

Leiden Journal of International Law

<http://journals.cambridge.org/LJL>

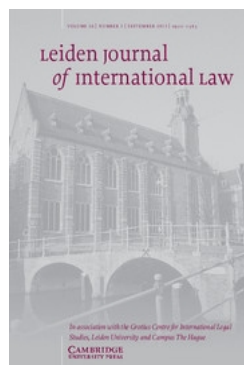
Additional services for *Leiden Journal of International Law*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making

DEVIKA HOVELL

Leiden Journal of International Law / Volume 26 / Issue 03 / September 2013, pp 579 - 597

DOI: 10.1017/S0922156513000253, Published online: 31 July 2013

Link to this article: http://journals.cambridge.org/abstract_S0922156513000253

How to cite this article:

DEVIKA HOVELL (2013). A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making. *Leiden Journal of International Law*, 26, pp 579-597 doi:10.1017/S0922156513000253

Request Permissions : [Click here](#)

A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making

DEVIKA HOVELL*

Abstract

This article proposes a different theoretical account of the role of domestic courts when engaged in judicial review of decision-making by international institutions. Many domestic courts in democratic societies operate in accordance with a ‘public-law model’ when adjudicating questions related to international decision-making, underwritten by respect for doctrines such as the rule of law and separation of powers. Drawing on a case study of domestic-court decisions in the Security Council sanctions context, this article seeks to demonstrate how the public law model’s focus on concepts of ‘bindingness’ and hierarchy between judicial and political organs can lead to distorted outcomes when applied to decision-making by international institutions. As an alternative, the author proposes a different theoretical account of the judicial role, described as the ‘dialogue model’, of courts when engaging in the review of Security Council decision-making. The idea is that domestic courts should confine themselves to tools of ‘interpretation’ and ‘declaration’ in their approach to international decision-making, so as to position their judgments in a more theoretically supportable way in the broader legal context.

Key words

Security Council; sanctions; domestic courts; due process; dialogue

I. INTRODUCTION

In the 1970s, Abram Chayes published an article in the *Harvard Law Review* on the ‘Role of the Judge in Public Law Litigation’.¹ In contrast to the traditional private law ‘dispute settlement’ conception of adjudication, Chayes chronicled an ‘emerging model of public law litigation’.² Under this public law model, the primary function of domestic courts was not the resolution of disputes between private parties, but rather an ‘expository’ function of interpreting and applying domestic regulation in accordance with the fundamental values of domestic society.³ In this article, I argue that, in recent decades, there has been a further ‘paradigm shift’ in the judicial function. While the public law model is now well established, the scope of judicial review under the public law model is increasingly expanding to include an

* Department of Law, London School of Economics and Political Science [D.C.Hovell@lse.ac.uk]. The author would like to thank Elizabeth Fisher, Gleider Hernández, Antonios Tzanakopoulos, and the anonymous referees for their immensely valuable contributions to the writing of this article.

1 A. Chayes, ‘The Role of the Judge in Public Law Litigation’, (1976) 89 *Harvard Law Review* 1281.

2 *Ibid.*, at 1284.

3 G. A. Spann, ‘Expository Justice’, (1983) 131 *University of Pennsylvania Law Review* 585, at 585. See also O. Fiss, ‘The Supreme Court, 1978 Term – Foreword: The Forms of Justice’, (1979) 93 *Harvard Law Review* 1.

international dimension. A growing number of cases involve domestic courts in the review (whether direct or indirect) of decision-making by international institutions. While the ‘public law model’ recognized that domestic courts have a legitimate and distinctive role in the implementation of domestic regulation, domestic courts are increasingly involved in decisions about the application of *global* regulation to individuals. The question is whether this shift justifies a further reconceptualization of the judicial function of domestic courts.

Of course, the task in chronicling these ‘paradigm shifts’ in the judicial function is not a purely descriptive one. Identification of the appropriate judicial function of domestic courts is related to the legitimacy of judicial action, and influences the scope of the powers and limitations recognized by domestic judges.⁴ If judges operate in accordance with the ‘public law model’ of adjudication when engaged in the review of international decision-making, the risk is that domestic courts will misconceive the scope of their legitimate role, with implications for the coherence and effectiveness of the broader system within which they operate. Nowhere is this more evident than in recent cases in which domestic (and regional) courts have engaged in review of Security Council decision-making.⁵ As one domestic judge himself described it, domestic courts have been invited in an increasing number of cases to operate ‘deep inside the realm of international law – indeed inside the very chamber of the United Nations Security Council itself.’⁶ It is not the domestic judge’s natural habitat, and the discomfort is shared by domestic judges and international decision-makers alike. On the one hand, domestic courts have forged a valuable role, and proved to be one of the most effective sources of rights protection for individuals impacted directly by Security Council decisions. A key example is the *Kadi* litigation, the first phase of which culminated in a decision by the European Court of Justice to invalidate the EC regulation giving effect to the relevant Security Council resolution on the ground that it violated fundamental human rights principles of the European Community legal order.⁷ On the other hand, reliance on a public law model of the judicial function has served to distort and fragment applicable international law,

4 See G. Hernández, *The International Court of Justice and the Judicial Function* (forthcoming) for a conceptualization of the judicial function of international courts, though, as the analysis here demonstrates, that is a qualitatively different exercise from the present study.

5 In my discussion of ‘domestic courts’ in this article, I include reference to the case law of the European courts and also the UN Human Rights Committee as these bodies have each adopted a traditional public-law account of their reviewing function in the Security Council context, casting themselves in the same role as domestic courts vis-à-vis the Security Council.

6 *R. (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, [2008] AC 332, para. 55.

7 The course of the *Kadi* litigation is well known. Mr Kadi, a Saudi Arabian resident, challenged an EU regulation implementing the 1267 sanctions regime under which his assets had been frozen by EU member states on grounds that it breached a number of his fundamental rights, including the right to a fair hearing, the right to respect for property, and the right to effective judicial review. In 2005, the Court of First Instance held that it was unable to review Security Council resolutions except to the extent that *jus cogens* norms had been violated, though it held ultimately that the relevant resolutions violated no *jus cogens* norms: Joined Cases T-306/01 and T-315/01, *Kadi v. Council and Commission*, [2005] ECR II-0000 (21 September 2005). This decision was overruled by the European Court of Justice, which determined that all EC regulations had to respect fundamental rights under the EC Treaty, regardless of their origin in Security Council resolutions: Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council of the European Union*, [2008] ECR I-0000 (3 September 2008). The European Court of Justice invalidated the relevant EU regulation on grounds it violated Mr Kadi’s rights of defence, right to an effective remedy, and right to effective judicial protection, and unjustifiably restricted the right to property, a decision that was followed subsequently by the General Court of the European Union:

and threaten the power and effectiveness of a global institution as significant as the Security Council. The decision of the European Court of Justice in *Kadi I*, while hailed as a triumph for human rights, opened up a dangerous hole in the counterterrorist sanctions net developed by the Security Council.

In sections 2, 3 and 4 of this article, I discuss the limitations of the public law model in the Security Council sanctions context. The issue stems from the foundations of the public-law model in concepts such as the rule of law and separation of powers, which encourages dependence by domestic courts on two central underlying tenets that prove problematic in the Security Council context: a criterion of *bindingness*, reducing a court's toolkit to existing binding law, and the use of *supremacy* as a means to determine whether judicial or political organs are authoritative in a particular context. This reduces pivotal questions of law and authority to binary choices: law enforcement or law creation, binding or non-binding principles, judicial or political supremacy, international or domestic law. Transferred to the Security Council setting, where the parameters of law and authority remain in question, such clear-line dichotomies are difficult to draw. Problems with the public law model in the Security Council context are explored through a detailed case study of domestic-court intervention surrounding the issue of due process protections in the Security Council sanctions regime. In this context, reliance on the criterion of bindingness has led domestic courts to treat the question of due process in sanctions decision-making as a quest for existing binding principles of law, distorting the development of a procedural framework adapted to the Security Council setting. In particular, domestic-court judgments have tended to (i) ignore the contextual nature of procedural fairness, (ii) demand the imposition of an inappropriate 'adjudicatory' framework in the sanctions setting, and (iii) determine the applicability of due-process principles based on an inapplicable civil/criminal dichotomy. Reliance on notions of supremacy have led domestic courts to take an 'all-or-nothing' approach to their capacity to review Security Council decision-making, under which courts have either denied the power to review the Council's exercise of discretion, or assumed an inflated role effectively subsuming the Council's primary responsibility for the protection of international peace and security. Both approaches have proved normatively and practically problematic.

The object of section 5 of this article is to propose a different theoretical account of the role of domestic courts in Security Council decision-making. The aim is to locate a middle ground between the dichotomies created by the public law model of the judicial function. I define this middle position as the 'dialogue model'. This proposal draws on a theoretical model that is gaining increasing support as a framework for decision-making by domestic courts about human rights.⁸ The dialogue

Case T-85/09 *Kadi v. European Commission*, [2010] EUECJ (30 September 2010) (General Court). The decision on appeal to the European Court of Justice in *Kadi II* had not been handed down at the time this article went to press.

8 See, e.g., T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act', [2005] *Public Law* 303; K. Roach, 'Dialogic Judicial Review and Its Critics', (2004) 23 *Supreme Court Law Review* (2d) 49; J. L. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?', (2006) 69 *Modern Law Review* 7; L. McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review', (2004) 32 *Federal Law Review*

model seeks to recalibrate the lopsided choices provided by the public law model of the judicial function, and introduce greater equilibrium into the relationship between domestic courts and the Security Council. In broad terms, the proposed reconceptualization of the judicial function recognizes *enhanced power* in domestic courts, in the sense that courts are not merely enforcers, but also play a recognized role as sources of law, and also *qualified authority*, in the sense that domestic courts are a persuasive but not determinative authority on the legal position. Specifically, I argue that domestic courts can seek either to interpret Security Council resolutions consistently with fundamental human rights principles, or to declare such resolutions inconsistent with human rights principles, though both ‘interpretive’ and ‘declaratory’ contributions are subject to response and indeed repudiation by the Security Council. The aim in proposing this different theoretical account is to encourage the development of a legal culture in which both Council and courts come to see themselves in a collaborative dialectic or ‘dialogue’ aimed at achieving symbiosis between international security and individual rights.

2. LIMITATIONS OF THE PUBLIC LAW MODEL IN THE SECURITY COUNCIL SETTING: THE DUAL IMPEDIMENTS OF BINDINGNESS AND SUPREMACY

In advocating a reconceptualization of the relationship between domestic courts and the Security Council, it is important to start with an understanding of the ‘public law model’ of the judicial function, as traditionally conceived. Of course, any attempt to synthesize the judicial practice of the world’s diverse legal traditions would need to occur at such a high level of abstraction as to be virtually meaningless. The following discussion is more narrowly focused, and stems from an analysis of the approach to judicial review by the more limited pool of courts that have engaged in review of Security Council decision-making to date. Most of the relevant jurisprudence derives from the legal systems of democratic countries, whose courts tend to share a number of central doctrines.

Domestic courts were originally conceived as an adjunct to a society in which the predominant social and economic arrangements were private, and where the primary function of courts was the resolution of disputes about the fair implications of individual interactions.⁹ With the growth in governmental regulation in the nineteenth and early twentieth centuries, domestic courts were called on increasingly to vindicate constitutional or statutory policies, and a new model of judicial action and the judicial role emerged, described by Abram Chayes as the ‘public law model’. In contrast to the traditional bipolar form of litigation recognized under the dispute resolution model, the scope of those potentially affected by adjudication under the

1; S. Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, (2001) 49 *AJIL* 707. Note that both Hiebert and Gardbaum would likely object to the use of ‘dialogue theory’ to characterize their analysis, though their articles also discuss the model of domestic-court engagement with which I seek to engage in this article.

9 L. Fuller, ‘The Forms and Limits of Adjudication’, (1978) 92 *Harvard Law Review* 353, 357; H. M. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958), 185–6.

public law model was far broader. The distinctive features of public law adjudication led to an overriding concern with interest representation,¹⁰ and a pervading focus on how to reconcile adjudication under the public law model with the majoritarian premises of democratic legal systems.¹¹ The legitimating aspects of the public law model, including structures for standing and justiciability, were developed based on a quest to accommodate the reality of judicial power with the theory of representative government.

Two broad doctrines have become central to confining the judiciary to its proper role under the public law model: the rule of law and the separation of powers.¹² Under the rule of law, according to Dicey's classical exposition, all governmental organs are subject to the ordinary law, and must not act outside it.¹³ The power of judicial review of governmental decision-making is accordingly concerned largely with checking that governmental decision-makers do not act outside the law. Yet, in exercising this power of review, the role of courts is conventionally circumscribed by recognition of a separation between 'judicial' and 'elective' power, which translates into a separation between the power of 'law enforcement' vested in courts and the power of 'law creation', generally vested in the democratic legislature.¹⁴ In simplified terms, the traditional public law model of the judicial function casts courts not as creators of new law, but as 'transmission belts' for the existing law, with their main task being to ensure governmental decision-makers stay within the boundaries set by the democratic branches of government.¹⁵ Even in the more 'creative' realm of the development of the common law, it is recognized that judges must develop the law within the established normative system, ensuring historical continuity with existing legal principles, and that this body of law can be overruled by legislative enactment.¹⁶

While this basic conception of the judicial function is evidently open to far more nuanced interpretation and indeed to critique,¹⁷ it serves as the clearest depiction through which to highlight the two central features of the judicial function that

- 10 R. B. Stewart, 'The Reformation of American Administrative Law', (1975) 88 *Harvard Law Review* 1667.
- 11 J. Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346; A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1993).
- 12 Spann, *supra* note 3, 632–47; A. Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', (2002) 116 *Harvard Law Review* 19, 26; D. Dyzenhaus, 'Formalism's Hollow Victory', [2002] *New Zealand Law Review* 525; M. Shapiro, 'The Success of Judicial Review and Democracy', in M. Shapiro and A. Stone Sweet (eds.), *On Law, Politics and Judicialization* (2000), 165–8, 176–82.
- 13 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, ed. E. C. S. Wade (1959), 193 and 202.
- 14 See, for example, C. Louis de Secondat baron de Montesquieu, *De l'esprit des lois* (1979); A. Hamilton, J. Madison, and J. Jay, *The Federalist: A Commentary on the Constitution of the United States* (1947), at 47, 48, and 51; M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967); E. Barendt, 'Separation of Powers and Constitutional Government', [1995] PL 599; Lord Bingham, 'The Rule of Law', [2007] CLJ 67.
- 15 See Stewart, *supra* note 10, at 1672. See also J. Laws, 'Law and democracy', [1995] *Public Law* 72.
- 16 R. Dworkin, *Law's Empire* (1986), 229; R. J. Traynor, 'The Limits of Judicial Creativity', (1978) 29 *Hastings Law Journal* 1025.
- 17 The conception of judicial review depicted is the classic positivist model favoured by scholars such as Wade: see H. W. R. Wade and C. F. Forsyth, *Administrative Law* (2004), 17. The model is open to critique, and is often contrasted with a 'rights-based' model of judicial review that recognizes an enlarged power of domestic courts decoupled from parliamentary intention: see, e.g., T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001); P. Craig, 'Competing Models of Judicial Review', [1999] *Public Law* 428; Dworkin, *supra* note 16.

create particular problems when applied to the review of international decision-making. These are (i) the notion of *bindingness* (restricting courts to the application of existing binding law), and (ii) the use of *supremacy* (as a description of the relationship between judicial and political organs). In the following two sections, I undertake a detailed case study of the impact of domestic court intervention in the Security Council sanctions context as a means of demonstrating in a more concrete fashion how conceptions of bindingness and supremacy play out when applied to the review of Security Council measures, and the problems they create.

3. THE LIMITATIONS OF 'BINDINGNESS' IN THE SECURITY COUNCIL SANCTIONS CONTEXT

Under the public law model, domestic courts are heavily reliant on a criterion of bindingness, which recognizes that a court's toolkit for the resolution of disputes is typically limited to existing binding law. As discussed, this is as a consequence of both the rule of the law and the separation of powers typically built into democratic legal systems, where law creation is recognized as the province of the representative political organs while courts are restricted to the enforcement of this law.

Applied to the Security Council sanctions setting, the criterion of 'bindingness' has proven an overly limiting concept for the determination of applicable principles. As is well known, the UN sanctions regime has been the subject of a raft of challenges in domestic courts, stemming predominantly from the perceived failure on the part of the Council to provide adequate procedural safeguards for individuals placed on sanctions blacklists. Faced with these challenges, domestic courts have responded with increasing fortitude, leading to a number of judgments in which courts have invalidated measures implementing Security Council sanctions on the basis of failure to accord to individuals a number of defined procedural safeguards. The problem is that these safeguards have been drawn by domestic courts from existing 'binding' principles of due process. Courts have tended to take one of two approaches in developing these principles: (i) a top-down approach, in which due-process principles have been drawn from international human rights law and applied directly to the Council,¹⁸ or (ii) a bottom-up approach, in which principles have been drawn from domestic or regional law and applied against the domestic legislative mechanism implementing the relevant Security Council decisions. In the latter case, this has included due-process standards derived from domestic and regional legal sources, including the European Convention on Human Rights,¹⁹ the Canadian Charter of

18 *Kadi v. Council of the European Union*, Judgment of the Court of First Instance, 21 September 2005, [231]; *Nada v. SECO*, 133 BGE II 450; (CH 2007) ILDC 461 [3]. See also *Sayadi and Vinck v. Belgium*, UN Human Rights Committee, Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006, 29 December 2008; *A and Others v. The Netherlands*, (3 February 2010) LJN: BL 1862/334949; (NL 2010) ILDC 1463.

19 *Kadi v. Council of the European Union*, Judgment of the Court, European Court of Justice, 3 September 2008, [283] and [326].

Human Rights and Freedoms,²⁰ and UK common law.²¹ Yet the application of existing principles to the Security Council setting has created problems in terms of their normative suitability and practical effectiveness. As the corpus of law binding the Council is uncertain and, at best, can be said to be in a process of development, domestic courts have drawn on legal principles developed to apply to domestic settings. In terms of the establishment of a procedural framework for the Security Council setting, this has had three negative implications: (i) it ignores the fact that procedural fairness is contextual, (ii) the distinctly domestic ‘adjudicatory’ model of procedural fairness is an awkward fit in the Security Council setting, and (iii) it has increased pressure to incorporate ill-fitting domestic classifications into Security Council sanctions decision-making. These issues shall be elaborated upon in turn.

3.1. The contextual nature of procedural fairness

As any public lawyer will readily identify, procedural fairness is not a universal concept intended to be transplanted between legal contexts, but is contextual. While procedural fairness or due-process rights are accepted by all common-law systems, and are recognized by many others,²² this should not lead us into the error of thinking either that this makes the principles ‘universal’ or that they take the same shape or have the same scope in every legal system.²³ In the domestic literature on procedural fairness and due process, it is well established that different legal contexts legitimately require different procedural standards and operate according to different principles and values.²⁴ One of the foremost comparative volumes on due process notes that ‘there is no general blueprint to follow and the variety of approaches found in statutes is considerable’.²⁵ A procedural framework needs to be developed with careful reference to the conceptual nature of procedural fairness, and the role it can play in the Security Council context, having regard to institutional limitations including broad discretion, widely delegated powers, the emergency context, and a historic aversion to judicial review.

3.2. The inappropriateness of an adjudicatory framework

As things stand, domestic courts have demonstrated a tendency to apply a distinctly ‘domestic’ model of due process to the Security Council setting. This can be characterized as an ‘adjudicatory’ or court-based framework; that is, a system structured around a logically coherent and complete system of rules, where decisions are

20 Federal Court of Canada, *Abousfian Abdelrazik v. Minister of Foreign Affairs*, Judgment of 4 June 2009, 2009 FC 580.

21 *Her Majesty's Treasury v. Al-Ghabra*, [2010] UK Supreme Court, 2.

22 For a global survey, see S. Guinchard et al., *Droit processuel, droit commun et droit comparé du procès* (2005).

23 C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, (2006) 17 EJIL 187, 204.

24 L. Zedner, ‘Seeking Security by Eroding Rights: The Side-Stepping of Due Process’, in B. J. Goold and L. Lazarus (eds.), *Security and Human Rights* (2007), 265.

25 D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996), 315. For similar comments, see *Lloyd v. McMahon* [1987] AC 625, per Lord Bridge; *R. v. Home Secretary; ex p Doody* [1994] 1 AC 531, per Lord Mustill; *Morrissey v. Brewer*, 408 US 471, 481 (1972); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123 (1951).

reached through the presentation of proofs in trial-type hearings and are subject to judicial review.²⁶ An aspect of almost all domestic case law responding to the Security Council sanctions regime has been an insistence on the inclusion of a judicial mechanism in the sanctions decision-making process, described variously in terms of the ‘right to judicial protection’,²⁷ ‘right of access to a court’,²⁸ ‘right to judicial review’,²⁹ or ‘right to an effective remedy before an impartial tribunal’.³⁰

The adjudicatory framework that is the hallmark of most domestic legal systems is potentially ill-suited to the Security Council setting. Such a framework was developed as a mechanism to deal with disputes that arise out of the distribution and power and the patterns of motivation typically found in domestic legal systems. Thomas Scanlon has recognized that this form of ‘due process’ is not readily exportable to regimes outside the domestic context on the ground that it depends on a minimal commitment to certain institutional tenets. These include, for example, the importance of belief in ‘the possibility of an independent judiciary’ and ‘the need to defend a charge publicly and with reference to a known law’.³¹ These tenets do not form part of the Security Council framework, and their introduction would require a fairly radical change of mindset on the part of the permanent members of the Security Council.³²

The adjudicatory model, revolving around the necessity of judicial review, is not the only model of procedural fairness. Michael Bayles recognizes that ‘[t]he process benefits of adversary adjudication are often overestimated’ and there are ‘a number of more appropriate alternative decision-making models, particularly in the context of decisions to impose burdens on individuals’.³³ The ‘bindingness’ model has contributed to reliance by domestic courts on existing models of due process developed for domestic settings, rather than spurring courts to craft a due-process framework suitable for the Security Council sanctions setting. If domestic courts felt less shackled by the need to apply existing binding principles, and paid greater regard to the distinctive needs of the Security Council sanctions context, domestic-court judgments would operate less obstructively and more facilitatively in contributing to the development of a contextually appropriate model of due process in the Security Council setting.

26 See Fuller, *supra* note 9. See also M. Bayles, *Procedural Justice* (1990), 14.

27 See *Kadi v. Council of the European Union*, *supra* note 19, at [352].

28 *Her Majesty's Treasury v. Al-Ghabra*, [2010] UKSC 2, [145]–[156] *per* Lord Phillips; [184]–[185] *per* Lord Rodger; [246] *per* Lord Mance.

29 *Ibid.*, at [81] *per* Lord Hope.

30 Case T-318/01, *Othman v. Council and Commission*, 11 June 2009, [83].

31 T. M. Scanlon, ‘Human Rights as a Neutral Concern’, in T. M. Scanlon (ed.), *The Difficulty of Tolerance: Essays in Political Philosophy* (2003), 116.

32 One US official has indicated that the US would stop submitting names to the Security Council in the event full review was instituted: Adam Szubin, US Office of Foreign Assets Control, ‘The Terrorist Designation Process in the United States’, Countering Terrorism through Domestic and International Targeted Sanctions Conference, American University Washington College of Law, 15 September 2008.

33 See Bayles, *supra* note 26, Chapter 8 (see in particular 168–89). See also Galligan, *supra* note 25, 392–3, 402.

3.3. Inapplicability of the civil/criminal dichotomy

A further consequence of the reliance by domestic courts on due-process standards developed for domestic settings is that it has led to a need to shoehorn the Security Council sanctions context into ill-fitting domestic classifications. One example is the long-running debate as to whether sanctions should be classified as civil or criminal in nature. This debate stems from the fact that most due-process guarantees in human rights instruments incorporate a procedural divide between civil and criminal cases in recognition of the civil/criminal dichotomy that is a hallmark of almost all domestic systems. For example, Article 6 of the European Convention on Human Rights distinguishes between civil and criminal trials, and identifies at least ten procedural rights applicable to those charged with criminal offences, though not to civil cases.³⁴

Of course, the civil/criminal dichotomy is not an aspect of the Security Council sanctions regime. Nevertheless, many courts (and indeed many academics) have engaged in consideration of whether sanctions are best classified as civil or criminal in nature. The Court of First Instance of the European Communities rejected the classification of sanctions as criminal measures. Using the example of assets freezes, the Court held that

the freezing of the applicant's funds is not a criminal conviction for the purposes of that case-law, since there has not been any classification as a criminal offence, since the measure in question concerns only a specific group of persons and since the severity of the measure is not sufficient for such purpose.³⁵

Similarly, the UN Human Rights Committee in *Sayadi* determined that, although the sanctions regime has serious consequences for the individuals concerned, it does not concern a 'criminal charge' in the meaning of Article 14(1), and therefore discloses no violation of the relevant due-process rights.³⁶ This exposes the danger that procedural fairness might be deemed inappropriate or unnecessary in the sanctions context because sanctions cannot be construed as 'criminal' in nature. Instead of attempting to derive procedural protections by reference to ill-fitting domestic categories, a more appropriate inquiry would be to have regard to the sanctions measures themselves, and develop protections appropriate to the gravity of the potential consequences for the affected individual.

34 These include (1) the right to be presumed innocent, (2) the privilege against self-incrimination, (3) the right of silence, (4) the right to legal aid and assistance, (5) the right to be brought promptly before a court, (6) the right to release pending trial, (7) the right to disclosure of documents, (8) the right to confront witnesses, (9) the right to be tried on evidence not obtained by violation of fundamental rights, (10) the right not to be placed in double jeopardy: Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (2002).

35 CFI, *Jose Maria Sison v. Council of the European Union*, Case T-47/03, Judgment, 11 July 2007, paras. 101 and 129.

36 UN Human Rights Committee, *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006, 29 December 2008) UN Doc CCPR/C/94/D/1472/2006, [10.11]. See also Individual Opinion (partly dissenting) by Sir Nigel Rodley, Ivan Shearer, and Iulia Antoanella Motoc, 27 ('Nor do we understand on what basis [the Committee] believes that articles 14 and 15 could be relevant to actions that the State party quite rightly maintains are administrative, not criminal').

4. THE LIMITATIONS OF 'SUPREMACY' IN THE SECURITY COUNCIL SANCTIONS CONTEXT

Another implication of the public law model of the judicial function is that the relationship between legal and political organs tends to be considered in terms of either judicial or political supremacy. Applied to the Security Council sanctions context, this approach has led to something of an all-or-nothing approach to Security Council decision-making under which domestic courts have either abdicated any effective judicial role in the review of Council decision-making under international law, or assumed an illegitimately inflated role and overruled the exercise of Security Council discretion on the basis of domestic law. The effect has been to emphasize the polarization between courts and Council, and between domestic and international legal orders, at a time when it is arguable that we should be moving toward much greater integration.

4.1. The inadequacy of judicial abstention

Much of the earlier case law arising out of the Security Council sanctions regime was underpinned by a clear respect for Security Council supremacy in the sanctions context. Certain domestic courts determined that the combined effect of Articles 25 and 103 of the UN Charter left the Security Council essentially free to take whichever measures it chose in response to threats to international peace and security.³⁷ To the same effect, other courts have exhibited extreme deference to the Security Council by narrowly interpreting applicable principles. For example, in *Kadi*, the Court of First Instance rather controversially held that the right to a fair hearing had attained *jus cogens* status, yet found it had not been breached despite the fact that individuals had no right to be heard by the Sanctions Committee, the only authority competent to give a decision.³⁸ The Court held that '[s]uch a restriction of the right to be heard ... is not ... to be deemed improper in light of the mandatory prescriptions of the public international order'.³⁹ In similar terms, the Court of First Instance held that the right to effective judicial review had not been breached because the Security Council was entitled to immunity from jurisdiction under Articles 25 and 103 of the UN Charter.⁴⁰

37 See, for example, the decision of the Administrative Appeals Board of the Turkish Council of State in *Al-Qadi v. The State*, (TK 2007) ILDC 311, discussed in A. Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010), 64. See also UN Human Rights Committee, *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006, 29 December 2008), UN Doc. CCPR/C/94/D/1472/2006, Individual Opinion (partly dissenting) by Sir Nigel Rodley, Ivan Shearer, and Iulia Antoanella Motoc, 27 ('the Security Council cannot be impleaded under the [ICCPR], much less the Optional Protocol'); Individual (dissenting) Opinion of Ruth Wedgwood, 30 ('As the Committee acknowledges, it has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant'); Individual Opinion of Ivan Shearer, 32 ('The Committee's reasoning ... appears to regard the Covenant as on a par with the United Nations Charter, and as not subordinate to it. Human rights law must be accommodated within, and harmonized with, the law of the Charter, as well as the corpus of customary and general international law').

38 See Joined Cases T-306/01 and T-315/01, *Kadi v. Council and Commission*, [2005] ECR II-0000.

39 Ibid., para. 268.

40 Ibid., para. 288.

A model of judicial abstention that recognizes international institutions as essentially free to do what they like is inappropriate in contemporary international society. The view that international institutions are manifestly a good thing that can do no wrong, whose functions could contribute only to the 'salvation of mankind', is the perspective of a bygone era.⁴¹ It is increasingly recognized that international institutions are capable of all manner of missteps, omissions, and sins, including in some cases human rights violations,⁴² and that there is a need to recognize a broader system of legal principles by which to check their conduct.⁴³ In contemporary international society, it is appropriate for domestic courts to assume a degree of authority to recognize greater legal limits on Security Council decision-making.

4.2. The inappropriateness of judicial supremacy

At the other extreme, some courts have assumed supremacy over the Security Council. In the sanctions context, it is a power that has been assumed by courts such as the European Court of Justice in *Kadi* and the UK Supreme Court in *al Ghabra*. Both courts ultimately invalidated the regional/domestic mechanism giving effect to the 1267 sanctions regime for inconsistency with principles of Community and UK law respectively. The exercise of such power by regional and domestic courts has been likened to a *Marbury v. Madison* moment.⁴⁴ From a normative perspective, it is, however, a difficult power to justify.

In historical terms, judicial supremacy was expressly rejected at the San Francisco Conference at which the UN Charter was drafted.⁴⁵ Instead, the drafters of the Charter placed the Security Council at the apex of decision-making about international peace and security and vested it with 'primary responsibility for the maintenance of international peace and security'.⁴⁶ Even today, significant controversy attaches to the question whether the International Court of Justice have the power to review Security Council decision-making.⁴⁷ The ICJ has no power to bind the Security Council through its judgments.⁴⁸

41 Nagendra Singh, *Termination of Membership of International Organisations* (1958), vii.

42 F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314.

43 J. E. Alvarez, *International Organizations as Law-Makers* (2005), at 585.

44 M. Milanovic, 'More on Nada v Switzerland' (EJIL Talk!, 23 December 2010), available at <http://www.ejiltalk.org/more-on-nada-v-switzerland>, accessed 31 March 2012; M. Milanović, 'Norm Conflict in International Law: Whither International Law?', (2009) 20 *Duke Journal of Comparative and International Law* 69.

45 'Dumbarton Oaks Proposals Concerning the Establishment of a General International Organisation: Amendments Submitted by the Belgian Delegation' (4 May 1945), UN Doc. 2, G/7(k)(1), 3 UNCIO Docs. 335, 336.

46 UN Charter, Art. 24. For discussion of the drafters' intentions, see Russell and Muther, 646; Frowein and Krisch, 'Introduction in Chapter VII', in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. 1 (2002); G. Simpson, *Great Powers and Outlaw States* (2004), 184–8.

47 The ICJ has clearly stated that it has no power to review Security Council resolutions: *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep., 45.

48 J. E. Alvarez, 'Judging the Security Council', (1996) 90 AJIL 1, 6. As shall become relevant in section 4 of this study, it is worth noting that, though the Court has not previously declared Security Council resolutions to be invalid, the International Court of Justice has in *Namibia* and *Kosovo* engaged in interpretation of Security Council resolutions. The point has been made that the very power to engage the Council amounts to a

Recognition of judicial supremacy in the Security Council context is also difficult to support on the basis of the limited scope of legal principles applicable to the Security Council. The indeterminate limitations on the Security Council under the Charter and international law, coupled with the ambiguity of many Security Council resolutions, have the capacity to give domestic courts disproportionate power to determine international policy. While in the domestic setting, courts are accustomed to filling gaps left by the legislature, in the Security Council context, these gaps become chasms. Although courts are recognized under Article 38(1) of the Statute of the International Court of Justice as having a role in the development of international law, this role is necessarily recognized as 'subsidiary', and not one of 'supremacy'.⁴⁹ It is not the function of courts to create new aims for international society, or to impose on society new basic directives.⁵⁰ Courts vested with the power of review would inevitably be required to make difficult and largely unguided substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions of appropriate responses to threats to international peace and security. Judicial activism by a domestic court purporting to act as an unrepresentative and largely uninvited 'guardian' of the international legal order arguably undermines rather than enhances the legitimacy and effectiveness of Security Council decision-making.

5. THE DIALOGUE MODEL: RECONCEPTUALIZING THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE SECURITY COUNCIL

As the focus on bindingness and supremacy reflects, the public law model of the judicial function views the role of domestic courts in terms of binary choices: binding or not non-binding law; law enforcement, not law creation; judicial, not political, supremacy; domestic, not international, law (or vice versa). The problem is that, in the Security Council setting, questions of law and authority resist such clear-line dichotomies. This article proposes a different theoretical approach to the role of domestic courts in Security Council decision-making that seeks to locate a middle ground between the dichotomies generated by the public-law account of the judicial function. I define this middle position as the 'dialogue model'. The core argument in favour of the dialogue model is that of balance. Rather than working in terms of binary choices, the model aims to reconcile the competing claims to authority by domestic courts and the Security Council.

The motivation for the proposed reconceptualization of the judicial function is that the public law model, encouraging a focus on binding law and questions of

normative check on the Council's authority: see G. Hernández, *The International Court of Justice and the Judicial Function* (forthcoming), Chapter 3.

49 Statute of the International Court of Justice, Art. 38(1)(d).

50 This was recognized by Lord Hoffmann in *Jones v. Saudi Arabia*, [2006] UKHL 26, [63]: 'It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states'. See also G. Simpson, 'Is International Law Fair?', (1996) 17 *Michigan Journal of International Law* 615, 625.

hierarchy between principles and institutions, misconstrues the role of domestic courts when they operate as agents of interpretation of international legal instruments. If domestic courts start to see themselves as part of a broader system, incorporating the capacity to review decision-making by international institutions, it is necessary to generate a model of the judicial function appropriate to the broader system within which a domestic court is operating.⁵¹ This may mean that (where a domestic court engages in decision-making about international legal issues) its legitimating foundations have to be recalibrated for the entirety of the order (domestic and international), not just for one part of it.⁵² In the following section, I suggest that two distinguishing characteristics of the relationship between domestic courts and the international legal system should be taken into account in reconceptualizing the judicial function: first, recognition of the enhanced power of domestic courts in the international context as ‘sources’ rather than merely ‘enforcers’ of international law; and second, recognition of the qualified authority of domestic courts as persuasive but not determinative authorities on the legal position. Taking these features into account, it is possible to develop a conception of the judicial function that positions courts in a more theoretically supportable way within the broader framework of the international legal system. My conclusion is that the judicial function of domestic courts is most appropriately characterized in terms of a persuasive contribution to a broader legal *dialogue*. More specifically, domestic courts may legitimately act as agents of interpretation of international decision-making (‘interpretive’ role), and/or as agents for the persuasive declaration of the compatibility (or incompatibility) of international decision-making with fundamental values (‘declaratory’ role), subject always to the capacity of the international decision-maker to reinterpret or repudiate the declarations of domestic courts. In the absence of any formal hierarchy between the Security Council and domestic courts, the idea is that courts and Council should regard themselves in an informal partnership. There is no doubt that domestic courts have a legitimate and valuable role to play in international decision-making, possessing both the capacity and expertise to propose means to accommodate rights claims within the international security framework, and to call attention to legal ‘blind spots’ overlooked by the Council, whether on account of inconvenience or inertia.⁵³

5.1. Enhanced power: domestic courts as a source of law

The public law model of the judicial function is based in part on recognition of a necessary separation between the judicial power of law enforcement and the

51 On this point, see the discussion of ‘systemic integration’ in the International Law Commission’s Report, ‘Fragmentation of International Law: Problems Caused by the Diversification and Expansion of International Law’, UN Doc. A/CN.4/L.682 (13 April 2006), [37]–[43].

52 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), 13.

53 In detailing possible ‘blind spots’ in the domestic context, Aruna Sathanapally notes that ‘lawmakers may fail to recognize that the law could be applied in a rights-infringing way, or fail to anticipate its effect on particular groups of people, or may fail to perceive how rights claims can be accommodated without much or any cost to legislative objectives’: A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (2012), 63. See also R. Dixon, ‘Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’, (2007) *ICON* 391, 402.

political power of law creation. Within democratic legal systems, it is the representative source of the law being applied by courts that lends legitimacy to the judicial role. However, where courts are reviewing the decisions of international decision-makers such as the Security Council, the normative basis for this separation is lost. When domestic courts seek to review decisions made by international institutions, domestic courts are no longer acting as legitimate guardians and enforcers of domestic law. Instead, they are engaging with a body of law that finds its source in the broader international legal system.

In the international legal order, domestic courts are not mere enforcers, but are also recognized as sources of international law. First, decisions of domestic courts are evidence of state practice, relevant to the three primary sources of international law listed in Article 38(1) of the Statute of the International Court of Justice, including interpretation of treaties, the development of international custom and elaboration of general principles of law.⁵⁴ Second, judicial decisions are referred to expressly in Article 38 as a 'subsidiary means for the determination of rules of law'.⁵⁵ It is accepted that the reference to 'judicial decisions' in this context includes decisions of domestic courts.⁵⁶ In practice, it has been noted that domestic court-decisions play an extremely important role in the identification and formation of international law, and are routinely cited as evidence of the meaning of international law.⁵⁷

In such circumstances, a polarization between law enforcement and law creation in elaborating the role of domestic courts is 'a simplistic and often inaccurate approach'.⁵⁸ Instead, domestic courts must recognize their capacity to contribute to the development of international law. The authority provided to domestic courts in Article 38 is based in recognition of the special legal expertise of judges, and their capacity to develop and fill gaps in the law utilizing powers of legal reasoning.⁵⁹ As Judge Higgins has recognized, international law would never develop beyond its rudimentary state if courts felt that the distinction between *lex lata* and *lex ferenda* forever prevented them from applying the law in a progressive manner. Indeed, part of the problem of the traditional 'bindingness' approach is that it may have a 'chill effect' on the law, freezing or crystallizing international norms at a particular

54 Although Article 38(1) technically applies only to the ICJ, its definition of the sources of international law has been adopted widely as canonical and has been recognized as having a more general character: M. Shahabuddeen, *Precedent in the World Court* (1996), 232; I. Brownlie, *Principles of Public International Law* (2003), 20.

55 Statute of the International Court of Justice (1945), Art. 38(1)(d).

56 R. Higgins, *Problems and Process* (1994), at 218; R. Jennings and A. Watts, *Oppenheim's International Law* (1996), at 41–42.

57 A. Nollkaemper, 'The Independence of the Domestic Judiciary in International Law' (2006) XVII *Finnish Yearbook of International Law* 1, 12–13; A. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G. Boas and W. A. Schabas (eds.), *International Law Developments in the Case Law of the ICTY* (2003), 277; A.-M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99.

58 A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', (2011) 60 *ICLQ* 57, at 60.

59 See Fuller, *supra* note 9; R. Dworkin, *Law's Empire* (1986); T. R. S. Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism', (1999) 115 *Law Quarterly Review* 221.

moment in time, and stalling important developments.⁶⁰ Instead, domestic courts should take the opportunity to exercise a more creative function, using legal reasoning to build on existing legal principles, and crafting applicable legal principles for new contexts. When operating in relation to the international legal sphere, the judicial function must include ‘developing and applying international law to hitherto untested situations in order to obtain socially desirable and enlightened results’.⁶¹

5.2. Scope of authority: the persuasive power of domestic courts

Though domestic courts have a role in law creation when acting in relation to the international legal order, it is important to recognize that this role is a qualified one. Domestic courts are not empowered to make a final or authoritative determination of the applicable law.⁶² Rather, under Article 38(1)(d) of the Statute of the ICJ, their role in the determination of law is ‘subsidiary’. They provide mere evidence of the primary sources of international law.⁶³ Ultimately ‘[t]he authoritativeness of [their decisions] will . . . be founded upon the constitutional function, perceived role and reputation of the Court’.⁶⁴ If international actors accept the relevant court’s decision, its law-making impact will be substantial. If not, the decision ‘may become marginalized, seen as exceptional and have limited law-making effect’.⁶⁵ The picture is therefore one of gradated authority, leaving behind the binary scheme of binding/not binding and political/judicial supremacy, and instead associating norms with levels of persuasiveness tied to broader conceptions of an institution’s legal reasoning and reputation.⁶⁶

5.3. Judicial function under a dialogue model: domestic courts as agents of interpretation and persuasive declaration

The challenge, then, is to recalibrate the judicial function to take account of the enhanced power of domestic courts as a source of international law, while recognizing the qualified authority of domestic courts in the international legal order. My conclusion is that a ‘dialogue model’ of the judicial function positions courts in the most theoretically supportable way in the broader international legal system. This model does not purport to cast domestic courts in an entirely new and foreign role, but instead draws on accepted models for domestic-court engagement with domestic human rights. In the human rights context, domestic legal systems have developed a number of ways to reallocate power between judicial and political organs in a way

⁶⁰ See Roberts, *supra* note 58, at 73.

⁶¹ R. Higgins, ‘Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd’, (1971) 11 *Virginia Journal of International Law* 327, 341.

⁶² See quote from *Jones v. Saudi Arabia*, [2006] UKHL 26, [63] *per* Lord Hoffmann, *supra* note 50.

⁶³ I. Brownlie, *Principles of Public International Law* (2003), 6.

⁶⁴ M. Shaw, ‘A Practical Look at the International Court of Justice’, in M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (1998), 11 at 27.

⁶⁵ A. Boyle and C. Chinkin, *The Making of International Law* (2007), 301.

⁶⁶ See Krisch, *supra* note 52, at 12; B. Kingsbury, ‘Weighing Regulatory Rules and Decisions in National Courts’, [2009] *Acta Juridica* 90; M. Moran, ‘Shifting Boundaries: The Authority of International Law’, in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law* (2007), 163.

that brings them into greater balance than under the traditional lopsided models of either constitutional supremacy (where courts are supreme) and parliamentary sovereignty (where Parliament is supreme). While it has taken a number of forms in Canada, the UK, Australia and New Zealand, the 'dialogue model' refers to a relationship in which judicial decisions about the compatibility of legislation with human rights are open to reversal by the legislature.⁶⁷

The relevant aspect for the purposes of the present discussion is that the authority of domestic courts is construed not in terms of supremacy, but in terms of a spectrum. Translated to the Security Council sanctions context, domestic courts could be seen as having the choice (i) to invalidate Security Council resolutions, (ii) to interpret resolutions in a way that is consistent with human rights, (iii) to declare resolutions incompatible with human rights, or (iv) to abstain from review. As has been discussed, domestic courts exercising the first option would overstep the permissible and practicable boundaries of their jurisdiction, as they have no power to impact on the validity of Security Council decision-making. By contrast, the final option would open domestic courts to the criticism that they had abdicated their responsibility to uphold the fundamental principles of their domestic legal systems. It is in the two central choices that we find the practically and theoretically supportable options for domestic courts. Each of these options can be seen as promoting dialogue in that they contribute to development of the law, yet are open to reversal by the Security Council should the Council fundamentally disagree with the court's decision.

The technique of interpretation discussed as option (ii) above offers the strongest tool. To the extent a Security Council resolution can be interpreted consistently with fundamental human rights, and it is appropriate to do so (in the sense that such rights are readily translatable to the Security Council context), domestic courts should take this option. Unlike option (i) above in which a domestic court chooses to invalidate a Security Council resolution (or the democratic mechanism implementing it), an interpretation offered by domestic courts is open to express reversal by the Security Council should the Council disagree with the interpretation taken.⁶⁸ Moreover, the interpretive option is stronger than options (iii) or (iv) in that it offers a means of protecting fundamental rights in so far as it is possible to read an intention to respect fundamental rights into relevant resolutions. If the Council does not respond negatively to an interpretation given by a domestic court, there will be a broader entitlement for other states to accept that such an interpretation is consistent with the sanctions regime, and follow suit. The idea is for a legal culture to develop in which Council and courts come to see themselves as involved in a dialectical

67 See literature cited *supra*, note 8.

68 The case of *Othman* provides an example of the Security Council confirming the interpretation of a Security Council resolution by a domestic court. In *Othman*, the English High Court read into domestic mechanisms implementing Security Council Resolution 1333 (2000) an exemption to assets freezes where the freeze would place the individual's life or health at risk: *R. (Othman) v. Secretary of State for Work and Pensions*, [2001] EWHC Admin 1022, § 57. The Security Council subsequently passed a resolution allowing for exemptions to the assets freeze to allow for basic expenses: Security Council Resolution 1452, 20 December 2002, Section 1. This is described in A. Tzanakopoulos, 'United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada (Minister of Foreign Affairs)', (2010) 8 *Journal of International Criminal Justice* 249.

partnership or dialogue in which they are both working toward an appropriate balance between human rights and international security.⁶⁹

The case of *Abdelrazik v. Minister of Foreign Affairs* is one example of a domestic court adopting an interpretive role in reconciling Security Council obligations with human rights obligations. It is perhaps unsurprising that this case derives from the Canadian legal system, the legal system in which the ‘dialogue model’ from which this analysis borrows had its domestic genesis and finds its strongest reflection. In *Abdelrazik*, a Canadian citizen argued that the Canadian government’s implementation of the travel ban under Security Council Resolution 1822 violated his right to return to Canada under Section 6 of the Canadian Charter of Rights and Freedoms. While acknowledging that the case raised tensions between international and domestic law,⁷⁰ Justice Zinn of the Federal Court of Canada treated the issue as one of interpretation of the relevant resolution. Relying on the wording of the resolution together with supplementary material, including Security Council guidelines, international treaties, and Canadian legislation, Justice Zinn reasoned that ‘properly interpreted the UN travel ban presents no impediment to Mr A returning home to Canada.’⁷¹ As Antonios Tzanakopoulos has recognized, this interpretation was not determinative of the position under international law, and was not binding on the UN or any other state.⁷² However, to the extent it was not overruled by the Council, it solved the domestic conflict, and provided a persuasive interpretation of the relevant Security Council resolution that could be relied on by other states.

The *Nada* case decided in 2012 by the European Court of Human Rights the best example to date of a court acting to harmonize conflicting obligations through interpretation rather than invalidation of Security Council resolutions.⁷³ The European Court of Human Rights invoked a general principle of interpretation that diverging international commitments ‘must be . . . harmonised as far as possible so that they produce effects that are fully in accordance with existing law’.⁷⁴ The Court invoked a ‘presumption’ that the Security Council does not intend to impose an obligation on member states to breach fundamental human rights.⁷⁵ The Court thereby avoided language of ‘hierarchy’ or ‘supremacy’ in determining the relationship between Security Council resolutions and human rights, or Council and courts, in favour of recognizing an obligation upon member states to harmonize obligations they regard as divergent. In this way, the ECHR expanded the notion of dialogue discussed in this article to include member states, Council and courts.

The difficulty with the interpretive ‘dialogue’ approach described above comes where it is not possible to interpret Security Council resolutions in a way that is compatible with fundamental domestic rights. Here, the dialogue would need to

69 For a depiction of the ‘dialectical’ nature of the dialogue between courts and legislatures at a domestic level, see G. Webber, ‘The Unfulfilled Potential of the Court and Legislature Dialogue’, (2009) 42 *Canadian Journal of Political Science* 443.

70 *Aboufian Abdelrazik v. Minister of Foreign Affairs* 2009 FC 580, [4].

71 *Ibid.*, at [129].

72 Tzanakopoulos, *supra* note 68, at 255.

73 *Nada v. Switzerland*, [2012] ECHR 1691 (12 September 2012).

74 *Ibid.*, [170].

75 *Ibid.*, [171], citing *Al Jedda v. United Kingdom*, [2011] ECHR 1092 (7 July 2011), [101]–[102].

move beyond a facilitative dialogue interpreting Council resolutions so as to accord with fundamental principles to a dialogue aimed at signalling objection. Ideally, courts would be empowered to make formal declarations of incompatibility as described in option (iii) above in relation to decisions of international institutions such as the Security Council where these violate fundamental domestic principles, as is the case in certain domestic systems.⁷⁶ An alternative, less formal, mechanism than the power to issue declarations of incompatibility would be for domestic courts to make statements in *obiter* (to use a common-law term), or in a 'declaratory' fashion, signalling the incompatibility of sanctions measures with fundamental human rights. While such determinations have no legally-binding effect, the effect of such judicial statements would not merely be academic but would fulfil a legitimate role within the Security Council sanctions framework contributing to the development of applicable international legal principles.⁷⁷ This form of 'declaratory' or 'principle-proposing' dialogue repositions judges in a broader international forum where their distinctive function is the determination of questions of rights, while recognizing that the development and pursuit of fundamental international principles is a 'collaborative endeavour' between courts, Council, and other actors on the international stage.⁷⁸ Once again, the judgment of the Federal Court of Canada in *Abdelrazik* provides a good example. While Justice Zinn ultimately affirmed the consistency of the relevant Security Council resolution with the Canadian Charter, he levelled criticism at the sanctions regime, '[adding] his name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights'.⁷⁹ It is notable that, in doing so, he referred to both international and domestic guarantees, declaring the 1267 regime to be in contravention of fundamental principles of 'Canadian and international justice'.⁸⁰ His focus was quite clearly on the substance of the norms, rather than their foundation in international or domestic law. Justice Zinn's judgment has been enormously influential and a beacon for reform, with much recourse made by other courts, academics, and expert reports to his statements in *obiter*. This case is an interesting example of the capacity of domestic courts to make valuable contributions to a broader dialogue.

76 Aruna Sathanapally details the value of declarations of incompatibility in 'strengthening the institutional foundations of political deliberation – building up processes of reason-giving around rights – rather than further limiting judicial intervention': A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (2012), 8.

77 Scholars who otherwise criticize traditional judicial review have recognized the benefit of less binding mechanisms by which to signal disagreement on the basis this accommodates the possibility of reasonable disagreement over judicial conclusions on the balance between rights and other pressing public interests: C. A. Gearty, *Principles of Human Rights Adjudication* (2004); F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000).

78 T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act', [2005] *Public Law* 303, 335.

79 *Abousfian Abdelrazik v. Minister of Foreign Affairs*, 2009 FC 580, [51].

80 *Ibid.*, [53].

6. CONCLUSION

The judiciary regularly exhibits a capacity to adapt to society's changing needs.⁸¹ This capacity for change extends to the judicial function itself, which has been recognized as a function of place and time, influenced by its environment and the constantly changing factual and social reality.⁸² The increasing intervention of domestic courts in decision-making by international institutions should encourage both courts and scholars to question the nature of the role of domestic courts in this setting. Lon Fuller recognized the need for the judicial function to be constantly cognizant of the problem of *system*, in the sense that judges must always consider the coherence of the system in which they operate, and the powers and limitations of the institution of the judiciary as defined within that system.⁸³ In the context of the international legal system, reliance on the traditional public-law model of the judicial function based on bindingness and supremacy leads to a polarization between law creation and law enforcement, binding and non-binding law, judicial and political supremacy, and international and domestic legal orders. In this article, I have argued that the future of domestic court engagement should not be in the perpetuation of these polarizing dichotomies, but in the fertile *dialogic* middle ground between these extremes. By recalibrating the judicial function in this way when engaging in review of decision-making by international institutions, domestic courts would not renounce, but rather recognize, their increasingly complex identity.

81 It has been said that a thousand years of common law are a thousand years of changes in the law in order to adapt it to the needs of a changing reality: J. Stone, *Legal System and Lawyers' Reasoning* (1964), 209–98.

82 Barak, *supra* note 12, at 25.

83 L. Fuller, *Anatomy of the Law* (1968), 94.