Attorney-General's Legal Services Directions require the Crown to act as a 'model litigant': Legal Services Directions 2005 (Cth) Appendix B. These Directions only apply to Government litigants.
32. Parker and Evans, above n 29, 49.
33. Law Council of Australia, *Model Rules of Professional Conduct* (2002) [www.law-council.asn.au/policy/1957352449.html](http://www.law-council.asn.au/policy/1957352449.html) at 19 March 2008.
34. Thomas Friedman, *The Lexus and the Olive Tree* (2000) 313. Quoted in Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173, 1177.

35. Mary Daly, 'The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-first Century' (1998) 21 *Fordham International Law Journal* 1239, 1240.
36. Pieter Bekker *et al.*, *Report of the Task Force on International Professional Responsibility* (2007) The American Society of International Law [www.asil.org/pdfs/taskforcereport.pdf](http://www.asil.org/pdfs/taskforcereport.pdf) at 30 April 2008.
37. For an interesting analysis of this trend see: Ashly Pinnington and John Gray, 'The Global Restructuring of Legal Services Work? A Study of the Internationalisation of Australian Law Firms' (2007) 14(2) *International Journal of the Legal Profession* 147.
38. David Weisbrot, (Speech delivered at Opening of AAL Symposium, Government House, Brisbane, 17 July 2007) [www.alrc.gov.au/events/speeches/DW/20071707\\_opening%20remarks.html](http://www.alrc.gov.au/events/speeches/DW/20071707_opening%20remarks.html) at 4 September 2007.
39. See also Lawyers Weekly Online [www.lawyersweekly.com.au/default.asp](http://www.lawyersweekly.com.au/default.asp) at 4 September 2007.
40. Baker & McKenzie, 'Our Firm', Baker & McKenzie [www.bakernet.com/BakerNet/Firm+Profile/default.htm](http://www.bakernet.com/BakerNet/Firm+Profile/default.htm) at 4 September 2007.
41. See 'Warm Welcome for Homeward-Bound Expats – Mallesons is Backing its Alumni Program to Help Beat a Skills Shortage', *The Australian*, 20 July 2007, 35.
42. Afshin A-Khavari, 'The Opportunities and Possibilities for Internationalising the Curriculum of Law Schools in Australia' (2006) 1 *Legal Education Review* 75. See also subsequent volume.
43. Daly, above n 35.
44. International Legal Education and Training Committee of the International Legal Services Advisory Council for the Australian Government, *Internationalisation of the Australian Law Degree* (2004) 4.
45. Michael Pfeifer and Jens Drolshammer, 'Introduction: On the Way to a Globalized Practice of Law?!' (2000) 2 *European Journal of Law Reform* 391, 393.
46. Winston Nagan, 'Lawyers Roles, Identity and Professional Responsibility in an Age of Globalism' (2001) 13 *Florida Journal of International Law* 131, 143, 157; International Legal and Education Training Committee, above n 44.
47. Detlev Vagts, 'The Impact of Globalization on the Legal Profession' (2000) 2 *European Journal of Law Reform* 403, 405.
48. *Ibid.* 406–7.
49. Quoting P. Terrill and J. Wildman, 'Rethinking Professionalism' (1992) 41 *Emory Law Journal* 403, 423.
50. Mary Daly, 'The Cultural, Ethical, and Legal Challenges in Lawyering for Global Organisation: The Role of General Counsel' (1997) 46 *Emory Law Journal* 1057, 1111. See also Vagts, above n 47, 411: 'The signs to date are that the globalized bar, in particular the expatriate segments of it, do not take part in ... activities [organised by lawyer associations, such as continuing legal education and promotion of law reform and pro bono work], and can be regarded as ... de-professionalized'.
51. Pfeifer and Drolshammer, above n 45, 391.
52. *Ibid.* 402. In recognition of the professional responsibility issues that the globalisation of practice raises for lawyers, the American Society of International Law set up a Task Force on International Professional Responsibility. That Task Force has recommended that the Society adopt six action items to address the

- significant professional responsibility issues raised by the huge changes occurring in legal practice due to globalisation. American Society of International Law, above n 36.
53. Bret Walker, 'Lawyers and Money' St James Ethics Centre 2005 Lawyers' Lecture, St James Ethics Centre, [www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0465.html](http://www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0465.html) at 4 September 2007.
  54. David Weisbrot, 'Promoting a healthy legal culture the focus of new Australian Academy of Law' (ALRC Press Release, 17 July 2007).
  55. Council of the International Bar Association, 'Resolution on Professionalism versus Commercialism', (2000), International Bar Association, [www.ibanet.org/images/downloads/Resolution%20on%20Professionalism%20v%20Commercialism%202000.pdf](http://www.ibanet.org/images/downloads/Resolution%20on%20Professionalism%20v%20Commercialism%202000.pdf) at 15 August 2007.
  56. Ibid.
  57. Commonwealth of Australia, above n 1, vol. 1, xii.
  58. Overington, above n 10, 257.
  59. Commonwealth of Australia, above n 1, vol. 1, xi.
  60. Ibid. According to Michael Ahrens, executive director of Transparency International Australia, the AWB scandal was instrumental in Australia slipping out of the top ten least corrupt countries, as measured by Transparency International's 2007 *Corruption Perceptions Index*. On a scale from zero (worst) to ten (best), Australia is rated 8.5, down from 8.6 last year, significantly losing two places in the ranking (from 9th to 11th spot): Transparency International Australia, 'AWB scandal takes its toll, says Corruption Watchdog' (TI Australia Press Release, 27 September 2007).
  61. Overington, above n 10, 178.
  62. Commonwealth of Australia, above n 1, vol. 4, 117 [31.35].
  63. International Legal Education and Training Committee of the International Legal Services Advisory Council for the Australian Government, above n 44, 5.
  64. Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (2007) 1.
  65. Commonwealth of Australia, above n 1, vol. 1, xii.
  66. Ibid. Cf Overington, above n 10, 258: 'I also accepted, over time, McBride's argument that "99.9 per cent of people at AWB knew nothing about this, had nothing to do with it, and how do you think they feel, when you keep going on about the corrupt culture, the culture of evil bastards, at the company they work for?" This brings to mind the different cultures that can occur around different legal specialisations within large law firms.
  67. Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (2007).
  68. Philip Zimbardo *Overview* (2007) The Lucifer Effect [www.lucifereffect.com/about\\_synopsis.htm](http://www.lucifereffect.com/about_synopsis.htm) at 6 September 2007. Is it mere coincidence that the 'Anonymous Lawyer' of *Anonymous Lawyer*, Blachman's satire on New York law firms, is portrayed on the book's cover and the website as a faceless man in business suit, with the horns and tails of Lucifer? See also Kath Hall, 'The Psychology of Corporate Dishonesty' (2006) 19(3)*Australian Journal of Corporate Law* 268.
  69. Andrew Francis, 'Legal Ethics, the Marketplace and the Fragmentation of the Legal Profession' (2005) 12(2) *International Journal of the Legal Profession* 173, 176.
  70. Ibid. 177. For a more positive take on large law firms see: William Wernz, 'The Ethics of Large Law Firms – Responses and Reflections' (2003) *Georgetown Journal of Legal Ethics* 175.



71. Francis, above n 69, 180.
72. Commonwealth of Australia, above n 1, vol. 1, lviii–lix.
73. Transcript of Inquiry, *The Inquiry into certain Australian Companies in relation to the UN Oil-for-Food Programme* (Terrence Cole, 26 September 2006) 7276. See also Commonwealth of Australia, above n 1, vol. 3 [27.318].
74. Christine Parker, ‘The Ethics of Advising on Regulatory Compliance: Autonomy or Interdependence?’ (2000) 28(4) *Journal of Business Ethics* 339.
75. Charles Sampford and Sophie Blencowe, ‘Educating Lawyers to be Ethical Advisors’ in Kim Economides (ed.), *Ethical Challenges to Legal Education and Conduct* (1998) 315, 333.
76. *Ibid.* 332. A recent survey by Opinion Research Corporation for Pepperdine University’s Graziadio School of Business and Management found that 76 per cent of respondents said they would move their investment money from a company if they learned it was engaged in unethical, but legal, behaviour. Pepperdine University, *Study: Investors Likely to Move Investments if Board Engages in Legal But Unethical Behavior* (2007), Pepperdine University Graziadio School of Business and Management [bschool.pepperdine.edu/newsevents/releases/2007/070626boardinvest.html](http://bschool.pepperdine.edu/newsevents/releases/2007/070626boardinvest.html) at 31 October 2007.
77. See Jonathon Macey, ‘Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of the Profession’ 2005–06 74 *Fordham Law Review* 1079, 1080–1. Macey makes this point in relation to the US legal profession.
78. Francis, above n 69, 174.
79. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [2.117].
80. Australian Law Reform Commission, ‘Promoting a Healthy Legal Culture the Focus of New Australian Academy of Law’ (Press Release, 17 July 2007).
81. Christine Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (2002) 25 *University of New South Wales Law Journal* 676, 677. See also Macey, above n 77.
82. Parker, above n 81, 702. Parker suggests that, given the diversity of legal practice areas, a fruitful regulatory strategy may require specific groups of lawyers (law firms, companies, public service, legal aid commissions etc.) to elaborate their own ethic of responsiveness to consumer and justice concerns.
83. Cathy Gale, ‘Making Work Enjoyable Again’ (2006) *Law Institute Journal* 4.
84. See, e.g., A. D. LaMontagne *et al.*, *Workplace Stress in Victoria: Developing a Systems Approach* (2006); Victorian Health Promotion Foundation, [www.vichealth.vic.gov.au/workplacestress](http://www.vichealth.vic.gov.au/workplacestress) at 12 September 2007.
85. Deborah Rhode and Paul Patron, ‘Lawyers, Ethics and Enron’ (2003) 8 *Stanford Journal of Law, Business & Finance* 9, 37.
86. Linda Treviño, Gary Weaver and Scott Reynold, ‘Behavioural Ethics in Organisations: A Review’ (2006) 32 *Journal of Management* 951.
87. The Carnegie Foundation for the Advancement of Learning, *Preparation for the Professions Program* (2006) [www.carnegiefoundation.org/programs/sub.asp?key=30](http://www.carnegiefoundation.org/programs/sub.asp?key=30) at 11 September 2007.
88. William Sullivan *et al.*, *Educating Lawyers: Preparation for the Profession of Law* (2007) 4.
89. William Sullivan, *Preparing Professionals as Moral Agents* (2006).

90. Noel Preston, 'Ethics Sans Frontiers: the Vocation of Global Citizenship' (2006) (Speech delivered at the 2006 Aquinas Lecture, Australian Catholic University, Brisbane Campus, 8 September 2006) [dlibrary.acu.edu.au/research/theology/ejournal/aejt\\_8/preston.htm](http://dlibrary.acu.edu.au/research/theology/ejournal/aejt_8/preston.htm) at 6 September 2007.
91. Ibid.
92. See Jerome Glenn and Theodore Gordon, *2007: State of the Future* (2007) 4 for discussion of the global challenges facing humankind.
93. Nagan, above n 46, 136.



## PART VI

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### Public law and public policy



## Who's responsible? Justiciability of private and political decisions

DANIEL STEWART\*

### 1. Introduction

This chapter considers two themes running through this collection: the public/private divide and the national/international divide in the context of the Cole Inquiry.<sup>1</sup> Both the private nature of Australian Wheat Board Limited (AWB) and the international nature of the UN sanctions regime and the Oil-for-Food Programme could be argued to have reduced the Australian Government's responsibility for the circumstances leading to that inquiry. The Australian Government was able to claim that it was not responsible for ensuring the veracity of the information provided by AWB. The Ministers whose portfolios were directly related<sup>2</sup> claimed that the activities of AWB, as a private company, were outside of their control, that they did not know about the payments before they took action and that other bodies under the UN sanctions regime had the obligation to do more in relation to checking the information provided. The distinctions between public and private, national and international, therefore, were used to deflect responsibility – at least at the political level – away from any deficiencies in the establishment of appropriate governance structures.

Other chapters in this volume examine the legal responsibility that was or perhaps should have been placed on the Australian and other governments in relation to the UN sanctions regime. This chapter seeks to demonstrate the role any characterisation as private or international has within the Australian system of public law. It will argue that the reason characterisation as private or international renders the decision free from judicial review by domestic courts is the lack of legally enforceable limitations imposed on the decision-maker by the source of the decision-maker's authority. This lack of justiciability is based, not just on the absence of ascertainable standards suitable to the judicial process,

but also on the presence of alternative accountability mechanisms, and, in particular, a reliance on political, rather than judicial, forms of accountability. The characterisation of a decision as private or international thus should serve to highlight, not minimise, the responsibility of the government for the consequences of such decisions.

## 2. Justiciability of 'private' actions

The role of AWB in the export of wheat from Australia, along with its wholly owned subsidiary, AWB International (AWB(I)), was the subject of the decision of the High Court in *Neat Domestic v. AWB*.<sup>3</sup> This case concerned an application by Neat Domestic Trading Pty Ltd for the consent of the Wheat Export Authority to export wheat, as required under the Wheat Marketing Act 1989 (Cth). However, under section 57 of that Act, no consent could be given unless AWB(I) had approved the export. In this way AWB(I), and hence AWB, was able to maintain monopoly control, or a 'single desk' policy, over the export of Australian wheat. The issue before the Court was whether the decision by AWB(I) to withhold consent was reviewable by the court for breach of public law standards, namely a failure by AWB(I) to consider the merits of Neat's application.

The majority<sup>4</sup> rejected the application of public law standards to AWB (I). They relied on three related considerations to hold that public law remedies did not lie in this situation:

First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors – the Authority and AWBI. Secondly, there is the 'private' character of AWBI as a company incorporated under companies' legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests.<sup>5</sup>

The private character of AWB(I) was therefore only a factor in determining that it was not relevantly authorised to make the veto decisions by legislation or any other source of public authority. As a matter of statutory interpretation, the legislation merely gave effect to AWBI's decision<sup>6</sup> – as it was described in a later case, the decision was *dehors* the legislation.<sup>7</sup> An examination of the legislation and extrinsic materials suggested that the legislation intended AWB(I) to act in its own self-interest, as any other private actor, and relied on the exercise

of that self-interest to achieve the regulatory objective of providing for the participation of the wheat growing owners of AWB in the regulation of wheat exports.

The majority reasoned that AWB(I), as a private company, did not need to rely on any public source of authority to enable it to consider an application to export wheat and to express its approval. Whether AWB(I) would approve of any exports depended upon its view of its own self-interest, or more particularly the interests of its shareholders who had contributed to the wheat pool administered by AWB. The relevant legislation 'neither modified nor supplanted the obligations which AWBI and its organs had under its constituent documents and applicable companies law principles'.<sup>8</sup> There was therefore no obligation placed on AWB(I) to consider more 'public' considerations that derived not from its self-interest but from the 'subject matter, scope or purpose of the [relevant legislation] which are identified as bearing upon the decision'.<sup>9</sup>

*Neat* concerned one aspect of the public/private divide in the application of public law standards: when is a private actor subject to those standards. The other aspect – when a public body can make a 'private' decision not subject to those standards – was considered in *Griffith University v. Tang*.<sup>10</sup> The majority in *Tang* drew on the decision in *Neat* in discussing the extent to which a decision by a university established under state legislation to expel a student is made 'under an enactment' so as to be subject to public law standards through operation of the Administrative Decisions (Judicial Review) Act 1977 (Cth).<sup>11</sup> Although the application of the decision to a broader context is uncertain, it can be argued<sup>12</sup> that, as a result of the decision in *Tang*, the application of public law standards generally, at least where the exercise of Commonwealth legislative authority is concerned, essentially involves two elements:

[F]irst, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.<sup>13</sup>

The decision of AWB(I) to refuse approval in *Neat* acted as a condition precedent to the consent needed from the Wheat Export Authority before wheat could be exported from Australia. It therefore affected the legal rights and obligations of both exporters and the Authority.<sup>14</sup> The decision in *Tang*, however, had no such effect, as the majority of the High Court<sup>15</sup> characterised the relationship between a university and a



student as consensual or private in character. Even though the university was public, in the sense of being established and relying upon legislation for its authority to make the decision in question, that authority did not provide the source for any effect on rights and obligations.

Both *Neat* and *Tang* are controversial cases.<sup>16</sup> They suggest statutory authorisation involves a fine question of construction to discern any intention by the legislature to impose limitations or restraints on the decision-maker that require them to have regard to something other than self-interest. However, as the facts in *Neat* suggest, a regard for the interests of others may be the very public law standard sought to be imposed. Using reliance on the self-interest of the decision-maker as a determinant of when any public law standard applies unduly restricts the potential applicability of such standards. As Gleeson CJ suggests in his decision in *Neat*, 'personal animosity towards an applicant, or a desire to confer a personal benefit upon a particular grower or exporter, would be extraneous considerations, and others may be imagined'.<sup>17</sup> It is difficult to find in the majority opinion the normative basis for rejecting the application of any public law standards other than a general reluctance, based on perhaps subjective notions of legislative intent, to subject the decisions of a body such as this to judicial oversight. The decision of AWB(I), therefore, in administering the single desk, is to be left unconstrained by legislation or other public law source of authority.

The second element of the test set out in *Tang* is perhaps even more uncertain in scope.<sup>18</sup> The need for any effect on rights and obligations to derive from a source of public authority serves to distinguish decisions to which public law standards apply from those that rely upon private law for their enforcement, such as through contract or property rights. But the second element does more than choose from alternative bases for judicial intervention. The requirement that a decision affect rights and obligations before it can be reviewed requires an examination of the nature of the decision rather than either the public or private status of either of the parties or the practical consequences of any decision that is made. This is because without such an effect on rights and obligations the decision is non-justiciable. As illustrated by the outcome in *Tang*, even institutions dependent on legislation for their existence are able to enter into, and end, consensual relationships that may not be the subject of judicial scrutiny. The requirement for a decision to affect rights and obligations acts to limit the range of justiciable controversies rather than identify the public or private nature of the decision-maker in question.

The reference to rights and obligations is derived by the court in *Tang* from the constitutional notion of a 'matter', which acts to limit the jurisdiction of federal courts.<sup>19</sup> As stated in *In re Judiciary and Navigation Acts*: 'there can be no matter within the meaning of [Chapter III of the Constitution] unless there is *some immediate right, duty or liability to be established by the determination of the Court*'.<sup>20</sup> The concept of a 'matter' has since been used by the High Court as a crucial element ascribing the range of justiciable controversies that come within the scope of Commonwealth judicial power.<sup>21</sup>

What constitutes a matter is not subject to precise limits. To the extent that the concept of a 'matter' delineates the boundaries of judicial power it is an 'amorphous' notion,<sup>22</sup> but generally requires the court be in a position to conclusively determine the legal position of the parties before it.<sup>23</sup> Thus, in *Minister for Immigration v. Bhardwaj*, Gaudron and Gummow JJ stated:

In the context of administrative decisions, the expression 'judicial review' tends to obscure the fact that the reviewing court is not simply examining the decision in question to see whether it is affected with error of the kind that requires it to be set aside or varied. Judicial review is an exercise of judicial power. As such, it is an exercise directed to the making of final and binding decisions as to the legal rights and duties of the parties to the review proceedings.<sup>24</sup>

As I have argued elsewhere,<sup>25</sup> a 'matter' does not require that the subject of the decision be the rights and obligations of the person affected by the decision.<sup>26</sup> The fact that the decision by AWB(I) in *Neat* did not deprive the applicant of any *right*, but merely the possible benefit of being allowed to export wheat should the Wheat Export Authority grant permission to do so, did not, in itself, mean that there was no 'matter' in dispute between the parties. A 'matter' may depend simply on the presence of conditions or limitations on the decision-maker in making the decision or the rights of the decision-maker to enforce or act upon the decision made.

The difficulty with this analysis is that public law standards can themselves be seen as conditions or limitations on the exercise of public authority. It is these standards which impose obligations on a decision-maker or result in the decision made being rendered invalid and unenforceable. However, a possible breach of those standards cannot be enough to enable them to be imposed and reviewed by the court. The determination of justiciability is necessarily prior to the determination

of whether a public law standard has been breached.<sup>27</sup> Therefore, where a decision does not itself change the rights and obligations of the person(s) affected by the decision, the test in *Tang* requires not only that there be some public source of authority for the decision in question, but that the conferral of authority itself impose limitations or constraints on the decision in question. As the decision in *Neat* demonstrates, the question of whether a private body is exercising public authority may depend on whether the source of authority, in that case legislation, imposes any limits or constraints. The two elements in *Tang*, in such cases, may be mutually dependent.

When described in this way, the majorities in *Neat* and *Tang* are merely applying the *ultra vires* principle based on a strict view of the separation of powers.<sup>28</sup> As outlined by Brennan J in *Attorney-General (NSW) v. Quin*, '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing the law which determines the limits and governs the exercise of the repository's power'.<sup>29</sup> The question is not whether or not the body or function in question is sufficiently public so as to require the application of public law standards, but rather whether or not the body in question, in making the decision or exercising the function, is acting outside of the limits of its authority. The basis of the implication of public law standards is therefore dependant on reference to some external, objective source of limits on authority.

This is also the approach generally taken by Gleeson CJ in *Neat*:

However, the Act gives each a statutory role which may affect the interests of members of the public, such as the appellant. A question arises as to the extent to which that role is circumscribed. When a state confers discretionary power which is capable of affecting rights or interests, the identity and nature of the repository of the power may be a factor to be taken into account in deciding what are intended to be matters that must necessarily, or might properly, be considered in decision-making or whether it is intended that the power is at large.<sup>30</sup>

The effect of the decision is therefore only a factor in determining the presence of limits imposed through the conferral of public authority. Gleeson CJ disagrees, however, with the majority conclusion that AWB (I)'s role is not circumscribed by the statute in question. He interprets the power to withhold approval, a condition precedent to a decision in favour of an applicant for consent, as requiring considerations going beyond AWB(I)'s self interest.<sup>31</sup>

The approach taken by Kirby J is less clear. Much of his judgment suggests, like Gleeson CJ, that he considers the regulatory scheme established by legislation to place obligations on AWB(I). But at times he suggests that the source of those obligations can be entirely external to the source of authority. He begins his judgment with a quote from *Gerlach v. Clifton Bricks Pty Ltd*:

All repositories of public power in Australia ... are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer absolute power on anyone ... [T]here are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose.<sup>32</sup>

For Kirby J, the legal controls over the exercise of public power in question derive ultimately from the Constitution and the system of responsible government it establishes through which Ministers are accountable to Parliament for the exercise of such power.<sup>33</sup> 'Public' power includes decisions which 'derive their necessity or effectiveness, and the bodies making them derive their existence or particular functions, from federal legislation'.<sup>34</sup>

For Kirby J, therefore, the role of the court may extend beyond enforcing limits on the conferral of authority by Parliament to include holding accountable any repository of public power. As those affected by the exercise of that power are not in a contractual relationship, enforcement of public law standards through judicial review becomes the only way to ensure that accountability. As his Honour suggests 'the only way that the decisions of AWBI, with their wide and significant impact, could be exposed to legal scrutiny or accountability was by way of administrative review. If such review were unavailable, AWB and AWBI, at least in this respect, would come close to possessing absolute legal power'.<sup>35</sup>

Kirby J is also prepared to go beyond any direct link to judicial enforcement of limitations implied through the exercise of statutory or executive authority, at least to assist in identifying the character of the decision in question. He refers to decisions in *Forbes v. New South Wales Trotting Club Ltd*<sup>36</sup> and the English Court of Appeal decision in *R v. Panel on Take-overs and Mergers; Ex parte Datafin*,<sup>37</sup> which identified various factors that may indicate when a body is exercising public power in the absence of statutory authorisation.<sup>38</sup> These included: having a significant effect on members of the public who had not consented to the exercise of power; implied governmental consent through the

absence of alternative regulation and recognition in other legislation; connection with government through appointment or other processes; and the absence of alternative remedies.<sup>39</sup>

Kirby J, however, recognises that these factors may not be 'sufficiently precise to be accepted as the basis for review of decisions under the common law'<sup>40</sup> and suggests that they merely 'point towards the conclusion that AWBI's impugned decisions were made pursuant to governmental or statutory authority'.<sup>41</sup> The private character of AWB(I) therefore has no immediate legal consequence: the legal character of AWB(I)'s decision depended upon force of legislation, and then only because the legislation in question 'gives such authority in clear and unmistakeable terms'.<sup>42</sup> It would seem that he ultimately, therefore, relies on the conferral of authority through legislation for the enforcement of public law standards through judicial review.

The judgments in *Neat* reflect different conclusions as to whether the decision of AWB(I) was authorised by legislation, which depended in turn on different views of the extent of any intention to impose limitations or obligations on AWB(I) through the legislative scheme. Only Kirby J, approaching a type of common law constitutionalism,<sup>43</sup> suggests that those limitations or obligations may be imposed through reference to some external source such as the Constitution or through the imposition of common law values by reference to the need to provide legal accountability. As we shall see, similar reliance on limitations imposed through the source of authority rather than some alternative reference to values enforced through the common law is evident in review of executive power in the international sphere.

### 3. Justiciability of 'international' obligations

International obligations have only a limited capacity to create legal rights and obligations at a domestic level<sup>44</sup> as they generally need to be incorporated into domestic legislation, either expressly or by implication, and perhaps subject only to clear words to the contrary.<sup>45</sup>

International obligations may also have an impact on the content of public law standards, such as obligations of natural justice. In *Teoh* a representation by the executive government at the international level, such as the ratification of a treaty, was held to lead to a legitimate expectation that the representation would be complied with. Obligations of natural justice required that individuals subject to decisions that had a reasonable connection to the treaty obligation in question be

informed of any deviation from the expectation and given an opportunity to comment on the deviation.

It was legitimate expectations based on executive conduct in the international sphere that arose in the UK case of *Abbasi*.<sup>46</sup> Mr Abbasi was a British national captured by US forces in Afghanistan and detained at Guantanamo Bay in Cuba without trial or legal representation. He sought judicial review to compel the UK Foreign Office to make representations on his behalf to the US Government. It was held that previous policy statements issued by the Foreign Office indicated an acceptance of a role in assisting British citizens abroad when there is evidence of miscarriage or denial of justice, particularly of what may be termed fundamental rights.<sup>47</sup> This meant that Mr Abbasi had a legitimate expectation that the UK Government would at least 'consider' making representations on his behalf.<sup>48</sup> The UK Court of Appeal held that the exercise of the prerogative, even in the field of international relations, could be justiciable. This depended 'not on general principle, but on the subject matter and suitability in the particular case',<sup>49</sup> which here extended to the exercise of discretion in deciding whether to act to protect British citizens.

The impact of the decision in *Abbasi* is limited, particularly as the court refused to require more than a consideration of the request for assistance, something which had already been met by the Secretary of State in Mr Abbasi's case.<sup>50</sup> In the course of giving consideration to Mr Abbasi's request, the court held that the 'Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable'.<sup>51</sup> While the court suggested that in some circumstances there may be more intrusive review, such as where there were no further appeal rights in the foreign country to which the applicant could argue their case, it is not clear on what basis this could be justified.

Commentators such as David Dyzenhaus have suggested that the decision in *Abbasi* suggests a willingness by the courts to intervene in the exercise of executive power in international affairs only to 'affirm the value of a practice in which the executive is already engaged'.<sup>52</sup> The court was willing to enforce values that the executive had previously taken responsibility for. The court may therefore have a ratcheting effect in ensuring that protection by the executive, once extended, cannot be subsequently derogated from except in special circumstances.

In an Australian context it is likely that even this limited effect may be beyond the courts. The Australian doctrine of legitimate expectations

does not extend to substantive protection.<sup>53</sup> Any legitimate expectation would only require notice be given to an applicant that the Government was not going to consider making representations on their behalf, and an opportunity to comment. The difficulty with this 'consider whether to consider' requirement was highlighted in *Lam*, with McHugh and Gummow JJ in particular emphasising that 'in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations'.<sup>54</sup>

The result in *Teoh*, however, suggested that the application of procedural fairness might require international obligations to be considered in light of the submissions of persons affected by non-compliance with those obligations. As they state:

The reasoning which as a matter of principle would sustain such an erratic application of the 'invocation' doctrine remains for analysis and decision. Basic questions of the interaction between the three branches of government are involved. One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs.<sup>55</sup> Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.<sup>56</sup>

The case of *Hicks v. Ruddock*<sup>57</sup> presented similar concerns to those dealt with in *Abbasi*, namely the obligations on the executive in relation to the imprisonment of nationals seeking to return to Australia. Mr Hicks sought judicial review of that decision on grounds including: the executive was under a duty to consider making a request of the US Government; and, in refusing to make that request, the executive had irrelevantly considered that Mr Hicks could not be prosecuted in Australia and it was desirable that he be held and subject to proceedings in Guantanamo Bay. The Federal Court refused to strike out Mr Hicks' application, holding that the issue was justiciable and the grounds alleged were at least arguable.

In discussing the issue of justiciability of international relations, Tamberlin J relied on the decision of Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation*.<sup>58</sup> The applicant in *Re Ditfort* sought to annul his bankruptcy due to the circumstances surrounding his

sequestration order. Those circumstances included promises made by the Australian Government to secure his extradition from Germany, which the applicant claimed were broken upon his return. The Deputy Commissioner, who had sought the sequestration order, had argued that the conduct of the Australian Government in making and, allegedly, breaking the promises was 'non-justiciable'.

For Gummow J, however, the concept of justiciability identified several distinct legal rules or principles.<sup>59</sup> It can include, for example, difficulties in admitting or calling into question necessary evidence, such as certificates providing for recognition of the executive government of external states of affairs. It may also extend to questions of discretion as to the awarding of equitable remedies against what may be termed 'political questions'<sup>60</sup> or the so-called 'act of state' doctrine that requires courts to respect the sovereignty of foreign states by not calling into question acts of the government of another country done within its own territory.<sup>61</sup> However, of most relevance to this chapter is the way in which Gummow J relates justiciability to the concept of a 'matter' and the exercise of judicial power for the purposes of Chapter III of the Constitution.

As Gummow J points out, questions involving the executive power of the Commonwealth involve the interpretation and enforcement of the limits on executive power imposed by section 61 of the Constitution. Provided issues of standing are addressed, 'no question of "non-justiciability" ordinarily will arise'.<sup>62</sup> When acting within the limits of constitutional authority however, international relations generally do not create rights or obligations sufficient to give rise to a 'matter' unless it can be shown that the international relations are 'a step in the process which as a whole has that effect'.<sup>63</sup> In the circumstances of *Re Ditford*, the events leading up to the making of a sequestration order included any promises made by the Australian Government. As 'a step in the process', these promises could properly be considered by the court under the legislation in question, and hence were elements of the 'matter' in issue in that case. In other words, the promises by the Australian Government themselves did not give rise to any obligation or substantive rights and were within the scope of executive power. But consideration of the promises, and whether they were kept, lay within the scope of discretion given to the court under the bankruptcy legislation in question, namely to make an order as to the rights and obligations of the parties by annulling the bankruptcy.



Another example of where international relations act as a step in a process which, as a whole, has an effect on rights and obligations is provided by *Minister for Arts, Heritage and Environment v. Peko-Wallsend Ltd.*<sup>64</sup> In that case, the applicants sought to challenge a decision by the Australian Government to nominate parts of Kakadu National Park for inclusion on the World Heritage List pursuant to the World Heritage Convention 1972. The listing would have had the effect under the World Heritage Properties Conservation Act 1983 (Cth) of enabling a proclamation to be issued by the Governor-General, which in turn would have prevented the applicants from carrying out mining activities under leases they held in the area. The listing was an act of Commonwealth executive power that, in itself, had no effect on rights and obligations.

As Wilcox J points out, the legislation in question did not authorise the listing.

[T]here was no statutory provision at all relating to the nomination by Australia of properties for inclusion upon the World Heritage List. The World Heritage Properties Conservation Act 1983 does not deal with this matter. Insofar as its operation depends upon properties being listed, that Act assumes that the property has been, or will be, listed *dehors* the Act.<sup>65</sup>

As in *Neat*, the act of the executive in nominating the property was not limited or conditioned by the legislation that provided for the effect on rights and obligations. Because the listing, as an exercise of executive power, did not, in itself, give rise to any direct and immediate effect on rights and obligations Wilcox J did not consider that the listing was justiciable.

It is not clear whether the other judges in *Peko* would have decided the case on the basis of the effect on rights and obligations. Even Wilcox J himself goes further in identifying features of the decision that would have made judicial review of the decision inappropriate even if it had affected rights and obligations.<sup>66</sup> He and the other judges emphasise the political nature of the decision, variously pointing to the complex, policentric nature of the decision<sup>67</sup> and its similarity with entering into a treaty.<sup>68</sup> However, as Gummow J in *Re Ditford* suggests,<sup>69</sup> it is arguable that the primary reason for holding that the decision in *Peko* was not justiciable was the political nature of the sanctions involved in making the decision. As Sheppard J in *Peko* states: 'The sanctions which bind [Cabinet] to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the court to interfere with what it does.'<sup>70</sup>

The non-justiciability of decisions involving political sanctions was avoided in *Hicks* through reference to Constitutional ‘restraints on and the extent and nature of the executive power’.<sup>71</sup> The Constitution, it was argued, by providing for protection by the laws of Australia as ‘the counterpart of an allegiance owed by a resident’<sup>72</sup> imposed a non-enforceable duty to protect against the punitive detention and prosecution of an Australian citizen in a ‘legal black hole’. This duty at least prevented the Australian government from relying on the protection of laws of another country where the offence was not subject to Australian laws. It was also argued that the Government was effectively permitting ‘the prosecution of an Australian citizen for a matter not known to Australian law’ contrary to the exclusive role of courts established under Chapter III of the Australian Constitution in imposing punitive detention.<sup>73</sup>

As Tamberlin J acknowledged in *Hicks*: ‘[t]he modern law in relation to the meaning of “justiciable” and the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law’.<sup>74</sup> Given the arguable imposition of duties in the exercise of executive power under section 61 of the Constitution his Honour was not prepared to strike out the application. In this way, Tamberlin J can be seen as acting consistently with the requirements for justiciability of private decisions discussed above, namely the reliance on limitations or obligations imposed through the public law source of authority. However, the nature of the Constitution as the source of those obligations highlights the role political sanctions may play in excluding justiciability – the separation of powers inherent in the Constitution brings with it the possibility that not all responsibilities placed on a non-justicial arm are enforceable by Chapter III courts.<sup>75</sup> The mere identification of the Constitution as the source of executive authority does not in itself give rise to rights and obligations sufficient to subject the exercise of executive power to judicial review. The obligations and duties imposed on the executive must condition the exercise of executive power so as to give rise to a ‘matter’ and not be subject, as suggested above, to merely political sanction.

Relying on the political nature of the sanctions available to determine when a decision is non-justiciable is, of course, in some ways self-fulfilling and indeterminate. As Chris Finn has suggested, it is not clear what aspects of a decision remove it from judicial review so as to render political sanctions perhaps the only ones remaining.<sup>76</sup> Questions of institutional competence relying on the unsuitability of the courts to

resolve policy or policentric issues are an unsatisfactory basis on which to exclude judicial review:

[t]o the extent that this is justified, it amounts to saying that there are no legal issues for a court to resolve, or no 'justicially manageable standards' which can be discovered and applied to resolve the dispute. But this is to say no more and no less than simply that no ground of review can be made out.<sup>77</sup>

This criticism reflects the observations made above in relation to private decisions. If the application of public law standards to private decisions is based on the source of authority and the effect on rights and obligations, and those in turn depend on the existence of conditions or limits on the grant of authorisation, then the basis of those limitations has been required by the courts to be sourced from something other than the public law standards themselves. Therefore, if questions of justiciability are to be separated from issues of the application of the grounds of review or public law standards, an alternative basis for the removal of judicial review needs to be found.

#### 4. Allocating responsibility?

Counsel for the applicant in *Hicks* put the basis for justiciability in the following terms, seemingly accepted by Tamberlin J: 'The question for a Ch III court is whether the proceeding requires the extension of the court's jurisdiction into areas political in nature such that it has no legal guidelines or criteria against which to make its determination.'<sup>78</sup>

This reference to legal criteria reflects a series of judicial statements describing the nature of Commonwealth judicial power. In *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* the joint judgment held that '[t]he function of the federal judicial branch is the quelling of *justiciable controversies* ... This is discharged by ascertainment of facts, *application of legal criteria* and the exercise, where appropriate, of judicial discretion.'<sup>79</sup> Similarly, as suggested in *Brandy v. Human Rights and Equal Opportunity Commission*:

[An] important element which distinguishes a judicial decision is that it determines rights and duties and does so according to law. That is to say, it does so *by the application of a pre-existing standard* rather than by the formulation of policy or the exercise of an administrative discretion.<sup>80</sup>

The meaning of legal criteria was discussed in the High Court case of *Thomas v. Mowbray*,<sup>81</sup> concerning the validity of a power given to

federal courts to issue an interim control order on bases including that the court was satisfied that the obligations, prohibitions and restrictions imposed by the order were 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.<sup>82</sup> The various judgments refer to legal criteria as serving various objectives in separating the judicial task. It prevents delegating to courts 'the essentially legislative task of determining "the content of a law as a rule of conduct or a declaration as to power, right or duty"'.<sup>83</sup> Similarly, it precludes judicial determination of how best to achieve government policy without providing standards by which that achievement is to be assessed, particularly where, 'federal courts are left with no practical choice except to act upon a view proffered by the Executive ... [and so] the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged'.<sup>84</sup>

The need for 'defined or defineable, ascertained or ascertainable'<sup>85</sup> legal criteria therefore reflects both recognition of relative judicial competence or expertise, requiring criteria which are suitable for judicial determination and an assessment of relative political responsibility.<sup>86</sup> It is arguably this later sense that Gummow J uses in *Re Ditfort* in removing from the concept of a matter the consideration of undertakings and obligations depending entirely on political sanctions.<sup>87</sup> The concept of justiciability can therefore be used by the courts as an aspect of the constitutional concept of a 'matter' and hence play a role in ascribing the responsibility of the different arms of government.

Kirby J referred to the allocation of responsibility in his dissent in *Neat*. He argued that, in so far as private bodies exercise public power 'under the Constitution, a Minister must be accountable to the Parliament in respect of such exercise. In turn, through the Parliament, the Minister, and the government of which he or she is part, are responsible to the electors'.<sup>88</sup>

The possible absence of responsibility is thus used by Kirby J to argue that the decisions of AWB(I) in *Neat* should be considered an exercise of public power, and hence the responsibility of the relevant Minister as well as being susceptible to judicial review. However, to the extent to which judicial review of private decisions reflects general notions of justiciability, it shares an alternative basis for the allocation of responsibility.

Kirby J's view reflects a perceived need to subject all forms of public power to judicial scrutiny. However, that may not necessarily operate to hold the executive government to account through Parliament and

ultimately the electors. Justiciability's resort to legal guidelines or criteria may instead reflect a concern that the executive is often empowered to act in situations where there may be few, if any, limitations on the exercise of discretion.<sup>89</sup> By rendering decisions non-justiciable the courts avoid providing the executive with the ability to claim they are acting with the sanction of the courts when they are largely free of legal constraints. As Timothy Endicott suggests, 'politicians should not be able to disclaim responsibility for such decisions on the ground that they are approved by or in the control of judges'.<sup>90</sup> A finding of non-justiciability, therefore, means that the burden of justification for the decision remains with the executive. The consequences of the decision lie not with judicial determinations of validity but the view of the electorate. The removal from judicial review can be seen as placing even greater reliance on the notion of responsible government that Kirby J refers to.

As a consequence of this view, in the circumstances the subject of the Cole Inquiry, the non-justiciability of decisions by AWB and domestic enforcement of international obligations under the UN sanctions regime are arguably premised upon the executive's political responsibility, if not for the actual breaches of UN sanctions but for establishing the conditions in which they occurred and which may have suggested a greater monitoring role. The instigation of UN sanctions has no direct domestic effect on rights and obligations since it does not impose obligations on private domestic bodies to comply with the sanctions in the absence of domestic legislation. Enforcement of those sanctions is likely to be non-justiciable in any Australian court. This would reflect a rejection by the courts of any role in determining how the international sanctions regime is to be implemented domestically. It is not for the courts to determine how international obligations are best satisfied. Responsibility for the enforcement of UN sanctions therefore rests solely on the executive arm of government until domestic obligations are implemented through legislation.

Similarly, the legislature placed reliance on the self-interested objectives of AWB and AWB(I) as private bodies in the operation of the wheat desk in order to meet the regulatory objective of protecting the interests of (largely) wheat-grower shareholders, something which the executives of AWB implicated in the inquiry claim was their sole objective. Even if AWB had remained under direct government control, the decision to enter into contracts and the terms of those contracts would likely be non-justiciable unless there were positive steps taken by the Government to require consideration of international obligations in

making such decisions. The private nature of the decision of AWB to enter into contracts in breach of the UN sanctions regime therefore can be argued to have placed the burden of ensuring compliance with any international obligations with the Government, something not considered in the Cole Inquiry to be within its terms of reference.

There remains considerable difficulty in determining when it is appropriate for the courts to, in effect, abdicate responsibility for a decision on the basis that it more appropriately resides in the executive. As the decisions in *Neat* and *Peko* suggest, one criterion is recourse to legislative authority as the basis for the implication of domestic rights and obligations. In both those cases, various judges accepted that direct legislative authorisation of the decisions in question would have made judicial review appropriate. This limits the role of the courts to enforcing legislative (or perhaps constitutional) limitations, with the protection of individual rights and interests only indirectly contributing to the identification of the content of the limitations. As the political implications from the circumstances leading to the Cole Inquiry are assessed, it remains to be seen whether the role of the courts can indeed be seen as ascribing political responsibility or merely abdicating the protection and enhancement of the responsibilities of the state from behind a veil of legislative interpretation.

In its response to the Cole Inquiry report the Australian Government acted on the three main relevant recommendations:

- (1) placing greater emphasis on companies seeking to export or import goods subject to a United Nations sanctions regime to provide accurate and complete information by increasing the financial and criminal penalties involved, including holding individual officers to account;
- (2) implementing legislation which criminalises conduct which breaches UN sanction regimes that Australia has agreed to; and
- (3) giving power to obtain evidence and information for the purpose of securing compliance with UN sanctions to those agencies responsible for granting permits in relation to UN sanctions.<sup>91</sup>

Each of these can be seen to respond to the elements discussed in this paper. They act to overcome the non-justiciable elements of UN sanctions regime obligations by entrenching those obligations in Australian domestic law. The first and second response acknowledges the need for a self-interested body such as AWB to give consideration to the relationship between its conduct and the implementation of UN sanctions.

The third response acknowledges the obligations on the executive through administrative bodies to effectively enforce those obligations. Whether they reflect an acknowledgement of responsibility for the inadequate implementation of UN sanctions leading to the circumstances of the Cole Inquiry is more difficult to discern.

### Notes

- \* Many thanks to Hitoshi Nasu and the editors of this collection, for their helpful suggestions. Thanks also to Leighton McDonald for managing to make both my intended and actual arguments clearer.
1. Commonwealth of Australia, The Inquiry into Certain Australian companies in relation to the UN Oil-for-Food Programme, *Final Report* (2006).
  2. Alexander Downer, Minister for Foreign Affairs and Trade, and Mark Vaile, Minister for Trade.
  3. *NEAT Domestic Trading Pty Ltd v. AWB Ltd* (2003) 216 CLR 277 (*Neat*).
  4. McHugh, Hayne and Callinan JJ. Gleason CJ also agreed with the orders of the court as there was no failure to consider the merits of Neat's application in this case, but would have held that Neat was in general subject to public law standards. Kirby J dissented (see further the discussion of Kirby J's judgment below).
  5. *Neat* (2003) 216 CLR 277, 297 [51] (McHugh, Hayne and Callinan JJ).
  6. Stephen Gageler, 'The Legitimate Scope of Judicial Review: The Prequel' (2005) 26 *Australian Bar Review* 303.
  7. *Griffith University v. Tang* (2005) 221 CLR 99, 130 (Gummow, Callinan and Heydon JJ) (*Tang*).
  8. *Neat* (2003) 216 CLR 277, 299 [59].
  9. *Ibid.* 299 [60].
  10. *Tang* (2005) 221 CLR 99.
  11. *Tang* actually concerned the Qld version of that legislation but this was accepted by the judges as relevantly subject to the same interpretation.
  12. See Daniel Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies' (2005) 47 *Australian Institute of Administrative Law Forum* 17.
  13. *Tang* (2005) 221 CLR 99 130 [89] (Gummow, Callinan and Heydon JJ).
  14. See the discussion in Daniel Stewart, 'Griffith University v. Tang, "Under an Enactment" and Limiting Access to Judicial Review' (2005) 33(3) *Federal Law Review* 525; cf Leighton McDonald and Christos Mantziaris, 'Federal Judicial Review Jurisdiction after *Griffith University v. Tang*' (2006) 17 *Public Law Review* 22.
  15. Gummow, Callinan and Heydon JJ, Gleason CJ agreeing with the orders on generally similar reasoning, Kirby J dissenting.
  16. They have certainly generated plenty of academic comment: see, e.g., McDonald and Mantziaris, above n 14; Graeme Hill, '*Griffith University v. Tang*: Comparison with *Neat Domestic*, and the Relevance of Constitutional Factors' (2005) 47 *Australian Institute of Administrative Law Forum* 6; and Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
  17. *Neat* (2003) 216 CLR 277, 288 [22].

18. See, e.g., McDonald and Mantziaris, above n 14.
19. More particularly the meaning of 'matters arising under' the Constitution or Commonwealth legislation for the purposes of s. 76 of the Constitution.
20. (1921) 29 CLR 257, 265–6 (emphasis added).
21. As Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ said in (*NT*) *Pty Limited v. Hatfield* (2005) 223 CLR 251, 262: it is well settled that 'an important aspect of federal judicial power is that, by its exercise, a controversy between the parties about some immediate right, duty or liability is quelled'. See also *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372, 457–60 (Hayne J); *Ainsworth v. Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
22. *R v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 396.
23. See *Thomas v. Mowbray* (2007) 237 ALR 194, 278 [305] (Kirby J).
24. (2002) 209 CLR 597, 617
25. See Stewart, above n 14.
26. See e.g., *Ainsworth v. Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*), where a remedy was available to declare that a report to the Queensland Parliament had been published in breach of the obligations of natural justice, even though the report had no legal effect: see further *ibid.* 540.
27. See, e.g., *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (*Re Ditfort*).
28. Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217.
29. *A-G (NSW) v. Quin* (1990) 170 CLR 1, 36.
30. *Neat* (2003) 216 CLR 277, 284 [11].
31. See quote above around n 17.
32. (2002) 209 CLR 478, 503–4 [70] (Kirby and Callinan JJ).
33. *Neat* (2003) 216 CLR 277, 308 [95]–[96].
34. *Ibid.* 308 [96].
35. *Ibid.* 311 [105].
36. (1979) 143 CLR 242.
37. [1987] QB 815.
38. *Neat* (2003) 216 CLR 277, 312–14. Kirby J goes on to state that decisions to enter contracts or pursuant to existing contracts were not 'apposite to the circumstances of the present appeal': 315 [118]. Presumably this refers to the fact that there was no such contract in issue in *Neat*, and not to the clear links that have been drawn in the English cases between the exercise of public power and the absence of contractual relationships: see *YL v. Birmingham City Council* [2007] 3 WLR 212. Several recent Australian cases have discussed the test set out in *Tang* in relation to possible contractual or otherwise consensual agreements: see *White Industries v. Federal Commissioner of Taxation* [2007] FCA 511; *Bilborough v. Deputy Commissioner of Taxation* [2007] FCA 773.
39. See discussion in *Neat* (2003) 216 CLR 277, 312–13 [110], 314 [113].
40. *Neat* (2003) 216 CLR 277, 314 [115]
41. *Ibid.*



42. Ibid. 316 [121].
43. See Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142.
44. See *Victoria v. Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 480–2 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) where the general proposition was traced back to *Walker v. Baird* [1892] AC 491. The few exceptions relate to treaties recognising foreign governments, treaties concluding peace, treaties determining international boundaries and, arguably in certain circumstances, treaties on migration: see generally Mark Leeming, 'Federal Treaty Jurisdiction' (1999) 10 *Public Law Review* 173.
45. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 (*Teoh*) 287–8 (Mason CJ and Deane J).
46. *R(Abbasi) v. Secretary of State* [2003] 3 LRC 297.
47. Ibid. [92].
48. Ibid. [99].
49. Ibid. [85].
50. Ibid. [107].
51. Ibid. [99].
52. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 169
53. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [67] (*Lam*).
54. Ibid.
55. Cf *Simsek v. Macphee* (1982) 148 CLR 636, 641–2 (footnotes original).
56. *Lam* (2003) 214 CLR 1, 33 [101].
57. (2007) 156 FCR 574 (*Hicks*).
58. (1988) 19 FCR 347 (*Re Ditfort*).
59. Ibid. 368.
60. See discussion in 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* 123, 126.
61. *Re Ditfort* (1988) 19 FCR 347, 371.
62. Ibid. 369.
63. Ibid. 370.
64. (1987) 15 FCR 274.
65. Ibid. 298 (emphasis added).
66. Ibid. 304.
67. Ibid. 279 (Bowen CJ).
68. Ibid. 308 (Wilcox J).
69. *Re Ditfort* (1988) 19 FCR 347, 370. See also *Thomas v. Mowbray* (2007) 237 ALR 194, 227 [106] (Gummow and Crennan JJ): 'There will be no 'matter' if determination of the controversy would require adjudication of obligations and undertakings which depend entirely upon political sanctions and understandings.'
70. *Peko* (1987) 15 FCR 274, 281.
71. *Hicks* (2007) 156 FCR 574, 579 [26]
72. Ibid. 593 [62].
73. Ibid. 596 [75].

74. *Ibid.* 600 [93].
75. See *Tasmanian Breweries* (1970) 123 CLR 361,403 (Wilson J).
76. See Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.
77. *Ibid.* 251.
78. *Hicks* (2007) 156 FCR 574, 586 [29].
79. (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (emphasis added).
80. (1995) 183 CLR 245, 267–8 (emphasis added).
81. (2007) 237 ALR 194.
82. As set out in div 104.4 of the Criminal Code (Cth): Criminal Code Act 1995 (Cth) sch.
83. *Thomas v. Mowbray* (2007) 237 ALR 194, 219 [71] (Gummow and Crennan JJ) Citing *Commonwealth v. Grunseit* (1943) 67 CLR 58, 82.
84. *Thomas v. Mowbray* (2007) 237 ALR 194, 331 [513] (Hayne J).
85. *R v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 291 (Dixon J).
86. See Timothy Endicott, 'The Reason of the Law' (2003) 48 *American Journal of Jurisprudence* 83, 98.
87. *Re Ditfort* (1988) 19 FCR 347, 370.
88. *Neat* (2003) 216 CLR 277, 308 [96].
89. See Dyzenhaus, above n 52.
90. Endicott, above n 86, 98.
91. See *Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*, Attorney-General's Department, 3 May 2007. The response was implemented in the Customs (Prohibited Exports) Amendment Regulations 2008 (No 1) (Cth) and the International Trade Integrity Act 2007 (Cth).

## AWB and oil for food: Some issues of accountability

RICHARD MULGAN

### 1. Introduction

The scandal surrounding the Australian Wheat Board's (AWB's) breaches of the UN Oil-for-Food Programme (OFFP) was played out globally across international and domestic fora. This chapter examines the affair from an accountability perspective, using it as a case study of the similarities and differences between domestic and international accountability regimes. While 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. 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.

Finally, the AWB affair underscores the ambivalent nature of all such accountability crises. On the one hand, it demonstrates a failure of accountability. The domestic Australian Cole Inquiry<sup>1</sup> and its international predecessor, the Volcker Inquiry,<sup>2</sup> undoubtedly revealed serious accountability deficiencies in the administration and monitoring of the Iraq sanctions regime in general and the OFFP in particular. On the other hand, these inquiries themselves and the political pressures that gave rise to them provide an accountability success story. They helped to bring the facts to light and so provided impetus for establishing a more effective accountability structure. Every routine accountability procedure is a response to some former scandal or crisis. In historical retrospect, the OFFP may well be seen as the spur towards major improvements in government accountability, both domestically and internationally.

Accountability is a relationship of rights and obligation, where one party, the account-holder, has the right to require the other party, the accountant, to meet certain obligations.<sup>3</sup> The obligations of accountability typically involve three stages or processes: reporting or informing (giving an account of past action), discussion and justification (questioning and providing reasons for action) and rectification (acceptance of remedies or sanctions as required by the account-holder). Accountability can be categorised into many different types, depending on the subject matter (e.g., financial or professional), the relative power of account-holder and accountant (vertical or horizontal), or the institutional mechanisms involved (e.g., legislative, political or legal). Some of these categories remain unsettled and contested. For instance, for the purpose of the present discussion, 'legal accountability' will be understood as accountability through a judicial or quasi-judicial process. This contrasts with more expansive definitions of legal accountability that link it to compliance with a rule, in contrast to the supposedly arbitrary nature of political accountability.<sup>4</sup>

In the AWB affair, who was accountable (the accountors), and for what? A number of players held particular responsibilities for which they could be held accountable. One was AWB itself and its commercial offshoot, AWB International (AWB(I)), one of the many companies seeking to trade with Iraq and therefore under an obligation to observe the terms of the OFFP. The behaviour of AWB and AWB(I) and, in particular, the issues raised by its status as a commercial company (albeit a very recently privatised company) are well dealt with elsewhere in this collection.<sup>5</sup> In this chapter, the focus is on the government agencies that were responsible for monitoring companies such as AWB(I) and for holding them to account. The main agencies to consider are the UN Secretariat, the Australian Department of Foreign Affairs and Trade (DFAT) and the Wheat Export Authority (WEA).

## 2. International accountability: UN Secretariat

Primary responsibility for administering the OFFP lay with the UN Secretariat. Given that all exports to Iraq under the scheme required formal approval by the UN Secretariat through the Office of the Iraq Programme (OIP), the Secretariat was in an excellent position to monitor the programme and to require compliance from participating companies. In this respect the OFFP was easier for the UN to monitor than other sanctions regimes, including the main Iraq sanctions programme,

in that the OIP provided an obligatory check-point and potential veto-point for all trading initiatives.

AWB submitted details of its contracts to the UN customs officers in the OIP.<sup>6</sup> Each contract was vetted first by a reviewing officer and then a checking officer. In 1999, when AWB submitted contracts that for the first time included references to the payment of a trucking fee in US dollars, the officers initially overlooked the offending clauses, neither of them appearing to notice the breach. When later questioned by Commissioner Cole, the Chief Customs Officer blamed the officers' lack of training and the time pressure under which they were operating. Commissioner Cole adds another possible reason for their not querying AWB's integrity – a sense of trust that AWB was a reputable firm that was unlikely to be breaking the sanctions regime.<sup>7</sup> Certainly, the officers were impressed by AWB's later rebuttal of Canadian accusations in 2000, to the extent of overlooking any apparent anomalies in the contracts.<sup>8</sup> For the most part, however, the relevant staff at AWB took care not to inform the UN officers of any dubious dealings, keeping these details out of the contracts that were forwarded to the OIP. The clause explicitly referring to the trucking fee was subsequently replaced with a general statement giving AWB responsibility for providing transportation within Iraq.<sup>9</sup> This statement was in fact false but was allowed by the UN, notwithstanding some misgivings from UN staff.<sup>10</sup>

As the Volcker Inquiry's report on the management of the OFFP makes clear,<sup>11</sup> the overall administration of the programme was both incompetent and corrupt, revealing a major lack of robust administrative systems and professional integrity within the United Nations Secretariat. Even when one of the customs officers became suspicious about possible breaches and reported her suspicions to her superiors, no action was taken. Documented evidence of companies being asked to include kick-backs in contracts was reported to the Director of the Contracts Processing Section, Mr Farid Zarif, and to the head of the OIP, Mr Benon Sevan, to encourage action by the Secretariat. It appears that Mr Sevan drafted threatening letters to the Iraqi UN Ambassador and to his immediate superior, Deputy Secretary-General Frechette, but the letters were never sent.<sup>12</sup> When the *New York Times* broke the scandal in March 2001, the OIP responded with an apparent tightening of its procedures but with no admission that breaches had actually been occurring and with little consequent effect.<sup>13</sup> The new procedures seem designed to give the appearance of enforcement but without any effective commitment to prevent breach.

What is more, the Secretariat was unwilling to report any problems to its political masters on the Security Council. Responsibility for oversight of the programme lay with the 661 Committee of the Security Council (named for the original Security Council resolution authorising the Iraq sanctions regime). On a number of occasions in 2000 and 2001, members of the 661 Committee, voicing complaints from companies in their respective countries, raised the issue of whether the Iraqi Government was demanding kickbacks from companies engaging in trade under the OFFP.<sup>14</sup> The US representative took the lead but concerns were also raised by the representatives of the Governments of France, the UK and Norway. In response, Mr Zarif, the Director of the Contracts Processing Section said that 'OIP had received no formal complaints from any permanent or observer mission in that regard'.<sup>15</sup> Later requests for reports were met with a similar response that the OIP had no information regarding any kickbacks. Clearly, the senior members of the Secretariat were determined to conceal relevant information from members of the committee.

The performance of the UN Secretariat and, in particular, its OIP was seriously deficient, which raises questions about the accountability processes to which it was subject. How was such maladministration allowed to occur? Being a government bureaucracy, like certain other international agencies such as the World Bank and the International Monetary Fund, the UN Secretariat is designed on standard Weberian lines.

In standard Weberian bureaucracies, the accountability of individual government bureaucrats is centred most immediately around a number of mechanisms which directly impinge on their day-to-day activities: *hierarchical accountability* to superiors through the internal chain of command; *auditing* to auditors and inspectors, both internally and externally; and *professional accountability* to peers and colleagues through formal and informal networks of communication and ethical reinforcement.

The OFFP illustrated weaknesses in the UN Secretariat in each of these mechanisms. The chain of command failed at key points, thereby frustrating the reverse chain of upwards accountability. Internal audit and monitoring systems were not equal to the task of holding the bureaucracy accountable for compliance with policy decisions. Though the OIP was seriously understaffed and though some individual bureaucrats clearly acted from the highest professional standards, organisational culture appears to have been too tolerant of negligent or corrupt behaviour within the Secretariat.

The main reason for these failures lies in the weakness or absence of other, external mechanisms of bureaucratic accountability which, in functioning domestic bureaucracies, help to underpin the immediate, day-to-day accountability structures. One such mechanism is *political accountability* exercised through a united and effective executive leadership. Discussions of political accountability in international bureaucratic organisations often concentrate on the democratic deficit.<sup>16</sup> Certainly, the absence of a directly elected world government means that international organisations are not democratically accountable through their elected representatives to the population they serve.<sup>17</sup> However, more important than the lack of ultimate democratic accountability to the citizens of the world is a weakness in an earlier link in this chain, namely that between the political leadership of the UN in the Security Council and the Secretariat. An effective rule-based bureaucracy depends on clear lines of command, with policy direction and rule-setting coming from the top, allowing for unimpeded application of rules lower down.

However, the Security Council is deeply divided politically and rarely speaks with the degree of unity that would give the Secretariat a clear political mandate for which to be accountable. As Kevin Boreham points out, the highly politicised environment of the United Nations is also allowed to permeate much of the Secretariat.<sup>18</sup> Unlike the rule-based professional bureaucracy of Weberian theory, the Secretariat is not able to quarantine its administrative functions from the conflicting pressures of its political masters. The full separation of administration from policy is impossible (and logically incoherent) but the distinction can serve as a useful myth to prevent unduly partisan or corrupt interference with administrative decision-making, particularly where integrity of process is an important value, as with the approval of contracts. Here, the problem is not so much insufficient political accountability as too much political accountability of the wrong sort. The problem for the UN Secretariat in this respect is less an absence of a democratic mandate as the lack of any clear political mandate at all.

Another major impediment to accountability, well documented elsewhere in this volume,<sup>19</sup> is the lack of *legal accountability* due to the weak legal regime in which the UN Secretariat operates. If a domestic bureaucracy had been in charge of the OFFP, legal challenges, either criminal or civil, would have quickly followed up the suggestions of impropriety in the handling of contracts. In spite of the steady development of international law and legal standards, many international organisations, including the UN, are not subject to full legal accountability through an

effective judicial process backed by enforceable sanctions. Internal audit and inspection processes cannot work in a legal vacuum but need reliable judicial back-up to deal with the most serious cases. Again, this deficiency is more important than any democratic deficit. The rule of law or *rechtsstaat*, of which a properly functioning government bureaucracy is an essential component, can flourish without democracy (and indeed, historically, preceded most of the world's stable democracies). But without legal oversight and accountability, a rule-based bureaucracy cannot be expected to maintain high standards of legality and due process.

In addition to the deficiencies in political and legal accountability, the UN Secretariat also lacks a consistently professional support base among the many bureaucracies that contribute to it. Criticism of the Secretariat's performance among developed countries naturally tends to assume standards of professionalism set by well-established domestic bureaucracies in effectively functioning states. But, from an international perspective, such bureaucracies are more the exception than the norm. The difficulties experienced within the UN Secretariat are not in principle very different from those of many domestic bureaucracies around the world, particularly those that are dependent on large degrees of external aid and have strong incentives to siphon off development funds or turn a blind eye on those who do. In this respect, the behaviour of UN bureaucrats may simply reflect the expectations and priorities of bureaucrats in most of the member states. Bureaucrats drawn from countries where governance is weak do not come with the same acculturation (or long-term material prospects and incentives) as those from developed democracies. It therefore becomes much harder to establish a strong culture of professionalism and integrity within the UN Secretariat.

The lack of effective accountability within the UN Secretariat has long been recognised and a number of improvements have been introduced. For instance the Office of Internal Oversight Services (OIOS) was established in 1994 on the model of independent inspectors, a feature of the United States and some other bureaucracies. However, this office failed to achieve sufficient independence and resolve, turning its compliance checks into largely ineffective formalities.<sup>20</sup> More than a decade on, the Volcker Inquiry found that auditing processes were still seriously deficient and recommended major changes in this area as matter of urgency.

Other accountability initiatives include the various ad hoc commissions and committees charged with monitoring UN activities, such as the 'expert' bodies supervising various sanction regimes.<sup>21</sup> These bodies are performing functions similar to government audit offices in the domestic



sphere which are increasingly extending their oversight beyond traditional financial and compliance audits to evaluate the efficiency and effectiveness of government programmes.<sup>22</sup> As Farrall points out,<sup>23</sup> these expert bodies suffer from some of the same persistent weaknesses of the UN, such as conflicts over policy direction and lack of professionalism. In the wake of the Volcker Inquiry, and at the urging of retiring Secretary-General Kofi Annan, the UN is contemplating another round of significant internal reform.<sup>24</sup> But, without strong external encouragement from member governments, it is unrealistic to look for major improvements in the levels of accountability.

### 3. Domestic accountability: Department of Foreign Affairs and Trade and the Wheat Export Authority

Apart from the UN Secretariat itself, two domestic Australian government agencies, DFAT and the WEA, could be also held accountable for not adequately monitoring the actions of AWB.

#### 3.1 *Department of Foreign Affairs and Trade*

DFAT had general oversight over Australia's observance of the Iraq sanctions regime. Moreover, its formal approval for individual sales contracts was required under the Customs (Prohibited Exports) Regulations. Under these regulations, exports to Iraq were prohibited unless the Minister of Foreign Affairs and Trade was 'satisfied that permitting the exportation trade [would] not infringe the international obligations of Australia'.<sup>25</sup> In practice, the Department gave the Minister's approval on notification that the exportation had been approved by the UN OIP as being consistent with the OFFP. There was no attempt to conduct any independent inquiry into whether the trade breached the sanctions regime.

On the face of it, deferring to the UN's judgment seems reasonable. After all, the UN OIP was set up to monitor the programme and would therefore be in the best position to declare whether any particular trading deal was in accordance with UN rules, and therefore with Australia's international obligations. In practice, as has now become evident, officers in the UN OIP were encouraged to grant approval by the fact that the Australian authorities were raising no objection, a classic instance of mutual buck-passing leading to an accountability failure.<sup>26</sup>

On one occasion, DFAT did give independent, formal approval to AWB's use of a Jordanian trucking company to ease apparent transport difficulties. In 2000, AWB wrote to DFAT saying that they were experiencing delays and therefore extra port charges because of transportation problems at the discharge port.<sup>27</sup> It sought DFAT's approval to enter into negotiations with a Jordanian trucking company to alleviate the problem. As Commissioner Cole observes, the request from AWB was clearly deceitful and gave no hint of the real reason behind the use of the Jordanian trucking company. The DFAT reply, written on behalf of DFAT by Ms Drake-Brockman,<sup>28</sup> saw no objection from an 'international legal perspective' to discussion with Jordanian trucking companies, a not unreasonable reply, taking AWB's request at its face value. AWB was then able to use the letter as evidence of DFAT's support for its improper payments to Alia, a Jordanian-based company responsible for funneling funds to the Iraqi government in breach of the sanctions regime.

On the assumption that the UN OIP and AWB, with their much more specialised resources, were acting with propriety, DFAT's approach was sensible. However, in hindsight, the charge can be levelled that trust was too readily bestowed. As the Volcker Inquiry makes clear,<sup>29</sup> rumours about corruption in the Programme were rife in New York and elsewhere over several years and must have been noted by DFAT officials, quite apart from any queries raised specifically about AWB by trading competitors such as the Canadians. The integrity of the UN approval process must therefore have been open to serious question. Reliance on the honesty of AWB in such a context seems either naive or willfully negligent.

True, DFAT did not have either the resources or the legal powers to conduct a major audit of AWB's commercial activities. Perhaps also, DFAT officials were misled by misplaced trust in the integrity of internal processes at AWB. Though AWB was at this time operating as a privatised company, its change of status from statutory authority to commercial company was very recent and public servants may have assumed their 'opposite numbers' at AWB would still be bound by public service procedures and expectations of integrity. Even so, DFAT officials could have done more to question AWB's assurances and, at least, to conduct some low-level, independent inquiries. When rumours of possible breaches by AWB were reported back to Canberra as early as 2000,<sup>30</sup> senior officials could have alerted ministers and prompted more vigorous inquiries. The suspicion must remain that ignorance of any wrong-doing

suit the government's position.<sup>31</sup> Substantial wheat exports were safeguarded and a powerful domestic political constituency left undisturbed. So long as formal compliance with the UN sanctions regime was seen to be maintained, members of the government perhaps had no incentive to inquire further.

Whether public servants deliberately turned a blind eye to the possibility that AWB might be paying kickbacks, or whether they complacently and negligently refused to believe unfounded rumours remains unclear. Commissioner Cole himself attributed the officials' negligence to trust in AWB's integrity and their support for Australia's economic and political interests.<sup>32</sup> Perhaps surprisingly, he found it difficult to see what possible motive DFAT might have for deliberately turning a blind eye, presumably on the ground that the risk to the country's reputation from such illegality would have been too great. He does not entertain the possibility that DFAT officials might have been prepared to take such a risk, confident that the government had sufficiently distanced itself from any complicity and hopeful that any potential transgressions from AWB might never see the light of day.

Whatever the officials' motivation, there can be little doubt that their inaction did not meet with disapproval higher up. How else can one explain the fact that ministers never publicly repudiated the Department's actions or rebuked officials for failing to report about AWB's possible breaches of the sanctions regime? DFAT officials either deliberately sensed that zealous monitoring would be politically unwelcome to their superiors or else, in good faith, failed to monitor with sufficient thoroughness, with the unintended, serendipitous consequence that they continued to protect the wheat trade as their political masters would have wanted. The full truth about the AWB affair will not emerge until more records become available and key players are free to speak out. In the meantime, whether official ignorance was deliberate or negligent ('conspiracy' or 'cock-up'), DFAT certainly failed in its duty to monitor compliance by Australian companies.

The AWB affair not only provides an example of DFAT's failure to hold a company accountable for respecting a UN sanctions regime, but also highlights weaknesses in the capacity of Australian political institutions to hold government departments to account. The Cole Inquiry itself was able to exact some accountability from ministers and officials but it was limited by its terms of reference, which were deliberately designed by the Government to concentrate on AWB's possible wrongdoing, with the Government's activities incidental to this main focus.

Moreover, the mechanism of a commission of inquiry is inherently ad hoc and does not provide a regular process for scrutinising a department.

The main avenue by which government departments are accountable to the public is through Parliament, particularly through the convention of ministerial responsibility. Ministerial responsibility requires ministers to take managerial responsibility for all actions taken in their departments, in the sense of providing answers to requests for information, justifying departmental decisions and, where necessary, imposing remedies or sanctions. According to deep-seated (and mistaken) popular mythology, ministerial responsibility also requires ministers to resign for departmental failures, even when they are not personally to blame. However, ministers never resign for such acts of 'vicarious responsibility' but only for acts where they are personally at fault, particularly for misleading Parliament.<sup>33</sup>

For this reason, the government's political opponents, who are naturally intent on snaring a ministerial scalp, expend most of their efforts on trying to catch ministers out in deliberate lies to Parliament. In response, ministers, with the help of their close advisers and senior officials, pay great attention to making sure that they cannot be caught out in a deliberate deceit. Information about potentially embarrassing issues may be deliberately suppressed or not formally passed on to ministers, to preserve the fiction of 'plausible deniability'. In the meantime, more important matters of collective departmental failure may become neglected.

The AWB affair provides an excellent example of this skewed focus in the practice of ministerial responsibility. In investigating the role of the government in approving wheat contracts under the OFFP, the key accountability issue should have been whether, and if so why, the government as a whole, in particular DFAT, had failed in its obligations to the UN sanctions regime. However, the opposition spokesman, Kevin Rudd, did not press ministers on the collective failure over which they had presided but only on their personal knowledge of it. The parliamentary opposition was desperate to find proof of a minister directly involved in deceit, though it was always unlikely that any unambiguous evidence existed. Otherwise why would the government have established the inquiry in the first place? Thus, most of the political controversy and media commentary surrounding the Cole Inquiry centred on the issue of government knowledge and potential cover-up. Who knew about AWBI's transgressions, and when?

The concentration on ministerial involvement also suited the government. When Commissioner Cole exonerated ministers from any direct personal knowledge of the kickbacks, the Prime Minister was able to say

that the government was acquitted of any wrongdoing.<sup>34</sup> He and the Foreign Minister, Alexander Downer, thus rejected any collective responsibility for failure by the government as a whole and refused to accept that there was any case for them to answer. Such apparent insouciance suited the government's deep ambivalence over whether the officials' unwillingness to look too closely into AWB's affairs had actually been against government policy and not a justifiable risk that had unfortunately been exposed. Again, whatever the actual motivation, Parliament and the public were short-changed in their rights to hold DFAT to account.

The other major mechanism of parliamentary accountability is through the Senate committee system where ministers and public servants can be questioned on their actions. However, while the Cole Inquiry was current, ministers refused to answer questions on the AWB affair, using the excuse that these matters were supposedly *sub judice*, and imposed the same ban on their officials. After the Cole report was published, as part of the regular estimates inquiries, the Foreign Affairs, Defence and Trade Committee explored a number of issues raised by the Cole Inquiry with DFAT officials, including any changes to procedures that had been brought in response to the inquiry.<sup>35</sup> DFAT officials argued that, because Commissioner Cole had excused them from deliberate wrongdoing over the monitoring of AWB contracts, their actions were not open to criticism, a position rightly contested by opposition senators. Officials took the same narrow view of their responsibility as their ministers had done, mistaking lack of documented evidence of intentional wrongdoing for complete exoneration over any institutional failure. A full Senate inquiry into the AWB affair would undoubtedly have been held if the non-government parties had held a majority in the Senate, as has been the norm for the last half-century. Unfortunately, however, the government was able to use its Senate majority to block any further investigation.

### 3.2 *Wheat Export Authority*

Another government agency charged with monitoring AWB, especially the trading company AWB(I), was the WEA. The role of this statutory body is fully discussed elsewhere in this volume.<sup>36</sup> Certainly, the WEA failed to monitor AWB(I)'s activities effectively. But it is unclear whether the failure was due to its own negligence or whether the reason lay more in the WEA's limited functions and powers. According to Commissioner Cole,<sup>37</sup> the authority should have taken a broad view of its obligations

and should have required that wheat exports be conducted according to proper standards of commercial conduct. The WEA itself has strongly rejected this criticism, arguing that its role has been 'to monitor management of the single desk in the interest of growers' and that it 'does not have an auditing role' or any obligation to monitor for proper commercial conduct.<sup>38</sup>

Certainly, the WEA was never envisaged as exercising a strongly independent role. Unusually for a regulator of a publicly guaranteed monopoly, its main focus was not on protecting consumers from price-gouging by a monopoly supplier but rather on safeguarding the rights of the monopoly supplier to extract maximum profit from the (overseas) market. However, even taking a strict focus on the export trade and the interests of growers, these objectives have been adversely affected by AWB's actions (or, more strictly, the exposure of its actions). It can therefore be argued that, by taking no interest in how AWB conducted its business, the WEA did fail in its regulatory mission.

In terms of being held accountable for its conduct, the WEA has certainly been subject to unexpected and unwelcome publicity. Belonging to a tightly knit and politically influential group of farming insiders,<sup>39</sup> the members of WEA would have assumed that their activities would proceed smoothly and without public controversy. The Cole Inquiry provided an abrupt lesson in public transparency. Rigorous questioning at several hearings by the relevant Senate Committee followed.<sup>40</sup> WEA executives, not being departmental officials under ministerial direction, could not hide behind any executive ban on public comment. However, the fact that eventual Senate scrutiny had to be prompted by findings from the Volcker and then Cole Inquiries, which were ad hoc and obviously exceptional, underlines the relative impotence of Parliament's routine oversight of regulatory authorities such as the WEA.

#### **4. Conclusion: Accountability across and between domestic and international spheres**

Overall then, a number of accountability failures by government agencies can be identified in the AWB affair, both internationally within the UN Secretariat and domestically within DFAT and the WEA. All fell short in their obligations to monitor the activities of companies trading with Iraq under the OFFP. These failures, in turn, illustrate certain structural weaknesses in the mechanisms by which the government agencies themselves were accountable for performing their accountability functions.

The 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*,<sup>41</sup> 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.

The main accountability deficiencies in the UN Secretariat were a continuing lack of appropriate political direction and judicial sanctions. In the case of DFAT, the external mechanisms of executive accountability through ministerial responsibility and legislative inquiry were insufficient to uncover and scrutinise questionable actions by individual officials, leaving unresolved the issue of whether the government condoned AWB's breaches of the sanctions regime in the interest of protecting wheat exports. The WEA's ineffectiveness was largely due to the limitations in its governing legislation, though some weaknesses could also be identified in the capacity of Parliament to subject it to regular scrutiny.

However, the AWB affair does not yield totally negative conclusions about accountability. After all, most of the main culprits were eventually exposed (if not fully punished) and a strong stimulus has been given to improving accountability regimes for the future. In retrospect, the Volcker and Cole Inquiries may prove to have been key events which led to significant administrative and legal reform.

The positive aspects of the affair 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. Some of these accountability mechanisms are highly specific, in both what they may investigate and how they may proceed. Consider, for instance, a judicial inquiry, like the Cole Inquiry, limited by its strict terms of reference and rules of judicial procedure. Other processes, such as performance audit or legislative inquiry, are more open-ended in the issues they may pursue but are still grounded in, and derive their legitimacy from, a specific institutional framework. At the other extreme, some accountability mechanisms are very fluid and unstructured, for instance the media investigations and political dialogue that surrounded the abuses of the OFFP, or the public debate arising from the daily revelations at the Cole Inquiry.

Again, some accountability mechanisms can contribute only to the initial stages of accountability – the provision of information and public

discussion – without bringing the final element of rectification in the case of mistakes or faults. The two key reports, first the Volcker report to the UN Security Council and then the Cole report itself, are in this category. They provided the essential element of transparency but they could not bring the closure of remedial action. For that, agencies are needed with the power to act, examples of which include: the federal executive branch of government, which can initiate legislative changes to the powers of AWB; the court system, which may bring criminal charges; and the legislative branch, which can force system-wide changes. Alternatively, the pressure of public opinion and the shaming effects of adverse publicity on reputation will sometimes be sufficient to make organisations impose their own remedies. Under the leadership of successive Secretaries-General, the UN Secretariat has embarked on its own programme of internal reform in response to the Volcker recommendations. Similarly, DFAT has agreed to tighten up procedures for monitoring sanctions regimes.

The AWB affair provides a good example of how multiple accountability channels can complement and assist each other in bringing an organisation to account. The process began with rumours of corruption within the UN Secretariat, which were seized on by critics of the UN in general and of the Secretary-General in particular. This led the Secretary-General to establish the Volcker Inquiry, as a political response, partly to limit reputational damage to the UN. The resulting report, taken up by Australia's trading competitors in the international wheat market, put political pressure on the Australian government to set up an inquiry into the activities of AWB. The hearings and report of the Cole Inquiry brought new matters to light and gave a further boost to the accountability process. Nor is the chain of events yet over, with impending criminal charges against AWB executives and board members.

A number of elements combined to make this an ultimately successful if belated accountability story. One was political pressure, first on the UN Secretariat and then on the Australian government. The effectiveness of this pressure depended on two further factors. In the first place, hostile critics engaged in adversarial politics with a vested interest in getting dirt on AWB, both internationally and domestically. This arena of political contest crossed national frontiers and included a range of interested parties, not only political players, such as the Canadian government and the Australian parliamentary opposition, but also AWB's commercial rivals, both overseas and at home. The second, interrelated factor was a system of free media, operating both internationally and domestically,



which sustained political debate, allowing the scandalous accusations to be aired and building up pressure on governments and the UN itself. For the most part the media played an intermediary role, relaying information and comment from key actors. On occasion, however, particular media outlets such as *The New York Times* and *The Australian* took the lead, conducting and publishing their own investigations.

The final necessary ingredient was the susceptibility of the major government institutions involved, both the UN Secretariat and the Australian government, to reputational pressure. Neither could be constitutionally compelled to act in response to public criticism. Nonetheless, each chose to defuse the political pressure by instituting credible, independent inquiries that had the power to discover evidence and report in an unbiased fashion.

Many aspects of this process, particularly media reporting and accompanying political pressure, readily straddled both the domestic and international spheres, as did the activities of AWB itself and other international traders. Government leaders and diplomatic officials engaged in discussions with overseas counterparts while also answering criticisms from political opponents at home. Media communication followed in the wake of political dialogue, moving seamlessly across national boundaries and between the domestic and international arenas. While 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 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.<sup>42</sup>

Such a pluralist framework, with different institutions making different, complementary contributions to an eventual accountability outcome, is not unique to cross-national activities, such as the AWB's trading with Iraq. It is also familiar in domestic politics, where, for instance, an issue may start with a parliamentary committee, move to the media, then to question time in Parliament before being answered by the relevant government minister who will then impose a remedy. Admittedly, all these accountability relationships occur within the one constitutional jurisdiction, but the various avenues of accountability still act more or less independently and are not necessarily confined within the one jurisdiction. Federal systems, such as Australia, make

the accountability picture more complex by allowing cross-jurisdictional accountability systems, where a given organisation or activity can be held accountable by different levels of government, even when no one level has final jurisdiction. An international dimension simply provides further complexity by adding yet another level of government.

Global accountability requires holding to account individuals and organisations that operate transnationally in both domestic and international arenas, and involves a plurality of different mechanisms. Some of these mechanisms, such as policy dialogue, political pressure and media reporting, can cross borders as easily, if not more easily, than commercial companies or individuals themselves. Others are inevitably more constrained in scope, particularly those involving governmental and legal institutions grounded in a particular, constitutionally defined jurisdiction. The AWB affair, though exemplifying the potential for different mechanisms to combine effectively, has also highlighted the weakness of some particular elements, particularly government agencies. Official bureaucratic organisations such as the UN Secretariat and the Australian DFAT were seen to have fallen short in their accountability obligations. In turn, deficiencies emerged in the mechanisms by which these agencies were themselves held to account, particularly the absence of strong political direction and judicial back-up in the United Nations and the weakness of domestic parliamentary accountability, particularly when government parties control both houses of Parliament.

### Notes

1. Commonwealth of Australia, The Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme, *Final Report* (2006) (Cole Inquiry).
2. United Nations, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Management of the Oil-for-Food Programme* (2005) (Volcker Inquiry).
3. Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (2003) ch 1.
4. 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* 75, 81. Given the centrality of discussion and justification to processes of political dialogue and accountability (even if the final verdict of the account-holding voter is beyond scrutiny), the depiction of political accountability as essentially arbitrary is highly tendentious.
5. See especially, Linda Botterill and Anne McNaughton, 'At the Intersection of International and Municipal Law: The Case of Commissioner Cole and the Wheat Export Authority' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 239.

6. Commonwealth of Australia, above n 1, vol. 1, 35–50 [1.74]–[101].
7. *Ibid.* vol. 1, 52 [1.106].
8. *Ibid.* vol. 1, xxiv.
9. *Ibid.* vol. 1, 41 [1.92].
10. *Ibid.* vol. 1, 54–7 [110]–[8].
11. United Nations, above n 2.
12. *Ibid.* vol. III, ch 4, 110–11.
13. *Ibid.* vol. III, ch 4, 87–90.
14. *Ibid.* vol. II, ch 3; Commonwealth of Australia, above n 1, vol. 1, 112–5 [4.5].
15. United Nations, above n 2, vol. II, ch 4, 82.
16. Eg Joseph Nye, ‘Globalization’s Democratic Deficit: How to Make International Institutions More Accountable’ (2001) 80(4) *Foreign Affairs* 2; David Held and Mathias Koenig-Archibugi ‘Introduction’ (2004) 39 *Government and Opposition* 125; Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 29; Chesterman, above n 4.
17. See, e.g., Robert Dahl, ‘Can International Organizations be Democratic’ in Ian Shapiro and Casiano Hacker-Cordon (eds.), *Democracy’s Edges* (1999) 19.
18. 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* 171.
19. Chesterman, above n 4; Boreham above n 18; 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* 123.
20. John Mathiason, ‘Who Controls the Machine, Revisited: Command and Control in the United Nations Reform Effort’ (1997) 17(4) *Public Administration and Development* 387; John Mathiason, ‘Who Controls the Machine, III: Accountability in the Results-Based Revolution’ (2004) 24(1) *Public Administration and Development* 61.
21. Jeremy Farrall, ‘Should the UN 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* 191.
22. Mulgan, above n 3, 83–90.
23. Farrall, above n 21, 204–11.
24. See United Nations, *Reform at the United Nations* (2007) [www.un.org/reform](http://www.un.org/reform) at 19 November 2008.
25. Customs (Prohibited Exports) Regulations 1958 (Cth) reg. 13CA(4)(b).
26. Mulgan, above n 3, 192–211.
27. Commonwealth of Australia, above n 1, vol. 1, xxxiii–iv.
28. *Ibid.* vol. 1, xxxiv.
29. United Nations, above n 2, vol. III, ch 4.
30. Commonwealth of Australia, above n 1, vol. 1, 202 [8.6].
31. Stephen Bartos, *Against the Grain: The AWB Scandal and why it Happened* (2006), 64–6.
32. Commonwealth of Australia, above n 1, vol. 4, 80–7 [30.167]–[88].

33. Richard Mulgan, 'On Ministerial Resignations (and the Lack Thereof)' (2002) 61 (2) *Australian Journal of Public Administration* 121.
34. Caroline Overington, *Kickback* (2007) 251.
35. Senate Foreign Affairs Defence and Trade Committee, Parliament of Australia, *Additional Estimates* (19 February 2007) 69–81.
36. Botterill and McNaughton, above n 5.
37. Commonwealth of Australia, above n 1, vol. 1, lxxxv.
38. Wheat Export Authority, *Annual Report 2005–06* (2007) 3.
39. Bartos, above n 31, 66–75
40. Senate Rural and Regional and Transport Committee, Parliament of Australia, *Additional Estimates* (14 February 2006) 16–84; (24 May 2006) 62–111; (23 May 2007) 27–70.
41. Mulgan, above n 3, 29.
42. Grant and Keohane, above n 16.



## PART VII

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### Parallel case studies



## Discriminating for world peace

SIMON RICE

### 1. Introduction

Controlling the spread of defence technology is a serious issue for the prospects of peace throughout the world, and for preventing abuses of human rights. Export regulations, which determine who will and who will not have access to defence technology, are a necessary part – but only a part – of that exercise in control.<sup>1</sup> Equally, the principle of non-discrimination is a human right that underpins core human rights instruments. Since September 11, 2001 these two fundamental considerations – security and non-discrimination – have been in relentless tension.

On a mild winter's day in 2003, that tension was played out in Brisbane, Queensland, Australia, where the Anti-Discrimination Tribunal was asked to balance competing claims of national security and non-discrimination.<sup>2</sup> Curiously, the national security at issue was that of the US, not of Australia. In the period since, similar scenes have played out in tribunal rooms and government offices around Australia.

These tribunal proceedings are ostensibly a private matter, where employers seek an exemption from the operation of anti-discrimination legislation to allow them to discriminate not in favour of a minority, as a special measure or affirmative action, but *against* people's interests, on the basis of their nationality. The employers seek the exemptions because US defence export regulations require an Australian importer of defence technology to engage in unlawful discrimination by singling out workers on the basis of their nationality.

The tribunal decisions demonstrate the difficulty of separating the national from the international and the public from the private, having to reconcile 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.



In this chapter, I first give an overview of the history and purpose of the US International Traffic in Arms Regulations (the ITAR). I explain how they achieve extra-territorial reach through what I call a ‘mandatory discrimination clause’ in defence export contracts, which relies on a person’s nationality to assess the risk posed to US national security. After noting the unsuccessful challenges that have been made against the ITAR in the US, I describe the Australian context within which the ITAR mandatory discrimination clause has effect.

Specifically, I describe the anti-discrimination laws in Australia that prevent employers from doing exactly what the ITAR mandatory discrimination clause requires: discriminating against employees on the ground of their nationality. I analyse the impossible situation this puts both employers and the discrimination tribunals in, and the way in which the tribunals have exempted employers from compliance with Australia’s comprehensive – and internationally compliant – anti-discrimination laws.

Finally, I consider the extent to which the US is accountable under international human rights instruments for the discriminatory effect of the ITAR, and contrast this with the way in which Australia is put in breach of its international human rights obligations as a result of the ITAR’s effect on its domestic law.

I conclude that the ITAR are a heavy-handed means of addressing real security concerns, and that there are preferable alternatives available that do not cause Australia, or indeed any other affected country, to breach its non-discrimination obligations under international law.

## 2. World peace and US security

The ITAR are export regulations, promulgated under the US Arms Export Control Act, which authorise the US President to control the export from, and import into, the US of ‘defense articles and services ... [i]n furtherance of world peace and the security and foreign policy of the United States’.<sup>3</sup> The President’s authority has been delegated to the Secretary of State,<sup>4</sup> and the Code of Federal Regulations (CFR) Title 22 – Foreign Relations, Chapter I, Subchapter M implements that delegated authority and sets out the ITAR.<sup>5</sup> Consistently with the President’s authority, the ITAR are applied to protect, or in furtherance of, ‘world peace, or the national security or the foreign policy of the United States’.<sup>6</sup>

The slip from the US Code’s ‘world peace *and* the security of the United States’ to the ITAR’s ‘world peace *or* the security of the United

States' is significant. While the use of the conjunctive 'and' in the US Code makes world peace and US security joint criteria for the President's exercise of authority, the use of the disjunctive 'or' in the ITAR makes world peace and US security alternative criteria for the operation of the ITAR.

### 3. The global reach of the ITAR

The ITAR are concerned with 'technical data', 'defense articles', and the provision of 'defense service[s]'. The ITAR define each of these in some detail,<sup>7</sup> and this chapter refers to them collectively as 'defence-related material'. The overall effect of the ITAR is to prohibit the transfer of defence-related material to people other than US nationals. This statement of effect is deceptively simple, based on the best sense that can be made of provisions that are notoriously difficult to comprehend;<sup>8</sup> dating from the period after World War II,<sup>9</sup> the ITAR have been described as 'particularly onerous',<sup>10</sup> 'arcane',<sup>11</sup> 'complex' and 'at times internally inconsistent'.<sup>12</sup> Their complexity has challenged even the US Department of State, which oversees the ITAR through its Defense Trade Advisory Group (DTAG).<sup>13</sup>

While 'export' is given its usual meaning of 'sending or taking' a defence article out of the US,<sup>14</sup> its meaning is broadened to include 'disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad'.<sup>15</sup> By using the phrase 'or abroad' the ITAR purport to regulate disclosure and transfer of technical data not only in the US, but anywhere in the world. Transfer *and* disclosure are not necessary to constitute export; the mere transfer of technical data is sufficient, without any actual disclosure; it is likely that sending an email to a foreign person constitutes a transfer – and therefore an 'export' – without the recipient reading the email, let alone opening any attachment.<sup>16</sup>

Although the ITAR do not have direct effect over a non-US person in jurisdictions outside the US,<sup>17</sup> they achieve extraterritorial operation by the simple device of incorporation within export contracts. The ITAR require the export of defence-related material to be pursuant to a prescribed manufacturing license agreement<sup>18</sup> or technical assistance agreement.<sup>19</sup> US exporters and corresponding non-US importers are bound by the ITAR-prescribed terms of these agreements, even after termination.<sup>20</sup>

Significantly, the ITAR require the agreements to prohibit defence-related material from being 'transferred to a person in a third country or

to a national of a third country except as specifically authorised in this agreement unless the prior written approval of the Department of State has been obtained'.<sup>21</sup> This mandatory discrimination clause incorporates the US's national security concerns into the terms of ITAR-regulated agreements, and brings those security concerns into direct conflict with another state's human rights obligations and extensive anti-discrimination laws.

If imported defence-related material is disclosed to a 'national of a third country' in breach of the mandatory discrimination clause and without prior written approval, the importer (in, say, Australia) is in breach of the contract and, under the ITAR, faces blacklisting by the US State Department for purposes of future trade.<sup>22</sup> In addition, the importer's conduct will place its US export partner in direct breach of the ITAR, exposing it to considerable penalties: a fine of up to US\$1 million and imprisonment for up to 10 years or both,<sup>23</sup> as well as seizure and forfeiture, and disbarment from future export activity.<sup>24</sup> The US State Department 'routinely charges multiple violations'.<sup>25</sup> In March 2006 The Boeing Company and L-3 Communications 'agreed to pay civil penalties of US\$15 million and \$7 million respectively' in settlement of alleged non-compliance with the ITAR,<sup>26</sup> and in March 2007 the ITT Corporation agreed to pay a US\$100 million penalty and to plead guilty to the export of secret military data in violation of the ITAR.<sup>27</sup>

This imposition of US national security objectives on private actors (US exporters and foreign importers) has parallels with the way the UN out-sources enforcement of its security concerns to individual states through international sanctions, a discussion of which can be found in several chapters in this volume. Indeed, concerns about the extraordinary reach of controls such as the ITAR have been equated with concerns expressed about the extra-territorial operation of US sanctions legislation such as the Trading With the Enemy Act,<sup>28</sup> and the Iran-Libya Sanctions Act and Cuban Liberty and Democratic Solidarity (Libertad) Act.<sup>29</sup>

It is arguable that the ITAR are achieving what the US would otherwise have to do through the protective principle under international law, which would allow it to exercise jurisdiction over non-US persons in foreign countries whose conduct threatens US security.<sup>30</sup> The ITAR are, however, a much more straightforward mechanism for the US to achieve its ends.

#### 4. The central concept of 'nationality' in the ITAR

The term 'national of a third country' is at the heart of the ITAR. The term is undefined in the ITAR, but it is probably correct to say that 'in

the context of an agreement which provides for the export of information from the United States and Australia, ["a third country"] must be a reference to a country *other than* the United States or Australia'.<sup>31</sup> The harder task is to give meaning to the word 'national' as the term is used in the ITAR.

The ITAR very deliberately use the word 'national', not 'citizen', reflecting a distinction in international law which 'places significance on the legal status of nationality ... [because] nationality secures rights for the individual by linking her to the state.' Citing *Nottebohm (Liechtenstein v. Guatemala)*<sup>32</sup> Rubenstein says that '[i]ntegral to the modern concept of nationality is ... "the individual's genuine connection with the State" [which] involves "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties"'.<sup>33</sup> Expressed this way, a person's nationality – properly understood – is much more relevant to the concerns of the ITAR than a person's citizenship, a conferred status concerned principally with 'the national domestic context'.<sup>34</sup> Although Legomsky observes that nationals are usually citizens, and that the terms effectively become interchangeable,<sup>35</sup> the ITAR's current wording takes advantage of a real technical difference between the two.

Because a person's nationality is a 'social fact of attachment', it cannot be confidently inferred merely from place of birth or upbringing. But the ITAR do not respect this refined idea of 'nationality'. Rather, they treat national origin (place of birth) as indicator enough of nationality,<sup>36</sup> and a person who was born in a state other than the US is treated simply as a 'national' of that other state. The ITAR use 'nationality-by-national-origin' as a crude proxy for national allegiance, and a person who is not a US national is presumptively a risk to US security.

Thinking of nationality in this way, the reasoning that underpins the ITAR becomes clear: the threat that a person poses to US security can be inferred from their nationality. The ITAR equate 'national' of another country with 'foreign person',<sup>37</sup> and 'foreign person' is, effectively, not a US person.<sup>38</sup> The ITAR are suspicious of any person who is not a US person, and use the idea of 'nationality' as a means of assessing that person's security status.

Objections to the reasoning behind the ITAR have been strongly worded; the Northern Territory Anti-Discrimination Commissioner said it is 'fatuous to presume that people of a particular racial background behave in a predictable way',<sup>39</sup> and Donald Kennedy asked rhetorically '[s]uppose your [research] collaborator was born in Iran, left in 1972

while the Shah was still in charge, and has lived as a British citizen ever since. He's a security risk? Give us a break.<sup>40</sup> Kennedy's supposition is fact: a defence worker in Australia was born in Vietnam, adopted by an Australian family as a child, educated in Australia and cleared to a high-security level for the Australian Air Force, but because of the ITAR's mandatory discrimination clause he lost his job. Another defence worker in Australia, born of Greek parents in a plane as it flew across Sudan, had his job changed and was badged according to his nationality<sup>41</sup> because under the ITAR he was treated as being Sudanese.<sup>42</sup>

By equating nationality with country of birth, and using that idea of nationality as an indicator of security risk, the ITAR avoid having to assess the allegiance of the employees of the non-US importer. Requiring that all staff be subject to security clearances, even of a prescribed type, could reasonably ensure the security of defence-related material without making a simplistic and crude equation between nationality and national allegiance.

The effect of the ITAR is that Australian companies who import defence-related material from the US can transfer that material only to persons who are Australian nationals,<sup>43</sup> although under a 2007 agreement between Australia and the US, most Australian dual citizens are recognised as Australian nationals for the purposes of the ITAR, in some circumstances.<sup>44</sup> Even so, Australia has a population with a high proportion of recently arrived migrants, none of whom is required to become an Australian citizen. As illustrated above, many in the Australian workforce are 'nationals of a third country' when assessed by reference to their place of birth, and are excluded by the ITAR from carrying out their normal duties in defence manufacturing without any assessment of the actual risk they pose to US security.

The US knows that the ITAR require discriminatory conduct in foreign jurisdictions, but is unmoved; DTAG minutes repeatedly record the fact that ITAR requires discriminatory conduct in other countries.<sup>45</sup>

## 5. Challenges to the ITAR

For US business, the ITAR are a regulatory obstacle. Businesses can 'routinely calculate their compliance program's potential vulnerabilities as technology evolves. [They can] minimise the risk of inadvertent transfers of sensitive data without compromising research and development flexibility if they tag data that has commercial value and legal sensitivity, and control it accordingly.'<sup>46</sup> Within the US, challenges to

the validity of export controls such as the ITAR have come not from business, but from universities.

Universities are vulnerable to ITAR interference,<sup>47</sup> and have been vocal in criticising the constraints that the ITAR impose on their ordinary dealings with international research colleagues in matters caught by the ITAR's definition of technical data. '[E]ven a discussion with a foreign researcher or student in a campus laboratory' could require a licence.<sup>48</sup> In September 2008 retired professor John Roth was convicted of violating the ITAR for sharing defence-related materials with Chinese and Iranian students at the University of Tennessee, without a license and knowingly in contravention of the ITAR, while working on Air Force contracts.<sup>49</sup>

Two university professors have attacked export regulations on constitutional 'free speech' grounds, but resolution of their claims left open the 'national security' justification for the extensive reach of the ITAR. Their claims were brought against the commercial, non-defence-related equivalent to the ITAR, the Export Administration Regulations (EAR), and focused on whether a particular type of technical data, encryption, has constitutional status as 'speech', rather than on whether the export rules limit freedom of speech.<sup>50</sup>

Professor Bernstein was successful in claiming that the EAR violated his constitutional free speech rights, but when the EAR were revised he lost a renewed challenge.<sup>51</sup> Professor Junger lost his initial claim, but in a renewed challenge he successfully established that the US Constitution's First Amendment protects computer source code as 'speech'.<sup>52</sup> In remitting the matter to the District Court, the Appeals Court acknowledged that the decision 'does not resolve whether the exercise of presidential power in furtherance of national security interests should overrule the interests in allowing the free exchange of encryption source code'.<sup>53</sup> These EAR cases would presumably be an answer to any 'free speech' challenge to the ITAR: US national security interests prevail.

The ITAR mandatory discrimination clause is contrary to many workplace policies in the US, and is arguably in contravention of the US Civil Rights Act 1964. In 1990 a US permanent resident, Mr Udofot, failed on jurisdictional grounds in a claim of discrimination on the basis of national origin and citizenship status under the Immigration Reform and Control Act 1986<sup>54</sup> because, as an employer of more than 14 employees, the General Electric Company was, for allegations of race discrimination, subject to the exclusive jurisdiction of the US Equal Employment Opportunity Commission.<sup>55</sup>

Although citizenship is not a basis for unlawful direct (or ‘intentional’) discrimination under the Civil Rights Act,<sup>56</sup> national origin is, and the line between the two can be difficult to draw.<sup>57</sup> Mr Udofot may have had a claim under the Civil Rights Act, but it is likely to have been caught by an exception that allows race discrimination in employment ‘in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President’.<sup>58</sup> Sperino is of the view that, despite very limited judicial discussion of it, ‘the national security exception should provide the employer with a defense in all deemed export cases falling under ITAR’.<sup>59</sup> In responding to Mr Udofot’s failed claim, the General Electric Company did ‘note’ that the work he had applied to do was subject to ITAR controls, suggesting that Mr Udofot would have met this ‘national security’ defence had he made a claim under the Civil Rights Act.

It may be that the absence of concern in the US for the discriminatory effect of the ITAR in other countries derives in part from uncertainty about whether the discriminatory effect of the ITAR is unlawful in the US. In other countries, however, the unlawfulness of that discriminatory effect is clear.

## 6. Perceptions of the ITAR in Australia

Australian-based companies, usually subsidiaries of US companies, engage extensively in defence manufacturing, and the Australian government has actively promoted opportunities for them to do so. Promoting the defence manufacturing industry in Australia involves promoting compliance with the ITAR, but no attention has been paid to the ITAR’s mandatory discrimination clause.

In 2006 the Australian Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade reported on Australia’s defence relations with the US,<sup>60</sup> but made no mention of the mandatory discrimination clause, and did not refer to the part of the submission from the Department of Tourism Industry and Resources which stated that ‘Australian companies have been required to seek exemptions from relevant anti-discrimination laws to be able to ask their employees if they have dual nationality and to allocate individuals to work on the basis of their nationality’.<sup>61</sup>

A discussion paper produced for the Australian government’s Defence Industry Policy Review in June 2006 made no reference to the ITAR at

all, let alone to the compliance difficulties they pose. The resulting policy statement characterised the ITAR as a mere complicating factor, a 'significant impost' in 'creating an environment in which SME [small to medium enterprises] can prosper as defence suppliers'.<sup>62</sup> A similar view was expressed by the Australian Industry Group Defence Council in its submission to the June 2006 review, with the mandatory discrimination clause being identified only as a 'difficulty' causing 'frustration'.<sup>63</sup>

The response of the Australian Government to the ITAR 'difficulty' was to promote avoidance of Australia's anti-discrimination laws. For example, in 'a series of International Traffic in Arms Regulations seminars aimed at raising awareness and assisting industry in understanding U.S. export control requirements',<sup>64</sup> a government speaker drew attention to the success that some companies had in seeking exemptions from anti-discrimination legislation,<sup>65</sup> and a 2006 information booklet, ostensibly produced by the Aerospace Industry Action Agenda (AIAA) but with what appears to be significant government involvement,<sup>66</sup> encourages employers to take steps to avoid the effect of anti-discrimination laws and to apply for exemptions.<sup>67</sup> In short, Australian public policy has treated the ITAR as a problem for business to deal with, with no apparent concern about the requirement to discriminate.

In 2007 the Australian Government rejected a recommendation by the Joint Standing Committee on Foreign Affairs, Defence and Trade that it 'make every effort to obtain exemption from ITAR from the United States Government in respect of defence goods and services purchased from the United States for Australian Defence Force purposes'.<sup>68</sup> But the security apprehensions of the US are too profound for there to be a realistic prospect of achieving broad exemption from the ITAR. Rejecting the recommendation,<sup>69</sup> the Government foreshadowed a 2008 treaty<sup>70</sup> that narrows to some degree the pool of non-US and non-Australian nationals who will be subject to individual clearance under the ITAR,<sup>71</sup> but which results only in less burdensome processes for some employers to obtain security clearances for employees in some circumstances.<sup>72</sup> The persistent discriminatory nature of the importing regime is clear: people who are not nationals of either Australia or the US will continue to be treated less favourably.<sup>73</sup>

The issue of the ITAR's mandatory discrimination clause has not been raised at all in the Australian Parliament. Despite occasional news reports about applications for exemptions from anti-discrimination legislation<sup>74</sup> the only analysis has been a one-hour investigative radio programme broadcast by the Australian Broadcasting Corporation in mid-2008,<sup>75</sup> where a



number of commentators explained and analysed the discriminatory effects of the ITAR.

### 7. Australian anti-discrimination laws

In the absence of even a statutory, let alone constitutional, national guarantee of equality and non-discrimination in Australia, all six states and both self-governing territories have passed laws to prohibit discrimination in employment, for both direct (disparate treatment) discrimination, and indirect (disparate impact) discrimination.<sup>76</sup> Discrimination is proscribed in all employment-related areas of activity,<sup>77</sup> including for contract workers.<sup>78</sup> Employers who discriminate unlawfully do not face penalties, but are likely to have to pay damages,<sup>79</sup> and to engage in remedial conduct.<sup>80</sup>

All the state and territory anti-discrimination statutes proscribe discrimination on the basis of 'nationality' as a particular aspect of the broadly defined term 'race', which is where the conflict with the ITAR arises.<sup>81</sup> The federal Racial Discrimination Act 1975 (Cth) (RDA) does not, however, define 'race' in this way,<sup>82</sup> so is apparently not in conflict with the ITAR.<sup>83</sup> The RDA does however define 'race' to include 'national origin', which would seem to bring the basis of actual operation of the ITAR into its scope, but no complaint under the RDA has been reported.<sup>84</sup> There is no provision in the RDA for seeking exemptions to allow non-compliance.

The effect of Australia's anti-discrimination laws, therefore, is that it is unlawful under state and territory law for an employer to treat one applicant or employee less favourably than another on the ground of their nationality, or to impose a requirement with which a person of a particular nationality is unable to comply. This is, however, exactly the conduct that the ITAR's mandatory discrimination clause demands of an employer.

### 8. The discrimination exemption applications

The Australian government has left it to the defence industry employers to resolve the conflict between the ITAR and anti-discrimination legislation. While employers must accept the terms of the ITAR-regulated contract, they have found that they can avoid the anti-discrimination legislation by obtaining an exemption that allows them to discriminate lawfully.

Exemption applications<sup>85</sup> 'are usually, but not necessarily, made for activities that might be described as 'special measures',<sup>86</sup> and special measures are 'for the benefit of some people with an attribute which is protected by that legislation in order to overcome disadvantage which has been experienced by those people because of their shared attribute'.<sup>87</sup> But the exemption applications that have been made to enable ITAR compliance are in a very different spirit: they seek permission not to benefit people and overcome disadvantage, but to discriminate against them and to disadvantage them.

In their exemption applications the employers have emphasised that they are seeking the exemptions reluctantly, and in approving the applications the tribunals have similarly been at pains to limit the scope of the exemptions to accommodate the ITAR only as far as necessary. Nevertheless, the discriminatory conduct that is permitted by the exemptions is wide-ranging.

In 2004, for example, an exemption granted to the ADI companies in Victoria allowed a wide variety of employment-related practices to discriminate on the basis of an employee's nationality. One permitted measure, starkly illustrating the discrimination involved, was '[i]dentifying (by means of a badge, inclusion in a list or otherwise) those in that workforce whose nationality or national origin is included in those who are permitted, under the United States law, to work on defence related projects or have access to related technology, materials or information, so as to distinguish them from those not so permitted'.<sup>88</sup> In Queensland employees can be badged according to their nationality: 'the badge will have a green bar to indicate that the holder does not have export privileges and that the employee is a foreign person'.<sup>89</sup> Similar steps are taken in Western Australia,<sup>90</sup> and in Canada where employees have also been 'barred from certain parts of the workplace, and in some companies are escorted by a security guard at all times'.<sup>91</sup>

It is precisely this humiliating differentiation of people that anti-discrimination laws are intended to prevent, but which is required by the ITAR mandatory discrimination clause.

In a series of exemption applications around Australia since 2003, defence manufacturing companies have brought into local Australian tribunals the vexed question raised by the ITAR's mandatory discrimination clause: what weight to give the US's claim for national security (and world peace) against Australia's own anti-discrimination laws. The exemption decisions have dealt with similar arguments from similar parties in similar circumstances, and in every application an argument

of the following nature was made: '[t]he Applicants cannot avoid discriminating [in breach of anti-discrimination legislation] if they are to comply with the United States export laws and meet their contractual obligations.'<sup>92</sup> Despite quite extensive procedural differences among the jurisdictions, the substantive decisions are very alike in their reasoning, and identical in their result.

Applications sought in Queensland,<sup>93</sup> Victoria,<sup>94</sup> New South Wales,<sup>95</sup> South Australia<sup>96</sup> and Western Australia<sup>97</sup> have been granted; only the Australian Capital Territory (ACT) and Queensland have refused an application for an exemption. In January 2008 the Northern Territory Anti-Discrimination Commissioner published what 'would have been my decision [refusal] ... but for the Applicant's withdrawal of its application'.<sup>98</sup>

The ACT decision to refuse an exemption was administrative in nature, advised by the ACT Human Rights and Discrimination Commissioner to the applicant in a letter,<sup>99</sup> and was later reviewed and set aside by the ACT Administrative Appeals Tribunal (AAT).<sup>100</sup> Differently from any previous decision, the ACT decision was made in the context of local human rights legislation: the Human Rights Act 2004 (ACT) directs that '[i]n working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred,' and permits human rights to be 'subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.<sup>101</sup> The Queensland refusal is the only decision to have relied on the existing legislative exemption for a 'genuine occupational requirement', thereby obviating the need to grant an exemption.<sup>102</sup>

The interplay between human rights legislation and anti-discrimination legislation is complex and novel in Australia. Exemptions applications made in Victoria after 1 January 2008 will have to be decided under the Charter of Rights and Responsibilities 2006 (Vic) which, similarly to the ACT's Human Rights Act requires interpretation consistent with human rights whenever possible,<sup>103</sup> and allows derogation from a human right only within demonstrably justified reasonable limits.<sup>104</sup> The 'reasonable limits' constraint on derogation from a human right is certainly much stricter than the test of 'necessary or desirable to avoid an unreasonable outcome' relied on by the Victorian tribunal in 2007, shortly before the Charter of Human Rights and Responsibilities Act took effect.<sup>105</sup>

## 9. The public interest

In their published decisions the tribunals have been confronted by the employers' dilemma, and have felt that there is no alternative but to grant the exemption. The tribunals have characterised the exemptions as being in the 'community interest',<sup>106</sup> or alternatively in the 'public interest' or 'national interest',<sup>107</sup> because of the adverse impact on the employer and its work force,<sup>108</sup> and the flow-on effects for Australia's national economy, if the exemption were not granted.

The tribunals have approached the question of whether to grant an exemption by asking whether '[t]he public interest in granting the exemption outweighs the public interest and other interests in not granting it.'<sup>109</sup> But the inflexible demands of the ITAR present tribunals with no real choice. Despite a 'paucity of evidence',<sup>110</sup> employers have asserted that without the exemption the contracts will be breached with serious consequences, including the loss of jobs. In the face of these threatened consequences the tribunals have had to find a way to make a credible decision to grant an exemption, and so have adopted a wider approach to the 'public interest' than has previously been the case.

In Western Australia (WA), for example, the applicant employers conceded that they could not invoke the 'spirit' of any of the exception provisions in the Equal Opportunity Act 1984 (WA), and the tribunal concluded that 'the grant of the exemption would not fit within the objects' of the Act.<sup>111</sup> But the tribunal decided that because of 'discriminatory, economic and defence [ramifications] ... the public or community interest in this application outweighs the negative discriminatory impact that granting the exemption would have'.<sup>112</sup> This approach elevates an assessment of the threatened commercial harm to a higher order consideration than the spirit and objects of beneficial legislation that ought to be construed widely and, correspondingly, for which exceptions ought to be construed narrowly.<sup>113</sup> Just as 'remedial legislation is not to be construed by stretching its meaning unnaturally in order to accommodate hard cases',<sup>114</sup> nor should exemption provisions be similarly stretched to accommodate hard cases. Hard cases are decided according to the applicable law, and a harsh result is dealt with, if at all, by Parliament; the WA tribunal observed that the process for exemption in New South Wales, 'perhaps correctly' puts the final decision in the hands of the Attorney-General because it 'allows for the inclusion of the political point of view'.<sup>115</sup>

If Australia had no laws proscribing discrimination on the basis of nationality, or if it were unremarkable to grant exemptions from those laws, the impact of the ITAR would scarcely be noteworthy. But the ITAR cut across well-established and widely respected anti-discrimination laws in Australia, and the ITAR's inflexible demands have distorted the manner in which anti-discrimination exemptions are granted.

### 10. Alternatives to complying with the ITAR

The extraterritorial reach – the global reach – of the ITAR, their inflexibility, and their very severe penalties, have dictated to the tribunals only one realistic decision, despite the exemption applications being outside the spirit and aims of anti-discrimination legislation. But there are ways to achieve the ITAR's goals consistently with prohibitions against discrimination.

Alternative approaches are not hard to envisage. The Northern Territory Anti-Discrimination Commissioner proposed a range of lawful measures that would achieve the ITAR's desired result 'without resorting to discrimination',<sup>116</sup> including security clearances, screening, references, inspections, and non-disclosure agreements. Although steps such as these require additional expense and administration, they are lawful and non-discriminatory. But even if Australian importers of ITAR-regulated material were to take all these proposed measures, they would continue to breach the mandatory discrimination clause until the US Government amends the ITAR to recognise the sufficiency of such measures.

Another alternative is to source the defence-related material elsewhere. If it were available from countries other than the US – that is, if the US exporters faced competition in their provision of the technology – the US exporters might find themselves at a competitive disadvantage because of the ITAR-mandated contract conditions. But the US is a preferred supplier, and has an effective monopoly on the supply of technology, because the Australian manufacturer/importers are subsidiaries of US companies, required to deal with their US parent companies.

### 11. ITAR and Canada

Canada, differently from Australia, has a constitutional guarantee of non-discrimination. In contrast with Australia, the ITAR discrimination issue has attracted considerable public comment and criticism.<sup>117</sup>

In 2006, ITAR-related discrimination complaints were lodged under the Ontario Human Rights Code.<sup>118</sup> The Human Rights Tribunal asked 'whether compliance with the ITAR supersedes the Human Rights Code', but the question was not answered as the complainants reached a negotiated settlement under which the employer in that case agreed to 'continue with its practice of making all reasonable efforts to secure such lawful permission as may be obtained to minimize any differential treatment for such employees'.<sup>119</sup>

This show of good faith on the part of the employer provided a solution in the specific case, but did not alleviate the persistent industry-wide impact of the ITAR. It is simply not feasible for every employer to get US State Department permission for every employee. Indeed, it appears that the only way Canada can manage the direct conflict between its constitutional guarantee of non-discrimination and the ITAR's mandatory discrimination clause is to negotiate a resolution to complaints on a case-by-case basis.<sup>120</sup> Canada's Department of National Defence, for example, recognises the unlawfulness in Canada of discrimination based on country of origin, and says that discrimination complaints caused by ITAR compliance are 'handled individually'.<sup>121</sup>

Canada has reached an agreement with the US on Canadian dual nationals in terms similar to the agreement between Australia and the US.<sup>122</sup> This is intended as an interim solution with ongoing discussions 'to find comparable long-term solutions for other federal government departments and Canadian industry'.<sup>123</sup> As with the Australian agreement, the 'dual nationality' arrangements are only a very small part of a solution; the agreement does not, for example, cover the employees of private defence manufacturers who are the very ones making the human rights complaints in Canada.

## 12. International human rights compliance

The ITAR control access to defence technology by reference to a narrow and simple conception of 'nationality', and in doing so they discriminate on the basis of country of birth, or 'national origin'. Discrimination on the basis of national origin violates both article 26 of the International Covenant on Civil and Political Rights (ICCPR) and articles 1 and 2 of the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD). Even if, as a result of DTAG's definitions review,<sup>124</sup> the ITAR were to discriminate on the basis of citizenship rather than national origin, it would violate the prohibition against discrimination

on the basis of 'other status' in article 26 of the ICCPR, and is likely still to violate articles 1 and 2 of the ICERD.<sup>125</sup>

Reliance on national security interests does not excuse these violations. The ICERD does not recognise national security concerns as a reason to derogate from its non-discrimination obligations, and article 4 of the ICCPR does so only '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', and never if the measures taken in derogation involve 'discrimination solely on the ground of race, colour, sex, language, religion or social origin'.<sup>126</sup>

But the US is effectively free of any international accountability under either the ICCPR or the ICERD for the discriminatory operation of the ITAR. In relation to the ICCPR, the US takes a narrow approach to interpreting the extent to which it both constrains anti-terrorism measures<sup>127</sup> and limits discrimination on the ground of race.<sup>128</sup> As well, the US's ratification of the ICCPR is subject to an 'understanding' that 'distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status ... [are] permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective',<sup>129</sup> meaning that the US has effectively reserved to itself the right to discriminate on any ground for its own 'legitimate objectives', of which national security is presumably one. Further, the US has not recognised the competence of the Human Rights Committee to receive and consider communications alleging a violation of the rights set out in the ICCPR, and is not comprehensive in reporting on its implementation of and compliance with the ICCPR.<sup>130</sup>

In relation to the ICERD, the US's ratification is subject to the reservation it 'does not accept any obligation under this Convention to enact legislation or take other measures ... with respect to private conduct except as mandated by the Constitution and laws of the United States'.<sup>131</sup> In so saying, the US has reserved to itself the right to permit racial discrimination within the bounds of the US Constitution, regardless of the more narrow strictures set out in the ICERD.

Australia, in contrast to the US's position, is accountable for its violations of the ICCPR and the ICERD, and is vulnerable to communications being made to the UN Human Rights and ICERD Committees concerning discriminatory conduct that has been allowed because of an exemption from anti-discrimination legislation, although no such complaint has yet been reported.

### 13. Conclusion

Through the ITAR, the US dictates the terms of private conduct by non-US people and corporations outside the US, causing them to act unlawfully under the law of their own states. For Australia, complying with this aspect of the ITAR breaches its international human rights obligations.

Workers have no standing to challenge the validity of the ITAR mandatory discrimination clause and, if employers are granted an exemption from anti-discrimination laws, workers have no relief from the discrimination they suffer. In short, the non-US employees of non-US companies in countries other than the US pay the price for maintaining US national security.

What could – and in principle should – be an impasse between US national security and Australia's commitment to non-discrimination is a one-way traffic in favour of the US. The US is aware of the conflict between the ITAR's mandatory discrimination clause and the anti-discrimination laws in Australia and Canada, but appears unfazed. Such a situation is unacceptable.

With some justification the US equates its own security interests with those of the world, but it coopts private interests, and the public institutions of other states, to protect those interests. The ITAR show no deference to the legitimacy of non-discrimination as a principle of international law, or to the integrity of domestic legal systems. The US cannot credibly pursue world peace and at the same time show no respect for other states' international human rights obligations and laws that promote non-discrimination.

### Notes

1. See, e.g., Edward Laurance, 'Political Implications of Illegal Arms Exports from the United States' (1992) 107 *Political Science Quarterly* 501; Elise Kepler, 'Preventing Human Rights Abuses by Regulating Arms Brokering: The US Brokering Amendment to the Arms Export Control Act' (2001) 19 *Berkeley Journal of International Law* 381.
2. *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21.
3. 22 USC §2778(a)(1).
4. Executive Order 11958, as amended by 22 CFR §120.1.
5. The export of items and technology for commercial (but not defence-related) purposes is regulated under the US Export Administration Regulations (EAR).
6. See, e.g., 22 CFR §127.8(a), 126.7(a)(1), 120.5.



7. 'Technical data': 22 CFR §120.10; 'software': 22 CFR §121.8(f); 'defense article': 22 CFR §120.6, 121.1; 'defense service': 22 CFR §120.9.
8. For a detailed contemporary account of the operation of the ITAR generally see Sandra Sperino, 'Complying with Export Laws without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules' (2007–08) 52 *Saint Louis University Law Journal* 375.
9. J. Camp and K. Lewis 'Code as Speech: A Discussion of *Bernstein v. USDOJ*, *Karn v. USDOJ*, and *Junger v. Daley* in Light of the US Supreme Court's Recent Shift to Federalism' (2001) 3 *Ethics and Information Technology* 21, 23.
10. Roland Trope, 'Immaterial Transfers with Material Consequences' (2006) 4(5) *IEEE Security and Privacy* 74, 74.
11. R. M. Atlas 'National Security and the Biological Research Community' (2002) 298 *Science* 753, 755.
12. E. B. Skolnikoff, 'Research Universities and National Security: Can Traditional Values Survive?' (Working Paper IPC-02-005, MIT, 2002) 2, 3.
13. In October 2008 the DTAG's 'ITAR Definitions Working Group' presented a proposal to review and rewrite the ITAR definitions provisions in 22 CFR §120, and identified citizenship, country of birth and country of origin as terms under consideration: *Directorate of Defense Trade Controls*, US Department of State [pmdtdc.state.gov/DTAG/](http://pmdtdc.state.gov/DTAG/) at 25 November 2008.
14. 22 CFR §120.17(a)(1).
15. 22 CFR §120.17(a)(4).
16. Trope, above n 10, 76.
17. See, e.g., *US v. Yakou* 428 F.3d 241, 244 (DC Cir, 2005): 'It is undisputed that Yakou is not a United States citizen, that the indictment does not allege that Yakou engaged in brokering activities within the United States, and that the United States does not argue that he is otherwise subject to the jurisdiction of the United States for the purposes of ITAR. Therefore, United States must show that Yakou is a "US person."'
18. 22 CFR §120.21.
19. 22 CFR §120.22.
20. 22 CFR §127.8(6).
21. 22 CFR §124.8(5).
22. Peter Fitzgerald, 'Pierre Goes Online: Blacklisting and Secondary Boycotts in US Trade Policy' (1998) 31 *Vanderbilt Journal of Transnational Law* 1, 31, 43.
23. 22 CFR §127.3; 22 USC 2778(c).
24. 22 CFR §127.6–127.8.
25. Trope, above n 10, 77.
26. Trope, above n 10, 74.
27. Roland Trope and Monique Witt, 'Allies at Sixes and Sevens: Sticky Issues in Australian–US Defence Trade Controls' (2007) 3(2) *Security Challenges* 73, fn 26 and associated text.
28. See e.g. Fitzgerald, above n 22, 41–3.
29. Eric Choi and Sorin Niculescu, 'The Impact of US Export Controls on the Canadian Space Industry' (2006) 22 *Space Policy* 29, 30.
30. See, e.g., Peter Swan, 'A Road Map to Understanding Export Controls: National Security in a Changing Global Environment' (1992) 30 *American Business Law*

- Journal* 607, 648 addressing the same issue in relation to re-export by non-US persons; Fitzgerald above n 22, fn 413; and Kepler, above n 1, 400.
31. *Exemption Application*, above n 2, [5.8] (emphasis original).
  32. *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ 4, 23.
  33. Kim Rubenstein 'Nationality' in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (2008), 819–20.
  34. *Ibid.*
  35. Stephen Legomsky, *Immigration and Refugee Law and Policy* (4th edn, 2006) 8.
  36. When the US State Department's Defense Trade Advisory Group (DTAG) insisted that 'Country of birth is a factor in determining nationality' (DTAG, 'Minutes of 21 September 2006 Plenary Session' 6, [pmdtdc.state.gov/DTAG/documents/plenary\\_minutes\\_09\\_06.pdf](http://pmdtdc.state.gov/DTAG/documents/plenary_minutes_09_06.pdf) at 27 November 2008), it did so despite minuted advice six months earlier that "'country of origin" ... has no bearing on the citizenships of an employee ... For 43 countries, only 14 countries take into account place of birth as a factor of citizenship': DTAG 'Minutes of 21 April 2006 Plenary Session' 10, [pmdtdc.state.gov/DTAG/documents/plenary\\_minutes\\_04\\_06.pdf](http://pmdtdc.state.gov/DTAG/documents/plenary_minutes_04_06.pdf) at 27 November 2008.
  37. 22 CFR §124.2(6).
  38. 22 CFR §120.15 and 22 CFR §120.16; 8 USC 1101(a)(20) and 8 USC 1324b(a)(3).
  39. *Exemption Application by Raytheon Australia Pty Ltd and related companies*, Northern Territory Anti-discrimination Commission, ADC 2007/027, [8.1].
  40. Donald Kennedy, 'A Welcome New Look' (2006) 312 *Science* 1557, 1573.
  41. See Section 8 of this chapter.
  42. Lorena Allam, 'Background Briefing: Defence and discrimination' *ABC Radio National* 24 August 2008 [www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm](http://www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm) at 25 November 2008.
  43. DTAG established a Dual National's Working Group to consider how the ITAR should apply to persons of dual nationality. In 2006 DTAG recommended that a person with dual nationality, when one nationality is of the contracting party, not be considered a national of a third country unless that nationality was of an embargoed country listed in 22 CFR §126.1 as amended from time to time by US Federal Regulation. This recommendation was rejected: DTAG, 'Minutes of 21 September 2006 Plenary Session', above n 36, 6.
  44. 'Australian dual-national employees of the Defence Department and Australian companies do not need to provide nationality information for US licensing purposes if they have at least a restricted security clearance and a need to know ... [and] Defence is the ultimate end-user ... This agreement does not apply to non-citizens, including third country exchange officers with the ADF, or to dual-nationals of proscribed countries listed at 22 CFR §126.1 (e.g., Cuba, China, Iran, Libya, North Korea and Vietnam). In such cases, prior written approval must be sought from the State Department before access to US technology is granted': Director US Export Control Systems *United States' Defence Export Controls: Guidance for Australian Companies Director US Export Control Systems* 6 August 2007, 14.
  45. DTAG, 'Minutes of 21 April 2006 Plenary Session', above n 36, 7; DTAG, 'Minutes of 21 September 2006 Plenary Session', above n 36, 6; DTAG, 'Minutes of 20 September 2007 Plenary Session', 6, [pmdtdc.state.gov/DTAG/documents/plenary\\_minutes\\_09\\_07.pdf](http://pmdtdc.state.gov/DTAG/documents/plenary_minutes_09_07.pdf) at 16 November 2008.

46. Trope, above n 10, 78.
47. See, e.g., Swan, above n 30, 635–7.
48. University of California, Berkeley, ‘Research Security in the Post-9/11 Environment’ in Research Compliance A Faculty Handbook, [rac.berkeley.edu/compliancebook/print.html](http://rac.berkeley.edu/compliancebook/print.html) at 16 November 2008.
49. Mark Menefee, ‘Compliance and Honest Services’ (2008) 22 *The Export Practitioner* 10.
50. See, e.g., Norman Crain, ‘Bernstein, Karn, and Junger: Constitutional Challenges to Cryptographic Regulations’ (1999) 50 *Alabama Law Review* 869; Seth Hanson, ‘Bernstein v. United States Department of Justice: A Cryptic Interpretation of Speech’ [2000] *Brigham Young University Law Review* 663.
51. *Bernstein v. US Department of Justice*, 192 F 3d 1308 (9th Cir. 1999); *Bernstein v. United States Department of Commerce*, C95–0582 (ND Ca R, 27 July 2003).
52. *Junger v. Daley*, 8 F Supp 2d 708 (ND Ohio, 2 July 1998); *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000).
53. *Ibid.* 7; Euben overstates the decision when she says that the ‘court observed ... that national security interests “should overrule the interests in allowing the free exchange of encryption source code.”’: Donna Euben ‘Academic Freedom and Professorial Speech’ (2004) Presentation to 25th Annual Conference on Law & Higher Education, Stetson University College of Law, February 2004 [www.aaup.org/AAUP/protect/legal/topics/prof-speech.htm](http://www.aaup.org/AAUP/protect/legal/topics/prof-speech.htm) at 27 November 2008.
54. 8 USC § 1324b(a)(1)(A).
55. 42 USC §§ 2000e-17 (2000).
56. 42 USC § 2000e-2(a) (2000).
57. See Sperino, above n 8, 404–17 and the discussion in section 4 of this chapter.
58. 42 USC § 2000e-2(g) (2000).
59. Sperino, above n 8, 416.
60. Joint Standing Committee on Foreign Affairs, Defence and Trade *Inquiry into Australia’s Defence Relations with the United States*, 22 May 2006.
61. Department of Tourism Industry and Resources, Submission to the Inquiry into Australia’s Defence Relations with the United States, 7–8 [www.aph.gov.au/house/committee/jfadts/relations/subs/sub14.pdf](http://www.aph.gov.au/house/committee/jfadts/relations/subs/sub14.pdf) at 27 November 2008.
62. Minister for Defence, *Defence and Industry: Policy Statement 2007* (2007) 22.
63. Australian Industry Group Defence Council, *Submission to the Defence Industry Policy Review* (October 2006) 5 [www.aigroup.com.au/portal/site/aig/policy/submissions/allother](http://www.aigroup.com.au/portal/site/aig/policy/submissions/allother) at 27 November 2008.
64. Jurgen Zacny, ‘ITAR Seminar 2006’ (2006) 2 *Defence Export Controls Bulletin* 4.
65. Mike Lawson, ‘Opening Address’, Presentation at the International Traffic in Arms Regulations (ITAR) Seminar Series, Adelaide, 2 March 2006 [www.industry.gov.au/General/MEL-JSFIT/Documents/opening\\_Address\\_Adelaide20060322092321.pdf](http://www.industry.gov.au/General/MEL-JSFIT/Documents/opening_Address_Adelaide20060322092321.pdf)
66. The cover of the booklet contains the logo and title of the Australian Government: Department of Industry, Tourism and Resources (DITR). In addition the AIAA, which itself was an Australian government initiative, identifies the booklet as a DITR publication: AIAA, *Third and Final Report of the of the Aerospace Industry Action Agenda Joint Steering Committee* (2007) 5–6.
67. ‘Aerospace Industry Action Agenda’, *Defence Export Trade Controls: An Information Booklet for Australian Companies*, January 2008, 15 [www.innovation.gov.au/Documents/DETC20060316113340.pdf](http://www.innovation.gov.au/Documents/DETC20060316113340.pdf) at 27 November 2008.

68. Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 60, Recommendation 6, 97.
69. Department of Defence, *Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Report* February 2007.
70. Treaty between Australia and the United States of America Concerning Defense Trade Cooperation, for which the Joint Standing Committee on Treaties recommended that binding treaty action be taken: Joint Standing Committee on Treaties, *Report 94*, 14 May 2008, 43; there is some doubt whether the US Senate will approve the treaty: cf. the comments of Senator Biden, United States Senate Committee on Foreign Relations, Hearing May 21 2008, audio [www.senate.gov/~foreign/hearings/2008/hrq080521a.html](http://www.senate.gov/~foreign/hearings/2008/hrq080521a.html) at 25 November 2008.
71. Articles 4(1)(b), (c) of the Treaty, and s 6(11) of the related Implementation Agreement.
72. The Treaty deals only with employers in the defence industry, not in civil industries that use the same imported technology, and addresses only arrangements that are made for existing employees, not arrangements made for hiring new employees.
73. Section 6(14) of the Implementation Agreement.
74. See e.g. Gavin Lower, 'Top-secret discrimination' *The Advertiser* 22 January 2008; Pia Akerman and Andrew McGarry, 'Contractor Accused of Racial Profiling' *The Australian* 26 January 2008; David Nason and Patrick Walters, 'Security is No Defence' *The Australian* 16 February 2008.
75. Allam, above n 42.
76. See, e.g., Discrimination Act 1991 (ACT) s. 8(1). The Discrimination Act 1991 (ACT) is used throughout to illustrate the type of anti-discrimination provisions that are common to all Australian states and territories. The provisions differ to varying degrees in form and effect among the jurisdictions: see generally Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008).
77. See, e.g., Discrimination Act 1991 (ACT) div. 3.1.
78. See, e.g., Discrimination Act 1991 (ACT) s. 13.
79. Damages are usually quite low – under AUS\$10,000: See Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11(1) *Australian Journal of Human Rights* 171.
80. See, e.g., Discrimination Act 1991 (ACT) s. 99(3).
81. Discrimination Act 1991 (ACT) Dictionary.
82. *Macabenta v. Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202.
83. *BAE Systems Australia Ltd* [2008] SAEOT 1, [59]; *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [49]; *BAE Systems Australia Ltd (Anti- Discrimination)* [2008] VCAT 1799, [12].
84. See the submissions and discussion in *ADI Limited & Ors and Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [77]–[80], [136]–[150].
85. See, e.g., Discrimination Act 1991 (ACT) s 109.
86. Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004) 547.
87. Rees, Lindsay and Rice, above n 76, 455.
88. *ADI Ltd (Exemption)* [2004] VCAT 1963 [8b].

89. *Exemption Application*, above n 2, [11.3b].
90. *ADI Ltd v. Commissioner for Equal Opportunity & Ors* [2005] WASAT 259 [5b].
91. Jasmin Legatos, 'Settlement Reached in Bell Helicopter Discrimination Case: Company Denied Haitian-Born Canadian a Place in its Internship Program', *The Gazette* (Montreal), 18 January 2008.
92. *Exemption Application*, above n 2, [15.1].
93. *Ibid.*; *Exemption application re: Raytheon Australia Pty Ltd & Ors* [2008] QADT 1; *Exemption application re: Boeing Australia Holdings Pty Ltd & related entities* (No. 3) [2008] QADT 34.
94. *ADI Ltd (Exemption)* [2004] VCAT 1963; *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532; *Raytheon Australia Pty Ltd and Others Exemption Application* [2007] VCAT 2230; *ADI Ltd (Anti-Discrimination)* [2007] VCAT 2242; *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799.
95. *Exemption Order* (Re Boeing), NSW Government Gazette 2005 No 25, 391; *Exemption Order* (Re ADI), NSW Government Gazette 2005 No 81, 3495–6.
96. *BAE Systems Australia Ltd* [2008] SAEOT 1; *Raytheon Australia P/L Ors* [2008] SAEOT 3.
97. *ADI Ltd v. Commissioner for Equal Opportunity & Ors* [2005] WASAT 259; *Commissioner for Equal Opportunity v. ADI Ltd* [2007] WASCA 261.
98. *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027.
99. The letter is published online: Human Rights Commission, *Human Rights & Discrimination/Publications/Discrimination Decisions* www.hrc.act.gov.au at 25 November 2008.
100. *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19. In late 2008 the ACT Commissioner sought leave to appeal from the AAT to the ACT Supreme Court.
101. Human Rights Act 2004 (ACT) s. 28, 30(1).
102. *Boeing Australia Holdings Pty Ltd & related entities (No 2)* [2008] QADT34. The Tribunal said, however, that it would have refused the application on its merits as the arguments were unpersuasive and supported by scant evidence.
103. Charter of Human Rights and Responsibilities Act 2006 (Vic) s. 32(1).
104. *Ibid.* s. 7(2).
105. *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532, [34].
106. *Ibid.*
107. *ADI Ltd (Exemption)* [2004] VCAT 1963 [48].
108. *Exemption Application*, above n 2 [16.1].
109. *ADI Ltd v. Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [161].
110. *Exemption Application*, above n 39 [7.19] and see *Boeing*, above n 102.
111. *ADI Ltd*, above n 109 [111].
112. *Ibid.* [132].
113. Although it was called 'curious', the Tribunal's decision was upheld on appeal: *Commissioner for Equal Opportunity v. ADI Ltd* [2007] WASCA 261, [32]–[33].
114. *Cosma v. Qantas Airways Ltd* [2002] 124 FCR 504 [511].
115. *ADI Ltd*, above n 109 [129].
116. *Exemption Application*, above n 39 [8.2].

117. See, e.g., *Questions from the Centre for Research-Action on Race Relations*, Submission to the Committee on the Elimination on all Forms of Racial Discrimination, UN, Geneva, Switzerland, 9 February 2007 [www2.ohchr.org/english/bodies/cehd/docs/ngos/crarr.pdf](http://www2.ohchr.org/english/bodies/cehd/docs/ngos/crarr.pdf).
118. *Ontario Human Rights Commission and Sinclair and Others v. General Motors of Canada Ltd* [2006] HRTO 30; HRTO 35; HRTO 36.
119. Ontario Human Rights Commission, 'Human Rights Settlement Reached with General Motors of Canada Ltd with respect to Workers with Citizenships other than Canadian or American' (Press Release, 5 July 2007) [www.ohrc.on.ca/en/resources/news/gm](http://www.ohrc.on.ca/en/resources/news/gm) at 16 November 2008.
120. See e.g., Legatos, above n 91.
121. Ian Austen, 'Strict U.S. Rules Disqualify Some Canadian Arms Workers' *New York Times*, 12 December 2006.
122. Above n 44.
123. National Defence and the Canadian Forces, *Arrangement Reached Concerning the Transfer, Access and Control of ITAR Controlled Defence Articles and Services* (17 May 2007) [www.forces.gc.ca/site/news\\_nouvelles/view\\_news\\_afficher\\_nouvelles\\_eng.asp?id=2290](http://www.forces.gc.ca/site/news_nouvelles/view_news_afficher_nouvelles_eng.asp?id=2290) at 16 November 2008.
124. Above n 13.
125. Committee on the Elimination of Racial Discrimination, *General Recommendation No 30: Discrimination Against Non Citizens*, 65th session, UN Doc HRI/GEN/1/Rev.7/Add.1(2005); and see Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) 90–4.
126. And see UN Human Rights Committee, *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11.
127. UN Human Rights Committee *Concluding Observations – United States of America*, 2006, [10]–[11], UN Doc CCPR/C/USA/CO/3/Rev.1.
128. *Ibid.* [23]–[24].
129. See generally Kristina Ash, 'US Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence' (2005) 3 *Northwestern University Journal of International Human Rights* [i].
130. UN Human Rights Committee, above n 127, [3]–[4].
131. Office of the High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, [392], [393], UN Doc A/56/18 (2001).

## Removing barriers to protection at the exported border: Visas, carrier sanctions and international obligation

ANGUS FRANCIS

### 1. Introduction

Asylum is being gradually denuded of the national institutional mechanisms (judicial, legislative and administrative) that provide the framework for a fair and effective asylum hearing. In this sense, there is an ongoing ‘denationalization’<sup>1</sup> or ‘deformalization’<sup>2</sup> of the asylum process. This chapter critically examines one of the linchpins of this trend: the erection of pre-entry measures at ports of embarkation in order to prevent asylum seekers from physically accessing the territory of the state.<sup>3</sup>

Pre-entry measures comprise the core requirement that foreigners possess an entry visa granting permission to enter the state of destination. Visa requirements are increasingly implemented by immigration officials posted abroad or by officials of transit countries pursuant to bilateral agreements (so-called ‘juxtaposed’ immigration controls). Private carriers, which are subject to sanctions if they bring persons to a country who do not have permission to enter, also engage in a form of de facto immigration control on behalf of states. These measures constitute a type of ‘externalized’<sup>4</sup> or ‘exported’<sup>5</sup> border that pushes the immigration boundaries of the state as far from its physical boundaries as possible.<sup>6</sup>

Pre-entry measures have a crippling impact on the ability of asylum seekers to access the territory of states to claim asylum. In effect, states have ‘externalized’ asylum by replacing the legal obligation on states to protect refugees arriving at ports of entry with what are *perceived to be* no more than moral obligations towards asylum seekers arriving at the external border of the state. Simultaneously, states are shifting the emphasis from in-country asylum processing to measures designed to deal with refugees in their regions of origin or in transit (e.g., extraterritorial or transit processing schemes, third country agreements and

resettlement quotas). In short, states seek to exert control over the access of refugees to their territory, while denying *legal* responsibility for protecting refugees subject to their jurisdiction.

This chapter proposes that new methods and measures must be sought to alleviate the adverse impact that pre-entry measures have on the ability of asylum seekers to access protection. It begins, in Section 2, with a discussion of the general nature and effect of external boundaries. Section 3 then analyses the rationale of pre-entry measures in order to understand why states are reluctant to acknowledge the application of their international legal obligations at the exported border. The remaining sections argue for greater efforts to remove barriers to asylum seekers striving to negotiate ubiquitous immigration controls, while also highlighting the practical difficulties faced when devising effective protection safeguards operable outside the territory of the state of asylum.

## 2. The exported border

Pre-entry measures threaten to leave the international refugee protection regime behind at the border post. Proponents of pre-entry measures argue that states' international legal obligations to refugees do not follow these external forms of immigration control<sup>7</sup> – a position that has potentially devastating consequences for the institution of asylum given the pervasive quality of pre-entry measures today. Consequently, state responsibility and obligation are chained to the physical border, while unfettered experimentation with new techniques of control occurs abroad.

Such an approach arguably turns a blind eye to the new realities of externalised immigration control. As Kesby points out, '[a]ccompanying the geographical or territorial border are invisible borders which reflect policy decisions and distinguish between people, whether on the grounds of race, class or nationality'.<sup>8</sup> There are, in short, 'multiple' borders.<sup>9</sup> The function, effect and location of the modern border is different from group to group and individual to individual.<sup>10</sup> The border for some may be experienced within a foreign state's territory at the port of entry, whereas for others it may be experienced in a transit country or even within the individual's own country.<sup>11</sup>

Increasingly, states officially endorse the traditional territorial definition of external borders while operating outside those borders to prevent the arrival of unwanted asylum seekers and irregular migrants. In the EU context, for example, the Schengen Borders Code defines external borders as the 'Member States' land borders, including river and lake



borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'.<sup>12</sup> A similar definition is found in the regulations establishing FRONTEX, the European agency charged with the management of the operational cooperation at the external borders of EU Member States.<sup>13</sup>

Yet despite the territorial definition of its external borders, a recent ECRE study on the access of asylum seekers to the EU noted that FRONTEX was active in 'extending controls from the external borders outwards towards the high seas and onto the territory of third countries'.<sup>14</sup> At the same time, the report observed that the 'projection of the EU's border controls away from the EU's physical borders does not have any clear legal basis and seriously obstructs the creation of a consistent understanding of what the EU external borders are'.<sup>15</sup> In practice, FRONTEX acts outside those borders beyond any effective modes of accountability and transparency in the way it exercises its immigration functions, especially with respect to asylum seekers.<sup>16</sup>

EU Member States make full use of this new immigration control artifice. Although not a formal member of the Schengen Framework, the UK government for example readily co-operates with FRONTEX in order to facilitate the exportation of its border. As stated recently by the Home Office's Director of Border and Visa Policy before the House of Lords EU Select Committee's inquiry into FRONTEX: 'one of the guiding lights of our philosophy of border control generally is to export the border as far away from the UK as possible and hence FRONTEX is part of that process'.<sup>17</sup>

Thus, on the one hand, states formally adhere to the traditional territorial conception of the border in international law,<sup>18</sup> while allowing their authorities and agents to act beyond the physical border to exercise the power of admission and exclusion. Simultaneously, they implicitly deny that their international legal obligations to refugees – that traditionally restrained the exercise of the state's right of immigration control at the physical border – have any relevance to new techniques of externalised control. In order to appreciate this last point fully, we need to understand the nature and rationale of pre-entry measures.

### 3. Government 'remote control'<sup>19</sup> over the arrival and entry of asylum seekers

States are attracted to pre-entry measures because of their capacity to control the arrival of asylum seekers without (it is erroneously

assumed)<sup>20</sup> engaging international legal obligations. Paradoxically, 'exporting the border as far away as possible' does not entail the relinquishment of state control over asylum. The 'denationalization'<sup>21</sup> phenomenon that lies at the heart of restrictive asylum policies maintains state *control* while seeking to deny state *responsibility*. This rationale of pre-entry measures becomes abundantly clear in the following discussion of visa requirements and carrier sanctions.

Visa requirements imposed on the nationals of refugee-producing states and enforced by carrier sanctions are the classic tool of so-called non-arrival or *non-entrée* policies.<sup>22</sup> The requirement that a person have a valid visa before boarding a boat or plane, when enforced by the carriers responsible for bringing the person to the destination state, makes it almost impossible for asylum seekers to seek protection in a destination state without false travel documents.<sup>23</sup> A typical example of this tool is found in section 229(1)(a) of the Australian Migration Act 1958 (Cth), which provides that '[t]he master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia ... are each guilty of an offence against this section unless the non-citizen, when entering Australia is in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia'.

Visa requirements and carrier sanctions ostensibly pursue legitimate objectives of general immigration control and civil aviation security.<sup>24</sup> Looking more closely, the true purpose of such measures in many instances is simply to prevent asylum seekers from arriving in the territory of destination states.<sup>25</sup> Preventing the arrival of putative refugees in destination states 'avoids concerns about the procedures of the determination process'.<sup>26</sup>

Rather than seek to explain or justify such measures by reference to the origins (and supposed economic motives) of asylum seekers from the global 'south',<sup>27</sup> recent scholarship views *non-entrée* policies as primarily a response to the increasing internal constraints placed on government treatment of asylum seekers.<sup>28</sup> In particular, scholars observe that the evolution of constitutional and administrative justice principles in liberal-democratic states have led to the reduction of the arbitrary and discretionary powers of immigration bureaucracies.<sup>29</sup> Restraints on discretionary powers also derived from the gradual development of a human rights culture within destination states that has had important 'spill over effects for non-citizens'.<sup>30</sup>

Paradoxically, it has also been observed that the development of the administrative apparatus supporting the modern liberal-democratic

state spawned greater and more sophisticated tools to prevent asylum seekers from accessing its benefits, including enhanced data processing and sharing capacities and visa control mechanisms.<sup>31</sup> Moreover, the bureaucratisation of the modern state, with its concentration on proper and orderly processes and results, has fostered an immigration control ethos within government departments seeking to deliver an immigration programme that achieves clearly quantified targets.<sup>32</sup>

The 'primacy of the bureaucracy' has been extenuated in Europe through the Schengen framework,<sup>33</sup> which has led to diminished parliamentary and judicial scrutiny of refugee and immigration policies in favour of inter-ministerial agreements that codified key *non-entrée* policies.<sup>34</sup> Since the Schengen framework emerged in 1985, the use of visa requirements and carrier sanctions (required by article 26 of the Schengen Agreement) has increased significantly. Today, the EU has a common list of over 120 countries whose nationals are subject to a visa requirement for entry into EU countries, including many refugee-producing countries such as Afghanistan, Iraq, Somalia and the Sudan.<sup>35</sup>

The same trend toward inter-governmental policy development is also apparent among other destination states, for example the activities of the Inter-Governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia (IGC). The IGC has played host to officials sharing ideas on the development of *non-entrée* policies – a process that occurs with little transparency and beyond domestic scrutiny. Rather than break down borders, internationalisation in this context has had the opposite effect of strengthening the autonomy of governments by establishing an immigration control arena 'shielded from the pluralistic domestic arena', including different sections of the bureaucracy, Parliament, and the courts.<sup>36</sup>

Visa requirements and carrier sanctions allow governments to control the numbers of asylum seekers arriving in the state. They place asylum seekers within the paradigm of irregular migration as part of an 'official drive to rein in, to control, to constrain, to render orderly and hence manageable' their arrival.<sup>37</sup> Armed with new and sophisticated means of border control and a control ethos to match, immigration officials have insisted on instigating and maintaining a form of 'remote control' over the entry of asylum seekers.<sup>38</sup> By employing visa requirements to 'export the border'<sup>39</sup> states pre-empt arrival and access to national asylum procedures by 'shifting the locus of control further afield'.<sup>40</sup> These measures have been given added energy by multilateral anti-trafficking initiatives requiring states to apply carrier sanctions.<sup>41</sup>

From this discussion it becomes clear that *non-entrée* policies in many instances are designed to circumvent access to asylum procedures in destination states. This is profoundly threatening to the rights of refugees in light of the essential contribution administrative, statutory and judicial mechanisms make to the operation of a fair and effective asylum process. The remaining sections of this chapter present a case for bringing pre-entry measures within the fold of international legal obligation and the rule of law, while also highlighting the practical challenges faced in ensuring the effective implementation of international obligations at the exported border.

#### 4. Recognising the application of key protection obligations at the exported border

The *non-refoulement* obligation is the core international obligation at issue at the exported border. The *non-refoulement* obligation requires that states ensure that individuals are not expelled or returned to territories in which they face (or are at risk of removal to) persecution on account of their race, religion, nationality, political opinion or membership of a particular social group, or torture or cruel, inhuman or degrading treatment or punishment.<sup>42</sup> The following discussion examines the relevance of the *non-refoulement* obligation in the context of pre-entry measures.

Implicit in the following discussion is the view that a good faith reading of the Refugee Convention and cognate rights instruments requires that states take positive steps to ensure the effective application of their protection obligations. The notion that states are under no obligation to take positive steps to exempt asylum seekers from general immigration controls,<sup>43</sup> and are thus free to fence off their territory so that no foreigner, refugee or not, can set foot on it,<sup>44</sup> contradicts the central purpose of protection, which is to act as an exception to the immigration control norm.

##### 4.1 *Recognising the extraterritorial reach of the non-refoulement obligation in article 33 of the Refugee Convention*

An underlying justification for targeting *non-entrée* measures at asylum seekers is that the *non-refoulement* obligation does not apply to such measures because they are enforced against refugees abroad. This rationale has the support of the traditional position in the scholarship that the *non-refoulement* obligation does not apply to refugees who are outside

the physical territory of the state.<sup>45</sup> This view also has the support of the US Supreme Court in *Sale*, which held that the *non-refoulement* obligation did not apply to Haitian refugees interdicted on the high seas.<sup>46</sup>

The preferable position, as expressed by the UNHCR<sup>47</sup> (and supported by modern commentators),<sup>48</sup> is that the *non-refoulement* obligation prevents states from reaching beyond their borders to return a refugee, directly or indirectly, to a place where he or she has a well-founded fear of persecution. Compelling arguments are put forward to support the extraterritorial reach of the *non-refoulement* obligation based on an interpretation of the Refugee Convention that accords with ‘the object and purpose appearing in the preamble and the operative text, and by reference to the history of the negotiation of the Convention’.<sup>49</sup>

Beginning with the ordinary meaning of ‘*refouler*’, the English translations of ‘*refouler*’ include to ‘repulse’, ‘repel’ and ‘drive back’ – indicating that the term is not limited to expulsion from within the territory of a contracting state.<sup>50</sup> A contextual reading of article 33 also supports its extraterritorial reach given that surrounding Convention obligations explicitly require a territorial nexus between the refugee and the country of refuge.<sup>51</sup> The drafting history of the Convention confirms this reading.<sup>52</sup>

Most importantly, the extraterritorial reach of the *non-refoulement* obligation in the Refugee Convention is consistent with the Convention’s humanitarian object and purpose. Domestic courts have stressed the importance of adopting an evolving and humanitarian interpretation of the Refugee Convention.<sup>53</sup> The overarching aim must be to ensure the continued effectiveness of the Refugee Convention in achieving its humanitarian object and purpose, as expressed in the preamble, of assuring to refugees ‘the widest possible exercise’ of fundamental rights and freedoms.<sup>54</sup>

Recognition of the extraterritorial operation of the *non-refoulement* obligation ensures its continued relevance in the context of novel and sophisticated tools of immigration control that we have begun to examine in this chapter. The Convention must be able to effectively perform its task by preventing states operating beyond their borders to force refugees back to a place of persecution.<sup>55</sup> In light of the current trend toward pre-entry measures and other *non-entrée* practices, recognition of the extraterritorial reach of the *non-refoulement* obligation is essential to safeguard refugees’ access to fair and effective in-country asylum procedures.<sup>56</sup>

The wider human rights context of the Refugee Convention – discussed further below in the context of the scope of the *non-refoulement* obligation under general international rights instruments – also supports the extraterritorial application of the *non-refoulement* obligation. The

Refugee Convention's preamble places it in the context of international instruments designed to protect the equal enjoyment by every person of fundamental human rights.<sup>57</sup> This calls for an interpretation of the Refugee Convention that takes account of the evolving understanding of the extraterritorial application of human rights instruments.

#### 4.2 *The extraterritorial reach of the non-refoulement obligation under international and regional human rights treaties*

An extraterritorial application of the *non-refoulement* obligation is also demanded where it is found in general international rights treaties.<sup>58</sup> In order to ensure the effective implementation of the ICCPR, the UN Human Rights Committee has recognised that the ICCPR imposes obligations upon states to respect and ensure Covenant rights to anyone 'within the power or effective control of that State Party, even if not situated within the territory of the State Party'.<sup>59</sup> The extraterritorial applicability of the ICCPR was confirmed by the International Court of Justice (ICJ).<sup>60</sup> The Committee against Torture has similarly expressed the view that the *non-refoulement* obligation found in article 3 of the Convention against Torture (CAT) applies outside the territory of the state to persons under the 'effective control' of the state party.<sup>61</sup>

It follows that the *non-refoulement* obligation in the CAT and the implied *non-refoulement* obligation found in the ICCPR are engaged where a person falls within the power or effective control of a state. This is confirmed by the fact that the Human Rights Committee expressly mentions refugees and asylum seekers when defining the extra-territorial application of the ICCPR.<sup>62</sup> Given the similar nature of the *non-refoulement* obligations and the object and purpose of human rights treaties on the one hand, and the Refugee Convention on the other, it also follows that the *non-refoulement* obligation found in the Refugee Convention is similarly concomitant with the exercise of extraterritorial authority and control.<sup>63</sup> Similar reasoning should be applied to the implied *non-refoulement* obligation in the ECHR, which adopts the same concept of 'jurisdiction' found in public international law.<sup>64</sup>

#### 4.3 *Applying the non-refoulement obligation to immigration controls outside the territory of the state*

It is evident from this discussion that the application of the *non-refoulement* obligation to immigration controls outside the territory of

the state will depend on whether a person subject to those controls falls within the effective control or authority of the state responsible for those controls. In order to determine whether this is the case, the guiding principles arguably should be the notions of 'effectiveness' and 'competence' that underpin the extraterritorial scope of human rights treaties.

The notion of 'effectiveness' is implicit in the Human Rights Committee's general comment on the extraterritorial reach of ICCPR rights. The Committee expressly bases the extraterritorial reach of the ICCPR upon article 2,<sup>65</sup> which imposes a duty to respect and ensure the rights found in the ICCPR.<sup>66</sup> Article 2 requires states to refrain from conduct that would breach ICCPR rights *and* to engage in positive conduct in order to ensure the effective and practical enjoyment of ICCPR rights.<sup>67</sup> Acknowledging the first component of article 2, the Human Rights Committee expresses the view that allowing a state to commit violations on the territory of another state that it could not perpetrate on its own territory would be unconscionable.<sup>68</sup> By relying on article 2, the Committee's position also demands that states should take positive steps to ensure the effective enjoyment of rights to individuals outside their territory where it is within their power to offer protection.

This reasoning is supported by the ICJ's discussion of the extraterritorial application of the ICCPR. The ICJ observes that the ICCPR's object and purpose and drafting history supported the Human Rights Committee's view that the treaty applies to persons outside the state who are within the jurisdiction of the state.<sup>69</sup> Implicit in the ICJ's discussion of the drafting history is that individuals should not be prevented from asserting ICCPR rights against a state where those rights fall within that state's competence.<sup>70</sup>

It follows that a state's obligation to protect will engage where it possesses the power and competence to ensure to an individual the practical and effective enjoyment of a particular right. A state should therefore take steps to ensure that its external immigration controls do not result in the *refoulement* of an individual where this is within its power and competence. Where the state has the power to ensure that its immigration officials or agents acting abroad do not commit acts of *refoulement*, it should do so. The very existence and implementation of externalised border controls provides evidence of that capacity.

This approach is at odds with the view that derives 'effective control' from the nexus between the immigration official posted abroad and the location in which a person seeks protection.<sup>71</sup> By focusing on the

destination state's sovereign control over that locality, this view ignores the same state's obvious power to change their own domestic laws and policies that direct the official's conduct. The immigration official's authority to issue a visa or entry clearance is clearly within the jurisdiction of the destination state in the same way that the issue of a passport by the Uruguayan consulate in Germany is within the jurisdiction of Uruguay.<sup>72</sup> Thus, generally the *non-refoulement* obligation should apply whether an immigration official is stationed at a consulate or embassy, posted to a port of embarkation, acting at a point in transit or intercepting boats on the high seas.

#### 4.4 *The applicability of the non-refoulement obligation to immigration controls within the country of origin*

An exception is where the asylum seeker confronts the exported border within their own state. Increasing use of the exported border makes it more likely that asylum seekers will confront a foreign border before ever leaving their country of origin. In those circumstances, governments may seek to deny that asylum seekers are entitled to protection under the Refugee Convention as they are not outside their country of nationality, and therefore do not satisfy the 'alienage' requirement of the refugee definition in article 1A(2).<sup>73</sup>

While in accordance with the text of the Convention, this approach is at odds with the true rationale of the alienage requirement. The alienage requirement is not a means of limiting a state's obligations under the Refugee Convention to the situation where a refugee is within the territory of the destination country; rather, it signifies the capacity of the international community to offer protection to refugees outside their country of origin. This understanding is in keeping with the fact that territorial sovereignty historically was the premise for the state's right to grant asylum, not a reason to deny obligations. As observed by Hathaway, the alienage requirement recognises the intersection between the 'ought' and the 'can' of international refugee protection: the international community *should* offer protection to refugees outside the borders of their country of nationality because it *can*.<sup>74</sup> Thus, the alienage requirement represents a duty and capacity to protect, rather than an excuse to erect barriers to protection.

Nevertheless, in the face of the express wording of the Refugee Convention, Hathaway argues that this shortfall in protection is best remedied by recourse to the right of emigration found in article 12(2) of



the ICCPR.<sup>75</sup> The right of emigration, or *ius emigrandi* as it was traditionally known, is the other side of the asylum coin – allowing asylum seekers to leave their country in search of protection. In accordance with the right of emigration, destination states are under an obligation not to prevent asylum seekers leaving their country of nationality. The right to leave any country, including one's own, may only be subject to restrictions necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.<sup>76</sup>

Where the restrictive measure is not in conformity with these permissible limitations on the right to leave, then it will be in breach of article 12(2).<sup>77</sup> It is unlikely that the control of illegal immigration is in conformity with these permissible limitations.<sup>78</sup> In support of these observations, the UN Human Rights Committee has expressed its concern that asylum laws and procedures that impose carrier sanctions and other pre-frontier arrangements may affect the right of a person to leave a country, including his or her own, in violation of article 12(2).<sup>79</sup>

In addition, other rights can be employed to restrain the use of immigration control measures designed to prevent a certain group from seeking asylum. In particular, asylum seekers within their country of origin who are subject to immigration controls that are targeted at their race, ethnicity or nationality also have recourse to the prohibition against non-discrimination found in article 26 of the ICCPR. Article 26 guarantees to all persons 'equal and effective protection against discrimination on any ground such as race, culture, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' In support of this analysis, the UK House of Lords held that the use of immigration officials posted at Prague airport to prevent the travel of Roma asylum seekers to the UK breached article 26 of the ICCPR and the racial non-discrimination prohibitions found in the Race Relations Act 1976 (UK).<sup>80</sup>

## 5. Outsourcing of the immigration control function to private carriers

Assuming that states are under an obligation to ensure their external immigration controls do not result in *refoulement*, shifting the locus and function of immigration control places significant barriers in front of asylum seekers wanting to enforce this obligation. Before considering this issue in Section 6, it is first necessary to highlight the role of private carriers. As Guiraudon has identified, 'denationalization' of migration

control not only embraces extraterritoriality, but also the use of private carriers to perform traditional state functions.<sup>81</sup> Carrier sanctions, by stipulating that sea, air or land carriers must not permit a person without valid travel documents to travel to the destination state, effectively enable a state to control immigration into its territory without establishing a physical presence in the states of embarkation.<sup>82</sup>

### 5.1 *State responsibility for a carrier's enforcement of visa requirements*

The strategic use of private enterprises to perform key governmental functions outside the borders of the state is not unique to the asylum context. 'Privatization ... has gone global.'<sup>83</sup> International law has struggled to keep pace with this trend. The International Law Commission has taken decades to codify the rules on state responsibility governing, *inter alia*, the devolution of state functions to 'parastatal' entities.<sup>84</sup> However, it is now clear from article 5 of the articles on the Responsibility of States for Internationally Wrongful Acts that international law recognises that the 'conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law ...'<sup>85</sup>

In the present context, a key issue is whether destination states are responsible for the actions of private carriers charged with administering their visa requirements. The International Law Commission's commentary on the articles on the Responsibility of States for Internationally Wrongful Acts expressly provides that article 5 extends to the situation where 'private or state-owned airlines may have delegated to them certain powers in relation to immigration control ...'<sup>86</sup> The justification for attributing to the destination state the conduct of private carriers is the fact that the law of the destination state has conferred on the carrier the exercise of an element of governmental authority.<sup>87</sup> As there is no need under article 5 to demonstrate that the carrier's conduct was in fact carried out under the control of the state, state responsibility attaches to the carrier's conduct irrespective of the level of independent discretion or power to act enjoyed by the carrier.<sup>88</sup>

Consistent with this position, scholars have reasoned that the *non-refoulement* obligation applies 'to circumstances in which organs of other states, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc.) or other persons act on behalf

of a Contracting State or in exercise of the governmental activity of that State'.<sup>89</sup> An act of *refoulement* undertaken by a private carrier will therefore engage the responsibility of the relevant state.<sup>90</sup> This is in keeping with jurisprudence on article 2 of the ICCPR, which clarifies that a state bears responsibility for violations of rights committed by its agents in the territory of another state.<sup>91</sup>

### 5.2 *The role and responsibility of carriers*

There is much sense in holding states solely accountable for the abuses of human rights that flow from their extraterritorial immigration controls. States create visa controls; they should therefore be responsible for preventing any abuses of human rights that flow from their enforcement. Any talk of assigning accountability to other entities or agencies, it might be argued, merely detracts from what is a failure of state protection, creating a 'diversion for States to avoid their own responsibilities'.<sup>92</sup>

Pursuing this line of argument, the enforcement of visa controls should be one case where corporations are not called upon to replace governments in their legitimate and primary responsibility for the protection of human rights. This point of view accords with the typical NGO position on carrier sanctions, namely that '[a]irline employees should not be expected to act as an immigration police force, making decisions which put people's lives in danger; that is the duty of governments'.<sup>93</sup> It also reflects the position of civil aviation staff, who object to being the state's frontline against unwanted asylum seekers.<sup>94</sup>

Moreover, the view that states alone should bear responsibility for ensuring that immigration controls do not impact adversely on asylum seekers also fits with the orthodox vision of international human rights law, namely that it 'generally binds only states because it is principally designed to protect individuals from the excesses of state power'.<sup>95</sup> As a result, 'where infringements are caused by abuse of private power, it is still the state that will be held vicariously liable at international law, if any legal entity is to be held liable at all'.<sup>96</sup> In accordance with the orthodox position, transnational corporations do not have direct responsibilities under international human rights instruments.<sup>97</sup>

Granted that states bear responsibility for human rights violations flowing from immigration controls, the issue remains whether carriers should be involved in ensuring that human rights breaches do not occur. As a pragmatic matter, this may be unavoidable. Carriers occupy a unique position with respect to asylum seekers, often being the only

means of escape or rescue for asylum seekers stranded within their country of origin or floundering in an unseaworthy boat. While a private institution, the carrier role is a conduit for the enjoyment of a number of public international law rights. Thus, it may be necessary to involve carriers to ensure the effectiveness of any extraterritorial protection safeguards.

The special position of private carriers has been at least implicitly recognised by states through EXCOM (the Executive Committee of the High Commissioner's Programme). In the context of interception measures generally, EXCOM has expressed the view that 'State authorities *and agents acting on behalf of the intercepting State* should take, consistent with their obligations under international law, all appropriate steps in the implementation of interception measures ...'<sup>98</sup> Specifically, EXCOM has called on both states *and* carriers to be alert to the human rights implications of the visa enforcement function.<sup>99</sup>

While perhaps stopping short of imposing a direct protection responsibility on carriers, these developments are in keeping with a growing expectation that transnational corporations will take steps to ensure the protection of human rights within their spheres of activity and influence.<sup>100</sup> Transnational corporations are increasingly expected 'to promote, secure the fulfilment of, respect, ensure respect of and protect human rights', including 'the rights recognized by ... international refugee law ...'<sup>101</sup> In accordance with the general principles of the UN Global Compact, businesses are called upon to 'make sure their own corporations are not complicit in human rights abuses'.<sup>102</sup> Thus, while states bear responsibility for their immigration controls, there is also an expectation that private carriers will be alive to the impact of immigration controls on the human rights of their passengers.

## 6. The practicality of external 'safeguards'

So far this chapter has proposed that states should ensure that immigration controls operating at the exported border accord with their international protection obligations, particularly the *non-refoulement* obligation. Moreover, as the vehicle for seeking protection, carriers should be sensitive to protection issues. That said, the current framework of externalised and devolved immigration controls places major obstacles in the face of asylum seekers wanting to enforce the obligations of destination states. This is evident from the following discussion of current safeguards implemented or mooted at the exported border.

### 6.1 *The inadequacy of current protection safeguards at the exported border*

The protection safeguards used or proposed to date in the immigration control context are underdeveloped and underutilised. The principal safeguard (where any at all) is the exculpatory provision that exempts carriers from fines where a carrier has reason to believe that a passenger without proper documentation is a refugee.<sup>103</sup> The idea of an exculpatory provision is that states should not sanction carriers that have 'knowingly brought into the State a person who does not possess a valid entry document but who has a plausible claim for refugee status or otherwise needs international protection'.<sup>104</sup>

In conjunction with exculpatory provisions, proposals have called for greater training of official and private border staff in protection matters. EXCOM requires that '[a]ll persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR'.<sup>105</sup>

In the EU context, ECRE has called for a portion of the expanding EU External Borders Fund (€1.82 billion) to be employed to help member states incorporate 'protection-sensitive' measures into the regulation of the EU's external borders.<sup>106</sup> As part of this, ECRE calls for training of staff involved in border control activities 'on the refugee and human rights implications of preventing access to the territory', and raising the awareness of carriers on protection issues.<sup>107</sup> There is already a precedent in the high level of training provided by states to carrier personnel in relation to the recognition of fraudulent travel documents.<sup>108</sup>

While these initiatives are a welcome move in the right direction, arguably it is not enough to rely solely on exculpatory provisions and the goodwill of private carrier personnel. The practice of waiving a carrier sanction for a passenger later recognised as a refugee may waive the carrier's financial burden, but this is little comfort to refugees who fail to reach the destination state because their papers are not in order or because they are relying on forgeries that are not sufficiently expert to evade detection by the carrier.<sup>109</sup>

Over reliance on private carrier personnel also raises the issue of the respective roles of immigration officials and carrier personnel. Further moves toward the use of exculpatory provisions and the training of

carrier personnel only reinforces a fundamental problem underlying carrier sanctions, namely that they oblige carriers to take on greater discretionary immigration powers.<sup>110</sup> As Nicholson has remarked, 'the act of making the imposition of a fine dependent or even discretionary on the basis of the outcome of an asylum application has the effect of making carriers assess the validity of a potential asylum application as well as the validity of that person's papers'.<sup>111</sup>

While some level of involvement of engagement between carriers and asylum seekers would appear inevitable given the unique position of carriers, carrier personnel will likely remain resistant to protection issues. While training would potentially boost the 'protection sensitivity' of carrier personnel, they are still likely to be comparatively inexperienced in protection matters and not necessarily motivated by humanitarian considerations.<sup>112</sup> Carrier personnel 'are not and will never become competent immigration officers nor, even, refugee sympathisers'.<sup>113</sup> Carriers have a powerful economic incentive to avoid the risk of sanctions on bringing an asylum seeker to the destination state where they are determined not to have protection needs.<sup>114</sup> Problems may further arise from the fact that carrier personnel often act as agents for other carriers.

## 6.2 *Greater state and international agency involvement*

These criticisms point to the need for greater state and international agency involvement in the protection afforded to asylum seekers at the exported border. Yet it is difficult to foresee how this can occur within the current carrier sanction regime, which even with exculpatory provisions in place inevitably shifts the protection obligations of states onto private carriers. Greater state and agency involvement would require new levels of co-ordination between private carriers, destination and transit states, and international agencies, including the creation of independent mechanisms for the monitoring and supervision of official and carrier personnel.<sup>115</sup> The growing role of FRONTEX in coordinating the immigration operations of EU member states would also need to be taken into account in the European theatre.<sup>116</sup>

In a recent move, the European Commission established a 'Forum on Carrier Liability', made up of carriers, officials and humanitarian groups, to consider ways to safeguard protection.<sup>117</sup> Yet while recognising that protection is an issue, dialogue is premised on the continuation of the carrier sanction regime.<sup>118</sup> On the other hand, a more positive

development is the recent initiative between states, international agencies and sea carriers, involving the rescue of asylum seekers at sea.<sup>119</sup> The initiative aims at ensuring that asylum seekers rescued at sea without proper documentation are disembarked at a place of protection.<sup>120</sup> These efforts perhaps provide a precedent for further co-ordinated efforts to make explicit the roles and responsibilities of destination states, transit states and carriers with respect to the protection of asylum seekers at the exported border.

UNHCR is the logical agency to lead this dialogue given its supervisory role under article 35(1) of the Refugee Convention.<sup>121</sup> While the UNHCR's '10 Point-Plan of Action' highlights the need for greater co-operation and co-ordination between 'key actors' in addressing protection within mixed migratory flows,<sup>122</sup> it not clear whether the safeguards contained in it apply to the exported and privatised border. Notably, it is silent on the question of the role of states vis-à-vis private carriers, referring to the 'key actors' only as the 'affected states, governmental bodies, regional and international organisations with relevant mandates' and NGOs.<sup>123</sup>

### 6.3 *Preserving access to internal protection safeguards*

In-country safeguards in destination states should consist of a range of legislative, judicial and administrative mechanisms that fosters the substantive and procedural justice necessary for a fair and effective asylum process. Extraterritorial safeguards should focus on ensuring access to such eligibility procedures.<sup>124</sup> This should involve, at the very least, the waiver of carrier sanctions and the referral of asylum claimants to the central authority in the country of destination.

Officers or agents at the port of embarkation should be obligated to permit putative refugees and other persons in need of protection access to the asylum application procedures at the port of entry (the current position in most states is that asylum claims can be made only at the port of entry – thereby denying any duty on officers at ports of embarkation).<sup>125</sup> Meanwhile, eligibility determination should take place onshore by the central authority charged with this function. This suggestion is in keeping with other observers who have proposed that the assessments of asylum claims should take place at the port of entry (rather than the port of embarkation),<sup>126</sup> and that there should be a right of appeal to an independent tribunal or court in the destination state.<sup>127</sup>

At the same time, the difficulty of ensuring that officers or agents of the destination state exercise their discretion in an appropriate manner must be acknowledged. As it stands, the UNHCR's 10-Point Plan is unclear on the extraterritorial operation of protection safeguards at ports of embarkation. Its 'protection-sensitive entry systems' simply apply 'in-country, at borders and at sea'.<sup>128</sup> Consequently, the 10-Point Plan does not explicitly address the issue of whether protection safeguards are practicable in the context of immigration controls administered outside the territory of destination states and with private carrier assistance. The Plan largely falls back on the notion of improved training and 'clear instructions' in protection matters for border guards and immigration officials without any indication whether carrier personnel are included in this reference.<sup>129</sup>

The 10-Point Plan also does not address the question of what accountability and enforceability mechanisms are available at the exported border to provide a framework for the exercise of discretion by fully trained and instructed officers. Awareness raising and information sharing are welcome. However, they must also be accompanied by mechanisms to ensure such training and instructions are in fact exercised in a manner beneficial to asylum seekers, including ensuring them access to fair and effective asylum procedures.

## 7. Rights and sovereignty

### 7.1 *Circumventing international obligations by avoiding internal constraints*

This chapter has observed that visa requirements and carrier sanctions seek to 'denationalise' asylum control by denying persons access to in-country asylum procedures. The effect of such *non-entrée* policies is to circumvent the state's protection obligations by avoiding internal constraints on government authority. *Non-entrée* measures extend the reach of arbitrary government power beyond the state, effectively dividing and circumventing the effective operation of external and internal restraints on the state's traditional unfettered authority over immigration control.

By re-instigating a form of unfettered government 'remote' control over the asylum process – which prevents access to in-country asylum procedures and the associated legislative and judicial safeguards that remove government control – states seek to re-instigate their traditionally unfettered right of immigration control through the circumvention



of the domestic enforceability of protection obligations. European confederation adds another layer between the person seeking protection and the in-country asylum procedures essential to their enjoyment of protection in the territory of EU member states.

### 7.2 *Disingenuous appeals to external sovereignty*

This analysis makes appeals to the state's traditional sovereign right to control immigration as a justification for externalising asylum appear disingenuous. Appeals to sovereignty in this context have an empirical and legal element. Empirically, it is claimed that the state's '[e]ffective control of admission requires general restrictions on access'.<sup>130</sup> Underlying this is the belief that today's asylum seekers are largely the new 'economic' refugees from the developing world who pursue asylum as a path of irregular migration and are difficult to deport when it is determined that they are not entitled to protection.<sup>131</sup>

These empirical observations conveniently slip into a normative legal justification for the application of remote control policies to asylum seekers: better to prevent arrival of asylum seekers, than deal with the social and economic costs of processing and deportation. In the UK, for instance, the initial extension of visa controls to refugee-producing countries and the imposition of liability on carriers in 1987 were clearly 'complementary measures intended to stem the flow of applicants for asylum'.<sup>132</sup> The then UK Home Secretary, Douglas Hurd, made it clear in his second reading speech to the bill introducing carrier sanctions in 1987 that it was 'intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned'.<sup>133</sup>

Yet even if the above empirical claims are correct, they do not sustain the normative conclusion urged by some states and commentators, namely, that the Refugee Convention and cognate rights instruments are not applicable where it would mean sacrificing the state's right to control immigration. An example of this approach is found in Hailbronner's argument that the *non-refoulement* obligation found in article 33 of the Refugee Convention is not applicable in the context of entry and transport regulations because it would have far-reaching consequences for immigration control.<sup>134</sup> In this respect, Hailbronner's analysis evidences a worrying trend to conflate refugee flows with 'large migration movements', providing states with a justification for the unfettered restriction of the 'uncontrolled access of foreigners to their territory'.<sup>135</sup>

The response of the EU's new migration agency, FRONTEX, to the arrival without proper documentation of Iraqi asylum seekers is typical of this trend.<sup>136</sup> Between January and September 2007, 18.4 per cent of asylum applications in Europe were lodged by Iraqis. The fact that there was a 90 per cent success rate in Sweden and a 74 per cent success rate in Austria suggests that most of the protection claims were genuine. Yet rather than ensure Iraqi asylum seekers continued to enjoy access to protection, FRONTEX's response was to view the 'illegal' immigration of Iraqi nationals as a potential threat to member states of the EU.<sup>137</sup> Consequently, FRONTEX engaged in a risk analysis of the 'illegal' arrival of Iraqis, focusing solely on 'threats of human trafficking, forgery of travel documents and possible abuse of asylum seeking procedure'.<sup>138</sup>

### 7.3 *A higher right?*

Ultimately, this type of practice rests on the belief that the sovereign right to exclude 'irregular' migrants is a 'higher' right than the right to protection from *refoulement*.<sup>139</sup> The core *non-refoulement* obligation is read down according to an 'overriding' state prerogative to control immigration. This reasoning fails to grapple with the fact that states accepted an intrusion into their traditional sovereign right to control immigration when they agreed to the binding provisions of the Refugee Convention and cognate rights instruments. While there is no obligation on a contracting state under the Refugee Convention or cognate rights instruments not to introduce or continue a system of immigration control,<sup>140</sup> the limits that the state may pursue in its own interests at the expense of the rights of refugees are clearly set out in the Convention.<sup>141</sup> None of them refers to 'general immigration control'.

Second, this reasoning effectively entertains the circumvention of national protection safeguards. A number of the core protection obligations in these instruments, especially the *non-refoulement* obligation, depend for their effectiveness upon a tapestry of national institutions, laws and principles. *Non-entrée* policies unravel this. There is no point in states endorsing rights that refugees cannot access or enjoy.

Thus, while the UNHCR recognises that states have a right to control irregular immigration into their territory,<sup>142</sup> immigration controls should not interfere with the ability of persons at risk of persecution 'to gain access to safety and obtain asylum in other countries'.<sup>143</sup> As stated by the European Commission on Human Rights, immigration controls must be exercised in accordance with a state's human rights obligations.<sup>144</sup>

Refugee status, by its very nature, is a “trump card” that can be played in order to avoid the usual rules of migration control.<sup>145</sup> It ‘is a needs-based recognition of the inherent implausibility of managed migration in circumstances where the need to flee is both ethically and pragmatically more powerful than the usual rules of immigration control’.<sup>146</sup> *Non-entrée* policies fail to acknowledge this fundamental premise of international protection.

The ‘migration management’ paradigm currently gripping inter-governmental dialogue does not alter this fact:

[M]igration management must take due account of international refugee protection obligations, including the importance of identifying people in need of international protection and determining appropriate solutions for them ... [M]easures taken to curb irregular migration, whether by land, sea, or air must not prevent persons who are seeking international protection from gaining access to the territory and asylum procedure of countries where protection can be found.<sup>147</sup>

In particular, immigration control must cater for the *non-refoulement* obligation. It is not enough to argue, as Hailbronner does, that applying the *non-refoulement* obligation ‘to facilitate access to the territory and to grant exemptions from generally applicable entry and transport regulations means a completely new dimension’.<sup>148</sup> It is inadequate to discount the application of the *non-refoulement* obligation to immigration controls on this basis. The need to extend the *non-refoulement* obligation to these measures is new because the sophisticated and targeted application of them to asylum seekers is new.<sup>149</sup> To permit states to erect a novel and complex exported border, then disown its adverse consequences for refugees, is inconsistent with the obligation to ensure the Refugee Convention, as well as other international rights treaties, operate effectively in today’s legal and social environment.<sup>150</sup> The exported border must bend to a state’s international protection obligations, not vice versa.

While states may not be under an obligation to seek out refugees, it does not follow that states are not under an obligation to remove barriers to refugees accessing protection. The *non-refoulement* obligation does not simply impose negative restrictions on a state. The *non-refoulement* obligation also requires states to take positive steps to prevent *refoulement*, for example the obligation to ensure that refugee determination processes are fair and effective. The positive obligations imposed by the *non-refoulement* principle should also extend to the removal of barriers to accessing those procedures if the *non-refoulement* obligation is to have any relevance in an age of ubiquitous immigration controls.

## 8. Conclusion

In conclusion, visa requirements and carrier sanctions legislation must be re-examined in light of the general obligation to interpret treaties in good faith and the Refugee Convention's object of assuring refugees the widest possible exercise of their rights.<sup>151</sup> It follows that 'a State wishing to obstruct the movement of those who seek asylum are thus limited by specific rules of international law and by the State's obligation to fulfil its international commitments in good faith; and that in pursuing the "legitimate purpose" of immigration control a State must act within the law'.<sup>152</sup> Practical protection safeguards should be investigated in the context of visa requirements and carrier sanctions that aim at 'renationalizing' the international refugee protection regime by facilitating the access of asylum seekers to fair and effective eligibility procedures.

## Notes

1. Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping' (2000) 38 *Journal of Common Market Studies* 251, 252 (using this term to describe the European trend in immigration control generally).
2. Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000) 191.
3. Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000) 108–9.
4. EXCOM, *Note on International Protection*, Report by the High Commissioner, [30], UN Doc A/AC.96/1038, 29 June 2007.
5. To borrow the language of immigration officials, see, e.g., Mr Dodd, Director, Border and Visa Policy, UK Home Office, Oral Evidence, House of Lords, European Union Committee, Home Affairs, FRONTEX Inquiry, 17 October 2007, 4. See generally, Alison Kesby, 'The Shifting and Multiple Border and International Law' (2007) 27 *Oxford Journal of Legal Studies* 101.
6. Dodd, above n 5, 4.
7. See, e.g., Kay Hailbronner, 'The Right to Asylum and the Future of Asylum Procedures in the European Community' (1990) 2 *International Journal of Refugee Law* 341, 354.
8. Kesby, above n 5, 102.
9. *Ibid.* 113.
10. *Ibid.*
11. *Ibid.*
12. EU Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), [2006] OJ L 205, 1, art. 2.2.
13. Council Regulation (EC) No 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the

- External Borders of the Member States of the European Union, [2004] OJ L 349, 1, art. 1.4.
14. European Council on Refugees and Exiles (ECRE), *Defending Refugees' Access to Protection in Europe* (2007) 9.
  15. Ibid.
  16. Ibid. 13.
  17. Dodd, above n 5, 4.
  18. As Kesby observes (see above n 5, 102) this is a border with a 'clear geographical threshold between interior and exterior. It denotes the physical territory over which a state's sovereignty is exercised, in particular, the sovereign right to admit and exclude'.
  19. Aristide Zolberg, 'The Archeology of "Remote Control"' in Andreas Fahrmeir, Olivier Faron, and Patrick Weil (eds.), *Migration Control in the North Atlantic World* (2003), cited in Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29 *West European Politics* 329, 334 and Guiraudon, above n 1, 258–9.
  20. See the argument in support of the imposition of international obligations at the exported border in Section 4.1.
  21. As noted previously, this term is coined by Guiraudon (see above n 1, 252) in the wider context of immigration regulation in Europe.
  22. James Hathaway, *The Rights of Refugees Under International Law* (2005) 291.
  23. EXCOM, *Note on International Protection*, UN GAOR, 48th session, UN Doc A/AC.96/882 (1997); Erika Feller, 'Carrier Sanctions and International Law' (1989) 1 *International Journal of Refugee Law* 48, 56.
  24. Feller, above n 23, 50.
  25. *R (On the Application of European Roma Rights Centre) v. Immigration Officer, Prague Airport* [2005] 2 AC 1, [28] (Lord Bingham); *R v. Secretary of State for the Home Department, ex parte Hoverspeed* [1999] INLR 591, 594–5 (Simon Brown LJ).
  26. Harvey, above n 2, 155.
  27. David Martin, 'Introduction: The New Asylum Seekers' in David Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 1, 4.
  28. Guiraudon, above n 1, 253–4.
  29. Ibid. 258–9.
  30. Matthew Gibney, 'The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy' in Susan Kneebone (ed.), *The Refugees Convention 50 Years On* (2003) 33. Cf. Christian Joppke, 'Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain' (1997) 30 *Comparative Political Studies* 259, 261.
  31. Andrew Shacknové, 'From Asylum to Containment' (1993) 5 *International Journal of Refugee Law* 516, 521.
  32. Ibid. 522.
  33. Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen Agreement, 14 June 1985, and Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the

- Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, [2000] OJ C 239, 19.
34. Shacknove, above n 31, 522. See generally, Lavenex, above n 19, 331.
  35. Council Regulation (EC) No 539/2001 (15 March 2001), Listing the Third Countries Whose Nationals Must be in Possession of Visas When Crossing the External Borders and Those Whose Nationals are Exempt from that Requirement (replacing Council Regulation (EC) No. 574/1999, 12 March 1999), [2001] OJ L 81, 1, art. 4.
  36. Lavenex, above n 19, 331; Guiraudon, above n 1, 252.
  37. James Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 *Journal of Refugee Studies* 349, 354.
  38. Zolberg, above n 19.
  39. See, eg, Dodd, above n 5, 4.
  40. Lavenex, above n 19, 334.
  41. James Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 *Virginia Journal of International Law* 1, 31 (noting that 'States Parties to the Trafficking Protocol agree specifically to require transportation companies to carry out document screenings of persons to be transported, enforced by carrier sanctions, and more generally to take steps to "strengthen cooperation among border control agencies"').
  42. Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (Refugee Convention), art. 33, read together with the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art. 3 (CAT); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) (ICCPR). The ICCPR contains an implied prohibition against the expulsion or return of a person to a territory where they face a real risk of a violation of their rights, such as a threat to the right to life (art. 6) or torture or other cruel, inhuman, or degrading treatment or punishment (art. 7): UN Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, [9], UN Doc HRI/GEN/1/Rev.7 (1992); UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant*, [12], UN Doc CCPR/C/21/Rev.1/Add.13 (2004); *ARJ v. Australia: Communication No 692/1996*, [6.8]-[6.9], UN Doc CCPR/C/60/D/692/1996 (1997); *R (on the application of Ullah) v. Special Adjudicator* [2004] All ER 153, [21]-[24] (Lord Bingham). There is also an implied obligation not to deport a person where the person concerned, if deported, faces a real risk of being subject to treatment contrary to art. 3 of the ECHR: *NA v. UK*, application no. 25904/07, Judgment, Strasbourg, 17 July 2008, [109].
  43. Hailbronner, above n 7, 354.
  44. Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37* (1997) commentary on art. 33(1), [3]; Nehemiah Robinson, *Convention relating to the Status of Refugees, Its History, Contents and Interpretation, A Commentary* (1953) 163.

45. Grahl-Madsen, above n 44, commentary on art. 33(1) [3]; Robinson, above n 44, 163.
46. *Sale v. Haitian Centers Council, Inc*, 509 US 155, 163, 179–87 (1993).
47. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007. A view shared by the Inter-American Commission on Human Rights: *Haitian Interdiction*, Case 10.675, Report No 51/96 [United States], IACHR 1996 Annual Report 550 (March 13, 1997), 183–8, [157].
48. Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, 2007) 244–53; Hathaway, above n 22, 163, 335–42; Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 87, [67].
49. *Applicant A v. Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 231 (Brennan CJ).
50. UNHCR, above n 47, 13.
51. Arts. 2, 4 and 27 require the presence of a refugee within the asylum country. Arts. 18, 26 and 32 stipulate that the refugee must be ‘lawfully in’ the territory of the contracting states. Arts. 15, 17(1), 19, 21, 23, 24 and 28 cover refugees ‘lawfully staying’ in the asylum state.
52. UNHCR, above n 47, 14–15.
53. *R v. Asfaw* [2008] UKHL 31, [54]–[55] (Lord Craighead).
54. *Ibid.*
55. Hathaway, above n 22, 163, 337.
56. EXCOM, Standing Committee, 18th mtg, *Interception of Asylum-seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CRP.17 (2000) reproduced at 12 (2000) *International Journal of Refugee Law* 488, 494.
57. *Applicant A v. Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 231 (Brennan CJ).
58. Lauterpacht and Bethlehem, above n 48, 110–11; UNHCR, above n 47, 16–18.
59. UN Committee on Human Rights, *General Comment No 31: The Nature of the General Obligation Imposed on States Parties to the Covenant*, 192 [10], UN Doc HRI/GEN/1/Rev 7 (2004). See generally, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005) 43–4.
60. Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen List No 131, 9 July 2004, [109]–[111].
61. *Conclusions and recommendations of the Committee against Torture Concerning the Second Report of the United States of America*, [15], UN Doc CAT/C/USA/CO/2 (2006).
62. UN Committee on Human Rights, above n 59, 192 [10] (‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies

- to those within the power or effective control of the forces of a State Party acting outside its territory ...').
63. UNHCR, above n 47, 19; Lauterpacht and Bethlehem, above n 48, [67]. See generally, Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?' (1997) 46 *International and Comparative Law Quarterly* 586, 614.
  64. *Issa v. Turkey*, application no 31821/96, Judgment, Strasbourg, 16 November 2004, [67].
  65. UN Committee on Human Rights, above n 59, 192 [10].
  66. *Lopez Burgos v. Uruguay*, [12.3], UN Doc CCPR/C/13/D/52/1979 (1981); *Celiberti de Casariego v. Uruguay*, [10.3], UN Doc CCPR/C/13/D/56/1979 (1981).
  67. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003) 96; Nowak, above n 59, 38.
  68. *Lopez Burgos v. Uruguay*, above n 66 [12.3]; *Celiberti de Casariego v. Uruguay*, above n 66, [10.3]. See also, in the context of the ECHR, *Issa v. Turkey*, above n 64 [71].
  69. Advisory Opinion of the International Court of Justice, above n 60 [109].
  70. *Ibid.*
  71. *R (On the Application of European Roma Rights Centre) v. Immigration Officer, Prague Airport* [2005] 2 AC 1, [21] (Lord Bingham).
  72. *Pereira Montero v. Uruguay*, [5], UN Doc CCPR/C/18/D/106/1981 (1983).
  73. See, eg, *R (On the Application of European Roma Rights Centre) v. Immigration Officer, Prague Airport*, above n 71, [18] (Lord Bingham).
  74. Hathaway, above n 22, 353.
  75. Hathaway, above n 22, 312–13.
  76. ICCPR, art. 12(3).
  77. UN Human Rights Committee, *General Comment No 27: Freedom of Movement* (1999), 173 [10], UN Doc HRI/GEN/1/Rev 7 (2004).
  78. Nowak, above n 59, 279.
  79. UN Human Rights Committee, *Concluding Observations on Austria*, UN Doc CCPR/C/79/Add.103 (1998).
  80. *R (On the Application of European Roma Rights Centre) v Immigration Officer, Prague Airport*, above n 71, [98]–[104] (Baroness Hale of Richmond).
  81. Guiraudon, above n 1, 252. See also, Virginie Guiraudon and Gallya Lahav, 'The State Sovereignty Debate Revisited: The Case of Migration Control' (2000) 33 *Comparative Political Studies* 163.
  82. Hathaway, above n 22, 311.
  83. Laura Dickinson, 'Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law' (2005) 47 *William & Mary Law Review* 135, 235.
  84. International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001*, noted by UN GA Res 56/83, UN GAOR, 56th session, Supp No 10, UN Doc A/56/10 (2001).
  85. *Ibid.*
  86. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) *Yearbook of the International Law Commission*, vol II, part 2, 43.



87. Ibid.
88. Ibid.
89. Lauterpacht and Bethlehem, above n 48, 109.
90. Ibid. 109–10.
91. *Delia Saldias de Lopez v. Uruguay*, Communication No 52/1979, [12.3], UN Doc CCPR/C/OP/1/88/1984. ('Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it'). See also, in the context of the ECHR: *Cyprus v. Turkey* (1976) 4 Eur Comm HR 482.
92. *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 10, UN Doc E/CN.4/2005/91 (2005).
93. Amnesty International, *No Flights to Safety: Carrier Sanctions, Airline Employees and the Rights of Refugees*, AI Index ACT 34/021/1997, 2.
94. International Transport Worker's Federation, *Resolution Concerning the Improper Involvement of Aviation Employees by their Employers in Violations of the Rights of Refugees and Asylum Seekers* (1992).
95. David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 935.
96. Ibid.
97. *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, [35]–[41], UN Doc A/HRC/4/035 (2007).
98. EXCOM Conclusion No. 97 (LIV) – 2003, [(a)(ii)] (emphasis added).
99. Ibid.
100. *Report of the United Nations High Commissioner on Human Rights*, above n 92, 10; *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, [45]–[62], UN Doc A/HRC/4/03 (2007).
101. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, [1], [23], UN Doc E/CN.4/2003/12/Rev.2 (2003).
102. *UN Global Compact*, principle 2; OHCHR, 'The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity: OHCHR Briefing Paper', in *Embedding Human Rights in Business Practice*, joint publication of the United Nations Global Compact and the Office of the United Nations High Commissioner for Human Rights (2004) 19; International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 125–36.
103. Antonio Cruz, 'Carrier Sanctions in Four European Community States: Incompatibilities between International Civil Aviation and Human Rights Obligations' (1991) 4 *Journal of Refugee Studies* 63, 68.
104. UNHCR, *UNHCR Position: Visa Requirements and Carrier Sanctions* (1995) 2.
105. EXCOM Conclusion No 97 (LIV) – 2003, [(a)(viii)] (emphasis added).

106. ECRE, above n 14, 10.
107. Ibid.
108. Cruz, above n 103, 65; Nicholson, above n 63, 592.
109. Nicholson, above n 63, 600.
110. Ibid. 606.
111. Ibid. 601.
112. Feller, above n 23, 57.
113. Cruz, above n 103, 79.
114. Ibid. 66–8, 79; Nicholson, above n 63, 601.
115. ECRE, above n 14, 10.
116. Ibid. 13.
117. European Commission, Communication on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents, (2003) 323. Cited in ECRE, above n 14, 29.
118. ECRE, above n 14, 29.
119. UNHCR, *Proposals for an Executive Committee Conclusion on Rescue at Sea*, 16 January 2007, 2.
120. Ibid.
121. The UNHCR's international protection mandate includes '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto,' Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(V), Annex, s. 8, UN Doc A/1775 (1950). UNHCR's supervisory responsibility under its Statute is mirrored in art. 35 of the Refugee Convention and art. II of the 1967 Protocol relating to the Status of Refugees.
122. UNHCR, *Refugee Protection and Mixed Migration: A 10 Point Plan of Action* (2007) 2.
123. Ibid.
124. EXCOM Conclusion No. 74 (XLV) – 1994 (i) ('Reiterates the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection are identified and granted such protection'); EXCOM Conclusion No. 82 (XLVIII) – 1997 (d) (ii) ('Reiterates, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects: access, consistent with the 1951 Convention and the 1967 Protocol, of asylum seekers to fair and effective procedures for determining status and protection needs.').
125. Nicholson, above n 63, 597.
126. Anne Ruff, 'The Immigration (Carriers' Liability) Act 1987: its Implications for Refugees and Airlines' (1989) 1 *International Journal of Refugee Law* 481, 492.
127. Ibid. 490.
128. UNHCR, above n 122, 3.
129. Ibid.
130. Kay Hailbronner, 'Comments on the Right to Leave, Return and Remain' in Vera Gowlland-Debbas (ed.), *The Problem of Refugees in The Light of Contemporary International Law Issues* (1996) 109, 115.

131. Hailbronner, above n 7, 342–3.
132. *R (On the Application of European Roma Rights Centre) v. Immigration Officer, Prague Airport*, above n 71, [28] (Lord Bingham); *R v. Secretary of State for the Home Department, Ex parte Hoverspeed* [1999] INLR 591, 594–5 (Simon-Brown LJ).
133. Cited at *R (On the Application of European Roma Rights Centre) v. Immigration Officer, Prague Airport*, above n 71, [28] (Lord Bingham).
134. Hailbronner, above n 130, 115; Hailbronner, above n 7, 354.
135. Hailbronner, above n 130, 115.
136. ECRE, above n 14, 12.
137. FRONTEX, *Public Bulletin*, September 2007, Reference Number: 9566/14.09 2007, 15, cited in ECRE, above n 14, 12.
138. ECRE, above n 14, 4.
139. See, eg, Catherine Dauvergne, ‘The Dilemma of Rights Discourses for Refugees’ (2000) 23 *University of New South Wales Law Journal* 56, 57.
140. UNHCR, above n 104, 1.
141. Refugee Convention, art. 1F (exclusion of entitlement to protection of persons who have committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime, or are guilty of acts contrary to the purposes and principles of the United Nations), art. 32 (expulsion of persons on grounds of national security or public order in accordance with due process of law), art. 33(2) (persons whom there are reasonable grounds for regarding as a danger to the security of the country, or convicted of serious crime constituting a danger to the community of the asylum country).
142. UNHCR, above n 104, 1.
143. *Ibid.*
144. *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471, [59].
145. Hathaway, above n 22, 354.
146. *Ibid.*
147. UNHCR, *Observations on the occasion of the First Euro-Mediterranean Ministerial Meeting on Migration*, Algarve, 18–19 November 2007, 14 November 2007, 1.
148. Hailbronner, above n 130, 115.
149. Cruz, above n 103, 64.
150. *R v. Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 500 (Laws LJ); *Applicant A v. Minister for Immigration and Multicultural Affairs* (1996) 190 CLR 225, 292 (Kirby J).
151. Feller, above n 23, 66, 59.
152. UNHCR, Amicus Curiae Brief in *R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport* (UNHCR intervening). Cited in (2005) 17 *International Journal of Refugee Law* 427, 436.

## Concluding remarks

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Not being a legal scholar, I will focus my concluding remarks on the more philosophical and historical aspects of this fascinating and important debate: issues that are especially prominent in the two opening chapters of this collection, but which illuminate and ground all of the chapters in this book.

The debate is triggered by the political developments of the last few decades, vaguely labelled 'globalisation'. Of greatest relevance for this volume are the aspects of globalisation that concern the relationship of international law on the one hand to public law within each state on the other – and, particularly, how that relationship is instantiated and informed by the development of international sanctions regimes. Traditionally, these two areas of the law, public international and domestic public, have been separate; the latter determined by domestic legislative processes and the former by the treaty-making powers of (the more powerful) sovereign states.

The word 'separate' here means, in the first instance, that there was little overlap between these bodies of law, that is, few cases that substantively involved either elements of both national and international law or legal rules from two distinct national jurisdictions. These bodies of law governed in separate spheres, and their main contact consisted in a shared recognition of this division of labour along with deference by each to the rules and judgments promulgated by the others. The word 'separate' does not mean that these bodies of law did not affect one another's content. Competing states are neither indifferent to what goes on within other states, nor unaware of the great causal importance of domestic law. They seek to influence the domestic legal organisation of other societies, and the means they use to do so are constrained and conditioned by the content and effectiveness of international law. It is against this background that Kant asserted: 'The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.'<sup>1</sup>

Two main components of globalisation are relevant to our topic. First, globalisation involves a dramatic shift of legislative authority and legal regulation from the national level to supranational levels. Even when this shift leaves national authorities formally in charge, it hollows out their authority and discretion: they get to formulate and to adopt the rules that World Trade Organization (WTO) membership requires them to formulate and to adopt, for example. Or, in the case of the United Nations Security Council sanctions, which form the background to the chapters in this volume, while the implementation of sanctions is carried out by national authorities, the original decision to enact sanctions, along with the terms and scope of those sanctions, are determined by the Security Council. Second, the jurisdictional spheres are much less separate from one another; it is quite common today for legal cases substantively to engage both national and international law or to involve rules from more than one national jurisdiction. Again, taking the example of sanctions, we see the content of sanctions being expressed across and by reference to other jurisdictional fora: between international law (Security Council resolutions) and domestic law (implementing legislation); as well as between the differing implementation strategies of nation states.

Both of these trends promote coherence and harmony of law. The first does so by replacing a diversity of national rules with one coextensive supranational set of rules. The second trend promotes coherence and harmony more indirectly: by strengthening the incentives legislatures and treaty-making bodies have to adjust their outputs to one another, and by throwing up cases that require courts to develop harmonising interpretations of laws from diverse sources.

These trends may result, as Sampford predicts in this volume, in a second, global Enlightenment that will civilise the institutions of global capitalism; or they may not. Whether they do depends of course, as Sampford writes, on human action. More precisely, it depends on two factors. One of these has to do with how thinly or thickly coherence and harmony will be understood by legislators, treaty-makers and jurists. On a thin understanding of coherence, it means no more than avoidance of inconsistency: specific conduct by some specific agent should not be expressly permitted by one body of law and expressly prohibited by another, for example. On a thicker understanding, it also means that the fundamental moral principles that plausibly rationalise one body of law should not stand in tension with the fundamental principles that plausibly rationalise another body of law. Sampford has such a thicker sense of coherence in mind when he points out the incoherence between

the democratic values enshrined in the domestic law of Western societies and the international rule of recognition that accepts those who hold effective power in any state as entitled to borrow money in the name of its people. Sampford rightly emphasises that this international rule of recognition greatly undermines the prospects for democracy in many countries by allowing putschists to entrench themselves in power and by strengthening their incentives to attempt a coup in the first place. In addition, he rightly diagnoses an incoherence of sorts between the commitment to democracy that is implicit in the laws and constitutions of the US, for example, and the unconcern for democracy that is manifested in US endorsement of, and compliance with, the international rule that recognises rulers on the basis of effective power alone as entitled to act on behalf of the population they manage to subdue.

But such a philosophical incoherence of values is not, and need not give rise to, a legal inconsistency that might undermine the clarity and predictability of laws and legal decisions. Such inconsistency is likely to result when legislatures and courts reason relativistically: attaching great importance to compatriots' and no importance to foreigners' opportunities for democratic participation. In this case, different courts might reach conflicting decisions about the same case by interpreting the same rules differently or by reaching different conclusions about which rules or courts are authoritative. But such relativism and legal inconsistency is avoided when a philosophical incoherence manifests itself through *rigid* discriminations on the model that Martin Hollis has memorably dubbed 'liberalism for liberals, cannibalism for the cannibals'. On this model, all laws and courts worldwide distinguish between, say, the individualistic and the traditional/communal peoples, attaching importance to the democratic participation opportunities of the former and no importance to those of the latter.

The importance of the first factor for the future evolution of law can then be put in this way. Will the conduct of legislators, treaty-makers and jurists manifest a quest for a thicker, more universalistic coherence of the kind Sampford envisions: a quest to develop a more substantive shared conception of how political arrangements should be shaped in the light of common human needs, rights or interests? Or will such conduct continue to be informed, as Rawls favours, by a thinner, more pluralistic coherence that would be compatible with a variety of diverse substantive conceptions of how national societies may be organised politically in light of their diverse cultures, histories and levels of economic development?

While the first factor concerns how much mutual adjustment there will be, the second factor concerns the direction such adjustment will take. When existing legal arrangements are felt to be uncomfortably incoherent in some thicker sense, there will always be diverse ways of effecting relieving adjustments. For example, international law can be adjusted to be as supportive of democratic forms of national governance as the domestic laws of Western societies are now; or the domestic laws of Western societies can be adjusted to be less stringent and less demanding about democratic governance even at home. Sampford's chapter gives reasons to *prefer* a quest for thicker coherence that leads to adjustments of the former kind: to a second, global Enlightenment; and I fully share his preference. But it gives us no reasons at all, I think, for believing that this is actually going to happen.

Lacking the confidence for 50-year predictions, let me just offer a few cautions. What sustains the international rule of recognition Sampford discusses? Is this rule just a hold-over from more Westphalian times? Is it kept in place by the interests banks have in lending to developing countries, which require good repayment prospects even when such countries undergo an unlawful change of government? There is, I think, a far more important sustaining cause in play. Leaving aside matters of transition, an international rule that would allow governments to decline repayment of funds borrowed by their undemocratic predecessors would be only a minor irritant for banks, which would then find it too risky to make loans to domestically illegitimate rulers. By contrast, a rule that would render null and void resource purchases from domestically illegitimate rulers could be catastrophic for today's affluent consumer societies that use up a greatly disproportionate share of the world's natural resources and whose lifestyle depends on continuing to secure such resources for themselves in an increasingly competitive international environment. In this environment, a rule that ties the validity of resource sales to the legitimacy of the selling government is not likely to be very effective, as illegitimate rulers would typically be able to sell their countries' resources anyway. The rule would, however, greatly disadvantage any governments that observe it by not allowing the importation of such tainted resources. Just imagine the developed Western states importing crude oil only from domestically legitimate governments that make decisions about such sales and about the disposition of sales proceeds in democratically accountable ways! To be sure, in such a world more oil exporting countries would be ruled by legitimate democratic governments. Still, with oil markets as tight as they are, the economic

losses (relative to the status quo) that this rule would impose upon Western corporations and consumers would be huge.<sup>2</sup> These prospective losses constitute a weighty counterforce to the predicted adjustment process toward a second, global Enlightenment.

Given this weighty counterforce, there is reason to expect that wealthy established democracies would put up strong resistance against any reform efforts towards making international rules more democracy-promoting by denying domestically illegitimate rulers the customary resource, borrowing, treaty and arms privileges. The same holds for any efforts to interpret existing international law so that domestically illegitimate rulers are unable to confer property rights in natural resources of the country they rule.<sup>3</sup> To be sure, such efforts may succeed nonetheless, and it would be good for the poor and oppressed majority of the human population if they did. But they would have to overcome an enduring constellation of interests among powerful corporations and governments that seem unbothered by the incoherence between national laws that require democracy in the most affluent countries and international laws that subvert democracy in many other countries.

My second caution is even more pessimistic. Far from ushering in a new Enlightenment, calls for coherence between national and international law may actually do the opposite, namely, roll back moral advances at the national level. There have already been a number of cases in which morally based domestic constraints on acceptable commodities have been diluted or abolished for the sake of complying with WTO non-discrimination standards.<sup>4</sup> In other cases, morally based constraints have been eroded by the need to survive in a highly open and competitive trading environment. In the latter cases, the incoherence is practical: by legislating decent domestic labour standards, a country may be courting economic disaster in the context of a global market system that does not include minimal global labour standards and does not permit the imposition of tariffs upon imports produced under inferior labour standards abroad. To preclude such disaster, the country is effectively forced to maintain its unjustly low labour standards: or even to revise such standards downward, thereby participating in and accelerating the so-called race to the bottom.<sup>5</sup>

These examples show how the quest for coherence is a two-edged sword; capable of moralising one body of law but also capable of demoralising another. Appreciating the second possibility, one may look more favourably upon the lack of thick coherence in John Rawls's work *The Law of Peoples*, which seeks to make central to international law a liberal



idea of toleration among peoples rather than the idea of individual autonomy that informs liberal thinking about social justice within the advanced Western democracies.

Peter Danchin in this volume is sympathetic to this Rawlsian approach and sympathetic also to Rawls's attempt to present his Law of Peoples as thickly coherent with his domestic theory of justice. This attempt is based on an asserted analogy between the relationship of free and equal peoples to an international Society of Peoples on the one hand, and the relationship of citizens to the basic structure of their liberal society on the other hand. The thick coherence between Rawls's two theories is supposed to consist in both of them manifesting a specific intermediate position between a fully comprehensive moral conception and a pluralistic extreme of maximal diversity. In the domestic case, the just liberal society will permit a wide range of 'reasonable' conceptions of the good, but not as extensive a range as could coexist in one society. Rawls does not deem it unjust for his liberal society to outlaw polygamy, pederasty, incest, necrophilia, sex with animals, eating of the dead and human sacrifices even when these practices are fully consented to by all involved. In the international case, the ideal Society of Peoples will permit a range of liberal and 'decent' forms of domestic organisation, but exclude countries (such as 'benevolent absolutisms') that domestically fail to respect Rawls's minimal set of human rights. Appealing to this analogy, Rawls claims that his Society of Peoples ought to 'express liberalism's own principle of toleration for other reasonable ways of ordering society' by accommodating the opponents of liberalism:<sup>6</sup> thereby living up to Robert Frost's humorous definition of a liberal as someone too broadminded to take his own side in a quarrel.

The failure of Rawls's effort to establish coherence through this analogy becomes apparent when we follow Danchin's invitation and substitute 'European states' for P and 'non-European peoples' for Q in the long passage Danchin quotes from Waldron.<sup>7</sup> Though Danchin claims that 'the argument is the same', in fact it is not. An individual person P can hope to work out how well a domestic system of rights and correlative duties would fit the needs and situation of another person Q, as Waldron suggests. To be sure, Q is likely to have a variety of different needs; but P can be guided by Q's own weighting and assessment of Q's needs, and so the project Waldron describes seems viable. Yet, it is not similarly possible for European states to work out how well an international system of peoples' rights and correlative duties would fit the needs and situation of non-European peoples. The reason is that the label 'non-European

peoples' covers a wide diversity of different peoples, cultures, groups and individuals whose needs, values and situations are very different from one another. There is certainly no agreement among non-European peoples about what their relevant needs are and how these needs should be weighted and aggregated. As Sampford's example of the recognition of effective rulers (regardless of their domestic illegitimacy) illustrates, international rules can do a wonderful job in accommodating the needs of non-European juntas and dictators even while they do very poorly in accommodating the needs of non-European individuals with an aspiration to participate in the governing of their country. In this context, the instruction that European states should seek to shape international rules so as to accommodate the needs and situation of non-European peoples is meaningless. By tolerantly inviting 'decent hierarchical societies' into his Society of Peoples, Rawls is offending the aspirations of those who are working, within such societies, for the rights of women and religious minorities and also offending the aspirations of many in societies that fall below his threshold of decency. Most importantly, Rawls is not genuinely accommodating the needs and values of others, but imposing his own liberal values to legislate what ways of ordering societies are to be counted as reasonable and unreasonable. As he writes, his Law of Peoples is developed within a *liberal* conception of justice as the proposed aspiration of a *liberal* foreign policy<sup>8</sup> – in disanalogy to his domestic theory, which seeks to accommodate a plurality of comprehensive conceptions of the good without being tied to any one of them in particular.<sup>9</sup>

What remains, then, is the incoherence Sampford diagnoses. As a theorist of domestic justice, Rawls holds that the interests of individual human beings are all that matters.<sup>10</sup> As a moralist of international relations, he assigns exclusive importance to the interest of peoples to be well-ordered (i.e., to have a liberal or decent internal organisation)<sup>11</sup> and 'to preserve the equality and independence of their own society'.<sup>12</sup> The interests of individuals are not considered at all, as is manifest in individuals not being represented in the international original position.<sup>13</sup> The effects of this decision are most visible in Rawls's late addition of a duty of assistance requiring 'provisions for ensuring that *in all reasonable liberal (and decent) societies* people's basic needs are met'.<sup>14</sup> The duty of assistance is a duty of peoples owed to other peoples whose well-orderedness is threatened by poverty. There is no duty to help meet the basic needs of persons in benevolent absolutisms or outlaw regimes where such assistance does not contribute to the attainment or maintenance of a liberal or decent regime. Nor, of course, is there a duty to

structure the rules of the world economy with an eye to avoiding severe poverty of individuals. These conclusions fit well with the economic interests and current practice of the affluent democracies, which accept the persistence of massive poverty abroad – about 30 per cent of all human deaths are from poverty-related causes – even while the opportunity costs of its eradication are small.<sup>15</sup> But they do not fit with Western liberal values, of course, nor do they fit with the values of any decent hierarchical societies whose values Rawls's Law of Peoples supposedly seeks to accommodate. The morally most important effect of the liberal modesty Rawls proposes and Danchin admires is thus to unburden the affluent liberal democracies of any responsibility with respect to the persistence of massive and severe human poverty whose elimination would *not* render any society well-ordered nor preserve any society in a well-ordered condition. In the name of toleration and pluralism, we are refusing to apply our own basic principles of economic justice to the rules governing the world economy (such as the rules of the WTO), thereby avoidably condemning billions of human beings to life-threatening poverty, despite the fact that there is no actual non-liberal opposition against reforming global economic rules so as to make them more poverty-avoiding.<sup>16</sup>

Now Danchin is right, of course, to view with suspicion the fact that 'Western states and the international institutions they control have advanced various anti-pluralist arguments that seek to give greater moral substance to the criteria for recognition as full, independent and equal subjects of international society'.<sup>17</sup> Powerful Western states will of course use appeals to morality, and specifically condemnations of supposed violations of liberal rights in other countries, in order to justify self-interested interference in those countries. But this commonplace abuse of morality by our governments is no reason to favour liberal modesty, because the same powerful Western states will also use appeals to pluralism and toleration to serve their own interests at the expense of foreigners. For example, they have justified arms deliveries to the likes of Suharto, Mobutu, Saddam Hussein, Pinochet, Sani Abacha, Mubarak and many other deeply unpopular and oppressive rulers (often put in place by those same Western states) on the ground that it would be immorally paternalistic – even neo-imperialistic – to discriminate among foreign governments on the basis of whether they happen to rule in conformity with our liberal values. Abuse of morality is rampant in politics, especially in foreign policy. It should be fought, of course, by calling our politicians to account, demanding arguments, highlighting inconsistencies and

supporting a meaningful discourse about what a just foreign policy would look like. Pre-empting such abuse once and for all through a pluralistic framework of international law is simply impossible.

This brings me to my final point, one that Danchin, following Waldron, understands well. There is no way that international law could be neutral with regard to the diverse values and interests of people and peoples. While some versions of international law – those that require all states to be organised on one preferred model, and those that impose no constraints on what states may do within their borders (no matter how brutal or dangerous to peace that may be) – will be universally rejected, there will be other, substantially distinct versions favoured by some states or cultures and rejected by others. There is much disagreement, not all of it unreasonable, about minimal international standards for protecting the interests of women and of religious and other minorities, for instance, as well as about the just design of global economic institutions; about whether and to what extent democratic values should be given global application (so that, for example, the will of a majority of human beings is given weight in settling certain parameters of global institutional design); and about what sorts of interference in the internal affairs of other countries ought to be legally mandatory or permissible, for international agencies or other states, under different sets of specific conditions. On these and other central questions concerning the content of international law we cannot just agree to disagree with each country left to follow the version of international law it prefers, because there would be no international law at all.

This is why – engaging with the practical and legal intricacies at the crux of these theoretical questions – the contributions in this book are so important. The authors who take up the issue of a global public law and the extension of domestic accountability norms to the international sphere – Simon Chesterman, Hitoshi Nasu, Devika Hovell, and Linda Botterill and Anne McNaughton – can be seen as attempting to come to terms with the question whether and to what extent democratic values should be given global application. Similarly, Erika de Wet's conclusion that the Security Council ought to comply with substantive human rights norms and Jeremy Farrall's proposals for reform of sanctions expert bodies constitute attempts to determine the just design of global institutions. Finally, those chapters that trace the burden of responsibility for sanctions abuse to lawyers (Vivien Holmes), corporations (Justine Nolan) and domestic regulatory bodies (Richard Mulgan, and Linda Botterill and Anne McNaughton) are concerned with elucidating to

what extent these entities are contributing to the furtherance of minimal international rights standards and the just design of global economic institutions.

I am not saying that the need to settle on *one* version of international law in the face of such value conflict (represented by the range of opinions expressed by the authors in this volume) is a reason for liberals to favour a version of international law that seeks to recreate all non-Western societies on the model of France, the UK, or the US. International law should, of course, provide space for some non-liberal ways of ordering a society. But in thinking about how we should want this space to be defined, and about what standards global economic arrangements ought to meet, liberals must not be so broad-minded as to put aside their own most fundamental moral commitments to the protection of women and minorities, to political participation and to economic sufficiency for all. We may well find reason to compromise our values in order to accommodate the values and concerns set forth by members of other cultures. But when engaging in this sort of cross-cultural dialogue we should certainly live up to our own values where they are unopposed and should judge in the light of these values how and to what extent we have reason to compromise them for the sake of accommodating others.

### Notes

1. Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' in Hans Reiss (ed.), *Kant's Political Writings* (1970) 47.
2. The existing 'resource privilege' and possibilities for removing it from domestically illegitimate governments are further discussed in ch 6 of my *World Poverty and Human Rights* (2nd edn, 2008). I agree with Sampford on the explanatory importance of the international practice of recognising rulers on the basis of effective power alone. This practice has pernicious effects not merely by enabling illegitimate rulers to entrench themselves in power by borrowing funds that the oppressed population will be compelled to repay, as Sampford stresses. It also enables such rulers to sell the natural resources of the population they manage to oppress and to spend the proceeds of such sales, to bind the country's present and future population through treaties in exchange for present benefits to the rulers and to use state revenues to import means of internal repression.
3. For a very interesting attempt in this direction, see Leif Wenar: 'Property Rights and the Resource Curse' (2008) 36(1) *Philosophy and Public Affairs* 1.
4. See, eg. *Shrimp Turtle case: United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body).
5. See Christian Barry and Sanjay Reddy, *International Trade and Labor Standards: A Proposal for Linkage* (2008).

6. John Rawls, 'The Law of Peoples' in Samuel Freeman (ed.), *Collected Papers* (1993) 529, 530. Cf John Rawls, *The Law of Peoples* (1999) 63.
7. 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* 27, 48–9.
8. Rawls, *The Law of Peoples*, above n 6, 9–10.
9. To be sure, Rawls is concerned to show that his Society of Peoples is 'also reasonable from a decent nonliberal point of view' and may thus become the object of an overlapping consensus among well-ordered peoples. But this concern presupposes his decision, from his own liberal point of view, about what nonliberal points of view are decent and hence worth showing concern for. In his domestic theory of justice, by contrast, Rawls does not present himself as deciding, on the basis of his own comprehensive conception of the good, which other conceptions of the good are worth accommodating through a political conception of justice that they, too, can endorse.
10. See especially, John Rawls, *A Theory of Justice* (2nd edn, 1999) 233–4.
11. Rawls, *The Law of Peoples*, above n 6, 33, 69.
12. *Ibid.* 41.
13. One might dispute this by reference to a supposed interest of individuals to be members of peoples that are well-ordered as well as equal and independent. But Rawls himself shuns this gimmicky move by frankly acknowledging that his international original position 'is fair to peoples and not to individual persons' (*ibid.* 17 fn 9).
14. *Ibid.* 38 (emphasis added). This eighth law of peoples was newly introduced in this text. The earlier essay version (see above n 6) listed only the preceding seven laws.
15. According to the latest World Bank figures 1.4 billion human beings are living in extreme poverty: below its new international poverty line (IPL) of \$1.25 per day (at 2005 purchasing power parities or PPPs) and 30 per cent below this level on average. (Shaohua Chen and Martin Ravallion, 'The Developing World is Poorer than We Thought, but no Less Successful in the Fight against Poverty' (World Bank Policy Research Working Paper WPS 4703, August 2008) 31, 36 [econ.worldbank.org](http://econ.worldbank.org) at 30 November 2008). Yet this entire shortfall is said to amount to only 0.33 per cent of global GDP (*ibid.* 23). Using a somewhat less extreme definition of poverty, some 2.6 billion people are reportedly living below \$2.00 per day (at 2005 PPPs) and nearly 40 per cent below this line on average (*ibid.* 31, 36). Even their entire shortfall still amounts to only 1.30 per cent of global GDP (*ibid.* 23).
16. For a fuller critique of Rawls's *The Law of Peoples*, see Thomas Pogge, 'Do Rawls's Two Theories of Justice Fit Together?' in Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (2006) 206.
17. Danchin, above n 7. 35.

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