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A Proposal Toward Redefining the Model of Application of International Law in the Domestic Arena

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I. Introduction

This article explores the interplay between international Law and domestic law with the view toward proposing a model for departing from the traditional pattern of application of international law in domestic courts. This model is based on a bilateral conception of dispute resolution, where local courts have ample leeway to determine the outcome of the decision.

The prevailing paradigm of application of international law on the domestic plane is first discussed, with the emphasis on identifying this model's shortcomings. To demonstrate its disadvantageous results, the United States Court of Appeals for the Second Circuit court judicial decision of in *Lisi v. Alitalia*[1] is examined as a paradigmatic case and contrasted with a similar case from another jurisdiction—Quebec, Canada—where virtually identical legal issues and facts were discussed but where the courts arrived at a diametrically different opinion.[2] Second, existing proposals to depart from the traditional model of application of international law are analysed, in particular, the transjudicial model and other ideas propounded by advocates from the Feminist and Critical Legal Studies schools of thought as well as other North American legal scholarship which have been favorably received by the North American and European academic community. I argue that while these proposals share the

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1 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966). The ideas and discussions of this article have also appeared in J. Hermida, "A New Model of Application of International Law in National Courts: A Transjudicial Vision", 11 *Waikato Law Review* (2003) at 37.

2 *Ludecke v. Can. Pac. Airlines Ltd.*, [1979] 98 D.L.R. 3d. 52 (Can.).

discontent with the current paradigm, they do not provide a viable solution to overcome its weaknesses. On the contrary, these alternatives sometimes exacerbate its contradictions and disparities. Finally, the main features of the proposed model for application of international law in domestic jurisdictions are outlined. This model calls for ample—non hegemonic—participation of the international community in the adjudication process. It borrows its essence from the vision of collective deliberation advocated by transjudicialism theories and on the profound discomfort with the International Court of Justice's application of the intervention procedures, which makes participation of non parties to a dispute quite burdensome. Additionally, it echoes Chinkin's call for a rupture with a purely bilateral conception of international dispute resolutions.[3] In brief, the proposed model calls for the participation of interested and potentially affected international parties in the adjudication process of the domestic jurisdictions, which should enhance the legitimate quality of domestic decisions and their non-hegemonic nature, by fostering a decision which more adequately represents the consensus reached at the international level.

This article adopts a socio-legal perspective in analysing both the shortcomings of the traditional method of application of international law and the proposed solution to overcome these shortcomings. It advocates a radical change in the dominant conception of international law and moves beyond superficial claims on the ineffectiveness of international law. The proposed model would need an essential transformation in the current international political scenario, which should leave aside a bilateral and non participatory conception of dispute resolution.

II. Traditional Model of Application of International Law in Domestic Courts

A. *Non-Participatory Process and Intrinsic Methodology*

The traditional model of how international law is applied in domestic courts has been dominated by a non participatory adjudicatory process that excludes the participation of other members of the international community, such as states that may have an interest in the interpretation of international sources which they are parties to, and non governmental international organizations, such as human rights organizations, based on a predominantly bilateral conception of dispute resolution, where only those states which are immediately

3 3. C. M. Chinkin, *Third Parties in International Law* (New York: Clarendon Press, 1993) at 147.

interested in the conflict are admitted. The internal methods of interpreting international sources have been only only concerned with an intrinsic examination of the legal texts.[4] Under this conception, the role of the domestic courts is limited to ascertaining in dichotomic terms which normative set of law—national or international—should be applied to a specific case.[5] When the court opts to employ an international source it often does so under a domestic and often hegemonic rationale, even if it purports to do otherwise, *i.e.*, the courts decide the outcome of a dispute by resorting to their ideologies and political interests.[6] This has resulted in a widely varied case law and unjustly diverse consequences, even in areas where the law has been amply harmonized.[7] The selected case for discussion, *Lisi v. Alitalia*,[8] illustrates how the domestic courts' principles, rules, methodology and historic characteristics, together with its political view, have shaped a decision which might produce diametrically different results in other jurisdictions on similar or identical facts.[9]

B. *The Adjudication Process in the Domestic Sphere*

Our analysis of the traditional method of application of international law in the domestic jurisdiction is grounded upon the premise that there is no rational process of interpretation of legal texts, both international or national. Hence the process of the adjudication of international legal controversies in domestic courts[10] is one where resort is made, consciously or unconsciously, to the values, objectives, political perspectives and ideology of the court deciding a legal controversy. Rooted in a bilateral paradigm of dispute resolution and consequently without any meaningful participation of the international community, there are no counterweights to the power of the domestic court. Underlying these premises is the idea that an internal

4 J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 5.

5 K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U. J. Int'l L. & Pol.* at 501.

6 Elizabeth Zoller, *Droit des relations exterieures* (Paris: Presses universitaires de France, 1992); Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton: Princeton University Press, 1992). Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", (1993) 4 *Eur. J. Int'l L.* at 159; A.M. Slaughter, "A Typology of Transjudicial Communication", (1994) 29 *U. Rich. L. Rev.* at 118.

7 G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* (Deventer: Kluwer, 1977) at 1.

8 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966).

9 *Ludecke v. Can. Pac. Airlines Ltd.*, [1979] 98 D.L.R. 3d. 52 (Can.).

10 L. Erades, "International Law, European Community Law and Municipal Law of Member States", (1966) 15 *ICLQ* at 120.

judicial review, *i.e.,* an analysis based exclusively on judicial texts,[11] of the international legal norms by resorting only to the canons of construction generally recognized by the international community,[12] such as textual, contextual, objective and purposive interpretations of international norms in a predominantly bilateral and non participatory adjudicative process, may produce results that accommodate national policy interests to the detriment of international obligations.[13] Thus, the adjudication process in national courts is at best a meaningless task—as it does not attempt to respect the consensus reached at the international level—and at worst the mere disguise in technical and legal costumes of the political, economic and social values of the state where the court is located.

These views may be illustrated by analysing a paradigmatic case of how a US Court interprets an international convention. This analysis is exploratory in intent, designed to highlight the shortcomings of the traditional model of application of international law in the domestic sphere. It is thus not based on a quantitative sample of cases as its primary intent is to identify recurrent typical features in such cases.[14]

The case of *Lisi v. Alitalia* involved an accident concerning an Alitalia airplane that crashed in Ireland while en route from Rome to New York. Here, the United States Court of Appeals for the Second Circuit rejected a literal and unambiguous interpretation of Article 3(2) of the Warsaw Convention, which deals with the loss of the limitation

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11 M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (Los Angeles: University of California Press, 1978) at 659.

12 Article 31 of the Vienna Convention holds that: "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 connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection 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. 4. A special meaning shall be given to a term if it is established that the parties so intended.

13 Elizabeth Zoller, *Droit des relations exterieures* (Paris: Presses universitaires de France, 1992); Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton: Princeton University Press, 1992). Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", (1993) 4 *Eur. J. Int'l L.* at 159; A.M. Slaughter, "A Typology of Transjudicial Communication", (1994) 29 *U. Rich. L. Rev.* at 118.

14 J. Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law", (1998) 30 *Colum. Human Rights L. Rev.* at 159.

of the carrier's liability in the absence, irregularity or loss of the passenger ticket.[15]

The Warsaw Convention created a uniform system that allocated the major risks arising from international carriage to the passenger and consignor by imposing very low limits of liability.[16] For this purpose, it established a fault liability regime for sustained damages in case of the death, wounding or any other bodily injury of the passenger,[17] for the destruction or loss of or damage to baggage[18] and cargo and for delay.[19] As a *quid pro quo* for the limitation of liability, the Warsaw Convention shifted the burden of proof so that the air carrier is presumed liable unless it can meet the necessary measures standard.[20] However, the Convention also engineered a formalistic regime which unified the format and legal significance of the documents, linking these formalities with the airline's liability, as its failure to comply with these requirements permitted the international passenger to escape the limits of liability.[21]

Alitalia argued that its liability was limited as clearly proscribed by the provisions of Article 22 of the Warsaw Convention and by the language of Article 3, which makes it clear that the only ground for denying the limitation of liability is the carrier's failure to deliver a ticket. Thus, in order to analyze the validity of Alitalia's arguments the Court in *Lisi* relied on two previous decisions of US domestic courts, the *Mertens v. Flying Tiger Line, Inc*[22] and *Warren v. Flying Tiger Line, Inc*[23] cases, thus ignoring the text, object, purpose and context of the Warsaw Convention as well as the practices of other parties to the Convention.

In the *Mertens* and *Warren* cases, the US courts had elaborated a test to determine whether the limits of liability were applicable to international airplane accidents when the airline had not fully complied with

15 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014, T.S. No. 876 (1934) [hereafter, the Warsaw Convention].

16 These were not only expressed in terms of monetary caps, but they were also "artfully camouflaged in a thicket of convention articles". In effect, apart from the limitations contained in Article 22, the WC limits recovery only to sustained damages. So, punitive and other non-compensatory damages may not be awarded[16]. The lack of compensation for non-bodily injuries also entails a significant limitation of liability, as well as the concept of accident in Article 17.

17 Warsaw Convention, Article 17.

18 *Ibid.*, Article 18.

19 *Ibid.*, Article 19.

20 *Ibid.*, Article 20.

21 Julian Hermida, "The New Montreal Convention: The International Passenger's Perspective", *Air & Space Law* 26 (2001) at 150.

22 *Mertens v. Flying Tiger Line, Inc.* (1965, CA2 NY) 341 F2d 851.

23 *Warren v. Flying Tiger Line, Inc.* (1965, CA9 Cal) 352 F2d 494.

the documentation requirements of the Convention. The test revolved around the question of whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures. In other words, the test sought to determine if there had been adequate delivery of the ticket to the passenger. However, when the *Lisi* Court proceeded to determine whether the tickets given by Alitalia met this requirement, it actually analyzed whether there was adequate notice, instead of adequate delivery. It quoted pure obiter dicta from *Mertens* and *Warren*, where en passant the Courts had stated that the statements were printed in virtually unreadable form. The *Lisi* Court went even further by holding that even if a passenger could read the printing on the ticket, it was unlikely that he would understand the meaning of its language. Therefore, the Court held that the tickets given by the airline to the passengers did not adequately give notice of the applicability of the Warsaw Convention and thus, contrary to the clear provisions of the Warsaw Convention, Alitalia was not entitled to avail itself of the limitation of liability defenses.

A substantially different conclusion was arrived at, in a case with almost identical facts under the same treaty regime, by the Canadian Superior Court (District of Montreal) in *Ludecke v. Canadian Pacific Air Lines*. The Ludecke court established that "the words of [Article] 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage."[24] Consequently the limitation of liability is only forfeited if no ticket is delivered. The Canadian court emphasized that American courts ignored the plain meaning of the Convention and "failed to give effect to a precise statement of the law."[25]

The *Lisi* Court's reading of the Convention constitutes a paradigmatic, albeit exacerbated, example of how a domestic court applies an international treaty. The *Lisi* Court applies the traditional intrinsic canon of interpretation of international treaties, in a non-participative process, which permits almost any reading of a text under the facade that the text constrains a certain 'correct' interpretation. Therefore, it arrives at a conclusion which radically deviates from the consensus reached during the negotiation of the treaty and the prevailing interpretation of the Convention by other state parties.[26] The decision of

24 98 D.L.R.3d 52 (Can. 1979).
25 *Ibid.*
26 Furthermore, it violently disregards the text of the Convention, which makes it clear that the only ground for denying the limitation of liability in an international flight is the carrier's failure to deliver a ticket not the inadequacy of the ticket as suggested by the Court. The interpretation of the *Lisi* Court also deliberately ignored the main purpose and object of the Convention, which clearly sought to limit the liability of

the *Lisi* Court is a clear reflection of the United States' active diplomatic policy at the time to change the Warsaw Convention as a result of pressures from the American Association of Trial Lawyers and other US interest groups.[27] Thus, the *Lisi* Court translates the demands of official US policy position into its judicial decision and in so doing blatantly disregarded all interpretations which were more respectful of the consensus arrived at the international conference and crystallized in the conventional text[28] in order to introduce changes to a convention which US diplomacy at the time was unable to achieve.

C. *Interpretation in the Adjudication Process*

(i) *Internal Interpretation of International Norms*

An internal interpretation of legal sources[29] such as the method employed in *Lisi,* is concerned with an intrinsic examination of the legal texts.[30] Internal interpretation has taken several forms, which

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the international airline carrier, as well as its context seen in light of the subsequent practice in the application of the treaty by other parties to the Convention regarding its interpretation. The court's argument was also oblivious of the rich negotiating history of the Convention. I*n re Mexico City Aircrash*, 708 F.2d 400, 415-16 (9th Cir. 1983) ("The cardinal purpose of the [Convention] is to ensure the existence of a uniform and universal system of recovery for losses incurred in the course of international air transportation. The United States has signed but not yet ratified the Vienna Convention on the Law of Treaties. However, the methods of interpretation are considered customary international law. See Louis Henkin *et al.*, *International Law* 387 (2d ed. 1987) [hereinafter Henkin, Casebook]; *Advisory Opinion on Namibia*, 1971 I.C.J. 16, reprinted in Henkin, Casebook at 485, 486. The preliminary draft of art 3 prepared in 1928 by CITEJA contained the same sanctions for Articles 3 and 4, *i.e.*, the sanction of unlimited liability would be imposed if the passenger ticket omitted any of the prescribed particulars. However, there was opposition among the delegates, especially the Greek delegation, that the unlimited liability might arise from trivial errors. Therefore, the phrase "or if the ticket does not contain the particulars" was deleted. The drafting history of Article 3 clearly indicates that the treaty makers did not want the carrier to be deprived of the limitation of liability for failure to deliver a passenger ticket not in conformity with the particulars listed in Article 3(1). The Hague Protocol, which the United States was not a party to, specifically adopted an amendment to Article 3(2) providing that if a ticket does not include the notice warning of the applicability of the Warsaw Convention and the ensuing limitation of liability, the carrier will not be entitled to avail himself of the limitation of liability of Article 22. II Conférence Internationale de Droit Privé Aérien, 4–12 oct, 1929, Varsovie, at 9,15, 220. *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R. 3d 52 (1979), G. Miller, *Liability in international air transport: the Warsaw system in municipal courts* (Deventer: Kluwer, 1977) at 1; T. Sweeney, "The Requirement of Notice in the Warsaw Convention", *61 J. Air L. & Com.* at 391.

27 Julian Hermida, The New Montreal Convention: The International Passenger's Perspective, Air & Space Law 26 (2001) p. 150.

28 A.M. Slaughter Burley, "International Law And International Relations Theory: A Dual Agenda", (1993) 87 A.J.I.L. at 221.

29 J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), at 5.

30 *Ibid.* at 6.

includes a textual, contextual and even purposive interpretation of texts. All these methods of interpretation have long been present in customary international law,[31] albeit in a less systematic form, and have been codified in the Vienna Convention on the Law of Treaties.[32]

These methods share the common feature of trying to elucidate the meaning of a provision by looking at the provision itself or other related circumstances.[33] For advocates of this internal interpretation method, the legal method is itself a form of constraint, but this ultimately derives from the adjudicator's reading of the text. For this school of interpretation, judges on the domestic plane must decide cases by applying the accepted methods of the legal profession, that is, citing precedent and statutory provisions, deciding cases in accordance with general principles of law and providing public justifications for their decisions.[34]

The resort to national courts to resolve international disputes has been widely adopted in international treaties, especially in the criminal law realm, as the domestic legal system is able to supply the coercive power that the international legal system usually lacks.[35] But, as Knop warns, this reinforces the hegemonic nature of the traditional model of application of international law, where domestic courts impose their domestic values.[36]

On the international plane, courts are equally free to impose their own ideologies without having to respect the consensus reflected in the international norms. For example, the Rules of the Court governing the procedure of the International Court of Justice (ICJ) only require the court to make explicit its reasons in point of law.[37] Undoubtedly, this leaves ample leeway to judges to reach decisions

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31 Restatement (Third) of the Foreign Relations Law of the United States 325.

32 I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984) at 115.

33 Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (The Hague: Kluwer Law International, 1997) at 327.

34 S.R. Lazos Vargas, "Democracy and Inclusion: Reconceptualizing The Role of The Judge In a Pluralist Polity" 58 *Md. L. Rev.* at 150.

35 S.R. Ratner, "International Law: The Trials of Global Norms", *Foreign Pol'y*, Spring 1998, at 65.

36 K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U. J. Int'l L. & Pol.* at 516.

37 Article 95, Statute of the ICJ states that: The judgment, which shall state whether it is given by the Court or by a chamber, shall contain: the date on which it is read; the names of the judges participating in it; the names of the parties; the names of the agents, counsel and advocates of the parties; a summary of the proceedings; the submissions of the parties; a statement of the facts; the reasons in point of law; the operative provisions of the judgment; the decision, if any, in regard to costs; the number and names of the judges constituting the majority; a statement as to the text of the judgment which is authoritative.

without any constraint, provided the court offers some legal reasons with respect to the question addressed, even if these legal reasons are completely arbitrary or lack legal grounds. The decisions of the highest international tribunal is plagued with examples which clearly show that there is nothing in the interpretation method or procedural rules that constraints its members to reach any type of decision.

To illustrate this point, it suffices to recall the ICJ decision in the *Nuclear Tests* cases[38] where the Court found that France had committed itself by unilateral declarations to refrain from further tests, rendering the claims of Australia and New Zealand moot and without object.[39] However, there is no legal basis for this decision other than perhaps a vague reference to the principle of good faith. Neither state practice nor general principles reveals a consensus that supports the possibility of creating international obligations by unilateral declarations.[40]

As the ICJ decision in *Nuclear Tests* and the US judgment in *Lisi v. Alitalia* clearly demonstrate, there is nothing in the international legal text itself that compels or even suggests that a certain legal provision should be read in a certain way. Nor would the legal method as such prescribe any particular reading.[41] This, as is clearly shown in the analyzed examples, renders the text meaningless. The reasonableness theory, whereby courts are simply obliged to reach a decision which satisfies a very low reasonability standard in which courts—both international and domestic—dress their decisions does not establish control of the outcome except in the formal sense. Even resort to notions of balancing interests or search for equitable situations can hardly determine a specific result.[42] The use of these notions merely reveals that the grounds for the decision emanates exclusively from the courts' ideological positions. In practice, a domestic court which adjudicates upon issues with international dimensions is not faced with any constraints—legal or otherwise—in deciding the case. Often, this results in the conscious or unconscious judicial application of that court's own political and legal values.

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38 *Nuclear Tests Cases*, (Australia *v.* France), [1974] I.C.J. Rep. 253, 267, and (New Zealand *v.* France), [1974] I.C.J. Rep. 457, 472.

39 Rubin, "The International Legal Effects of Unilateral Declarations," (1977) 71 A.J.I.L; Lellouche, "The Nuclear Tests Cases", 16 *Harv. Int'l L.J.* 614 (1975); McWhinney, "International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case", (1975) 3 *Syracuse J. Int'l & Comp. L.* 9.

40 Rubin, "The International Legal Effects of Unilateral Declarations," (1977) 71 A.J.I.L. Lellouche, The Nuclear Tests Cases, (1975) Harv. Int'l. L.J. 614 at 2.

41 For example, as discussed above in the *Lisi* case, the Court disregarded the clear language of the Convention and actually read in the adequate notice which was not present in the Convention by interpreting that the passenger must have notice of the limitation of liability.

42 Corten, L'utilisation du raisonnable para le juge international: Discours juridique, raison et contradictions (Brussels: Bruylant, 1997) at 5.

(ii) *Intervention in International Cases*

The lack of meaningful participatory mechanisms for the adjudication of international legal disputes leaves countries virtually free to apply the intrinsic interpretation methodology. If members of an international convention who were not parties to a specific dispute were able to participate in the judicial procedures of a member directly engaged in a dispute, this would constrain the hearing court, resulting in a decision more consonant with the general consensus of the parties to the convention as crystallized in the text. This is because the positions of members not party to the dispute would be taken into account in resolving the dispute. However, the participatory mechanisms currently existing in national and international processes, such as intervention, are very limited and do not allow non-members to the dispute to shape the decision in a manner consistent with the consensus expressed in the treaty.

On the international plane, judicial intervention has a very narrow and limited scope, which has been much criticised.[43] The Statute of the ICJ provides[44] two forms of intervention: the so called discretionary or third party intervention (Article 62) and intervention as of right or treaty intervention (Article 63).

Article 62 allows a state to submit a request to be permitted to intervene in a dispute between other States when it believes that it has an interest of a legal nature which will be affected by the decision.[45] Any third State thus seeking to intervene in the case should normally file its request for permission to do so before the closure of the written proceedings in the principal case.[46] The ICJ held that "it is normally by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible." However, the term 'interest' is not defined in the Statute of the Court

43 C.M. Chinkin, "Third-Party Intervention Before the International Court of Justice", (1986) 80 A.J.I.L. at 495.

44 Statute of the International Court of Justice, Article 63.

45 *Ibid.*, Article 62.

46 Fiji sought permission to intervene in the *Nuclear Tests* cases, as did Malta in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Italy in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Nicaragua in the case concerning the *Land, Island and Maritime Frontier Dispute* and Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia with respect to the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*. The only one of these applications for permission to intervene to have been granted by the Court was the one filed by Nicaragua.

or elsewhere. Article 62 does not provide any basis for defining the scope of the interest.[47]

Article 63 interventions apply whenever the construction of a convention to which states, other than those concerned in the case, are parties to is in question. In such cases, the Registrar will notify all such States of the right to intervene in the proceedings, but if they use this right, the construction given by the judgment will be equally binding upon them.[48] The underlying policy behind this intervention procedure is that since parties to a treaty are bound by it, all parties necessarily have an interest in its construction. Thus, parties to a convention whose construction is in issue should be given an opportunity to express their preferred interpretation to the Court.[49]

These articles clash with the clear provisions of the *res judicata* principle contemplated in Article 59 of the Statute, which declares that "the decision of the Court has no binding force except between the parties and in respect of that particular case."[50] This has led Chinkin to wonder if intervention is ever possible if this article means what it says.[51]

Several states have presented Declarations of Intervention in terms of Article 63.[52] However, applying very narrow parameters for admission of intervention, the International Court of Justice only accepted the intervention in the *Haya de la Torre* case.[53] In this case, the Court examined the admissibility of the Cuban Government's intervention. Cuba, invoking Article 63 treaty intervention, had filed a Declaration of Intervention in which it set forth its views concerning

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47 The express wording of Article 62 is thus not restrictive. It is phrased subjectively and the only requirement is that the state must consider that its interests might be affected. C.M. Chinkin, "Third-Party Intervention Before the International Court of Justice", (1986) 80 A.J.I.L. at 495.

48 A declaration of intervention may be made even though the Registrar has not given the notification, but it should normally be filed before the date fixed for the opening of the oral proceedings relating to the principal case.

49 C.M. Chinkin, "Third-Party Intervention Before the International Court of Justice", (1986) 80 A.J.I.L. at 495.

50 Statute of the International Court of Justice, Article 59.

51 *Ibid.* at 2.

52 In Wimbledon, Poland obtained treaty intervention in the case brought by France, Great Britain, Italy and Japan against Germany in a disputed dealing with the Treaty's Kiel Canal provisions, PCIJ, ser. A, No. 1, p. 11 (1923). El Salvador requested intervention in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia requested intervention with respect to the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case.*

53 *Nuclear Tests* (Austl. *v.* Fr.; NZ *v.* Fr.), Application to Intervene, 1974 ICJ REP. 530, 535 (Orders of Dec. 20).

the interpretation of the Havana Convention. Peru contested the Intervention and the Court held:

> [the] Court observes that every intervention is incidental to the proceedings in a case, that, consequently, a declaration filed as an intervention only acquires that character if it actually relates to the subject-matter of the pending proceedings [...] In these circumstances, the point which it is necessary to ascertain is whether the object of the intervention is the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee: as according to the representative of the Government of Cuba the intervention was based on the fact that it was necessary to interpret a new aspect of the Havana Convention, the Court decided to admit it.[54]

In the *Libya v. Malta* case[55] Italy filed an application to intervene under Article 62 of the Statute. Both parties to the dispute objected to the intervention and the Court held that "if it were to admit the Italian contention, it would thereby be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States."[56] The Court considered that "an exception of this kind could not be admitted unless it were very clearly expressed, which was not the case". It therefore considered that "appeal to Article 62 should, if it were to justify an intervention in a case such as that of the Italian Application, be backed by a basis of jurisdiction."[57] Similarly, in *Tunisia v. Libya,* Malta was not permitted to intervene because it failed to demonstrate with sufficient clarity the interest of a legal nature that could be affected by the judgment.[58] The language of Article 62 is not restrictive. It is phrased subjectively and the only requirement is that the state must consider that its interests might be affected.[59] However, the Court interpreted otherwise and restricted the possibility of intervention.

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54 Judgment of 13 June 1951, International Court of Justice, *ibid.*
55 *Libya v. Malta*, 1985 I.C.J. 13 (June 3).
56 *Ibid.*
57 *Ibid.*
58 S. Rosenne, *Intervention in the International Court of Justice* (Dordrecht: M. Nyjhoff Publishers, 1993).
59 C.M. Chinkin, "Third-Party Intervention Before the International Court of Justice", (1986) 80 A.J.I.L. 495.

In the *Nuclear Tests* cases,[60] the ICJ laid down a series of restrictive rules to deny the possibility of intervention. First, it confirmed the incidental nature of intervention by dismissing the request for intervention where the main dispute was no longer litigated.[61] Second, it held that the subject matter of the proposed intervention must bear a sufficiently close connection to the proceedings for intervention to be permissible and the competence of the Court to consider the request for intervention may be based on this nexus, not the normally applicable principle of consent, a conclusion that has been strongly resisted by a number of judges.[62]

The most remarkably restrictive case of denial of intervention concerns El Salvador's request in the dispute between Nicaragua and the United States,[63] where the Court declared El Salvador's effort to intervene inadmissible insofar as it related to the jurisdiction/admissibility phase of the case.[64] El Salvador wanted to support the United States in its jurisdictional arguments and to contest the admissibility of Nicaragua's application. It based its grounds for intervention on its membership to the Statute of ICJ and other treaties of general scope. However, the Court rejected El Salvador's intervention by holding that its request was premature without any further substantive justification for its decision.[65]

The jurisprudence of the ICJ shows that the possibility of meaningful intervention in disputes is seriously restricted to only a handful of situations and it confirms Rosenne's contention that:

> the legislative history of these two provisions [...] suggests that little attention was paid to the implications of their inclusion in the Statute, or to the legal significance of the language used in 1922, and altered ... in 1945. Little wonder that the subsequent evolution of the concept or concepts of intervention [...] has been fraught with difficulties and uncertainties which have still not been dissipated.[66]

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60 Request for an Examination of the Situation with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case. 1995 ICJ Rep. 288.

61 Request for an Examination of the Situation with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case.

62 C. M. Chinkin, "Third-Party Intervention before the International Court of Justice", (1986) 80 A.J.I.L. at 495.

63 *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. *v.* U.S.), 1984 I.C.J. 215, 216 (Declaration of Intervention, Order of Oct. 4).

64 Sean D. Murphy, "Amplifying the World Court's Jurisdiction through Counter-Claims and Third-Party Intervention", (2000) 33 *Geo. Wash. Int'l L. Rev.* 5.

65 C.M. Chinkin, *Third Parties in International Law* (New York: Clarendon Press, 1993) at 179.

66 S. Rosenne, *Intervention in the International Court of Justice* (Dordrecht: M. Nyjhoff Publishers, 1993).

Chinkin's thesis is that bilateralism is no longer appropriate as the paradigm model for the regulation of activities in the international arena as "all members of the international community share an interest in the outcome of all claims."[67] Chinkin maintains that the actions of any two states have an impact upon the interests of other states and of other participants in international and municipal arenas.[68] For Chinkin,

> the bilateral formulation by parties of cases for presentation before adjudicative tribunals frequently does not take into account the multifaceted interests characteristically at stake in international disputes. International situations that culminate in claims are rarely bilateral, although it may be in the parties' interests to present them as such. More frequently the actions and reactions of States in their international dealings will impinge on the interests of other participants. […] Yet when the decision is made to resort to adjudication or arbitration these third party interests are minimized, and the dispute is presented before the tribunal as bilateral.[69]

On the domestic plane, the situation is not very dissimilar. Even if a vast number of states permit judicial intervention, the scope of this is also very narrow and does not allow ample participation of non parties, especially those whose only interest in the dispute is the interpretation of an international norm to which they are parties to. For example, in the United States, intervention at the federal level takes the form of intervention of right and permissive intervention. The former occurs when an applicant claims, in a timely manner, an interest not protected by the parties to the dispute.[70] There is a tripartite test to satisfy before a non party may be admitted as an intervention of rights. This test asks firstly, whether there is a significantly protectable interest in the claim;[71] secondly whether the ability to protect the

67 C.M. Chinkin, *Third Parties in International Law* (New York: Clarendon Press, 1993) at 147.

68 Stephen M. Schwebel, "Third Parties in International Law. Book Review" (1995) 89 A.J.I.L. at 835.

69 C.M. Chinkin, *Third Parties in International Law* (New York: Clarendon Press, 1993) at 148. This emphasis on bilateralism encloses an artificial notion that the practices of states, as well as other actors of the international community, necessarily affect the interests of many others.

70 The US government always has an unconditional right to intervene.

71 59 Am Jur 2d PARTIES §184.

interest be impeded or impaired by not allowing the non party into the case;[72] lastly, if those already in the case protect the interest.[73]

Intervention of right by those whose interests may be inadequately represented has depended on whether the applicant is or may be bound by a judgment in the action.[74] Before a non party may intervene as of right, the essential question is whether the applicant will be bound under the doctrine of *res judicata*.[75] In other courts whether in a practical and realistic sense those seeking intervention will be bound by the judgment insofar as they will not be permitted to dispute or deny an issue which would be determined in the action, even one that is adverse to their interests or where *res judicata* does not apply.[76]

In cases of permissive intervention, a non party may be permitted to intervene in an action when a statute confers a conditional right to intervene or when an applicant's claim or defense and the main action have a question of law or fact in common.[77] Permitting such internvetion is a matter of judicial discretion.[78]

Neither of the intervention alternatives has been conceived or permits members of an international treaty which are not parties to the dispute to voice their concerns and argue their positions with regard to the interpretation of the international treaty unless their positions fall within one of the restrictive situations contemplated in the federal rules.[79]

III. Alternative Models

In recent years, alternatives to the traditional model of application of international law have been propounded in the international legal literature. Feminist, Critical Legal Studies and other jurisprudential perspectives which are concerned with a general understanding of

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72 The issue of practical impairment is necessarily one of degree and requires a consideration of the competing interests of the plaintiff and defendant in conducting and concluding their lawsuit without undue complication, and of the public in the speedy and economical resolution of legal controversies. *U.S. v. City of Jackson, Miss.*, 519 F.2d 1147 (5th Cir. 1975).

73 USCS Fed Rules Civ Proc R 24.

74 59 Am Jur 2d PARTIES §184.

75 *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); *Ratermann v. Ratermann Realty & Inv. Co.*, 341 S.W.2d 280 (Mo. Ct. App. 1960).

76 *Kozak v. Wells*, 278 F.2d 104, 84 A.L.R.2d 1400 (8th Cir. 1960); *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1957).

77 USCS Fed Rules Civ Proc R 24b.

78 In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. USCS Fed Rules Civ Proc R 24b.

79 David A. Sonenshein, *Federal Rules Of Civil Procedure* (National Institute for Trial Advocacy, 2002).

interconnections of human activities as they actually occur beyond the constraints of meaningless legal texts have voiced their concern with the deficiencies of the international model and have put forward proposals to overcome the shortcomings of the prevailing model.[80]

A. *Critical Approaches*

In this respect, Critical Legal Studies and Feminist scholars have remarked that judges can consciously or unconsciously dictate outcomes according to their own ideology and experiences, both individual and social.[81] For instance, Wilson's opinion in *Morgentaler* is a paradigmatic example of how her gender position and understanding of women's relations can be outcome determinative.[82] In this decision, which is the Canadian leading case on abortion, the Supreme Court analysed held that the abortion provisions of the Criminal Code infringed the right to life, liberty and security of the person.[83] In general, judges' ideology and social context tend to determine their judicial analysis. According to Critical Legal Studies theorists, judges are socially constructed. Although judges interpret the law in good faith, they do so according to their own social experiences, shaped by their political and economic ideology.[84]

Feminist jurisprudence has long insisted on the disclosure and recognition of contextualization for any legal analysis.[85] This includes acknowledging all subjective biases, beliefs, expectations and values of the person engaged in legal analysis. Feminist jurisprudence calls

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80 Other models include Bechky's shadow court to hear international treaty cases as a partial solution to the current misinterpretation and mismanagement. The shadow court is a special court at the trial level responsible for all international treaty cases in a certain field. This shadow court would tend to promote uniformity and expediency and due to its high degree of specialization it would produce judicial decisions which are more attuned with other signatories' interpretations and international law obligations. However, the creation of shadow courts does not offer a solution to the hegemonic problems and does not guarantee by itself any respect for the decisions and arguments of other parties to a treaty. P.S. Bechky, "Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention In Air Disaster Litigation", (1995) *60 J. Air L. & Com.* at 528.

81 Sylvia R. Lazos Vargas, "Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity" 58 *Md. L. Rev.* at 150.

82 *R. Morgentaler v.* [1988] 1 S.C.R. 30.

83 *Ibid.*

84 Such socially positioned ideology is the "common sense" that each of us uses to order what we perceive. J.M. Balkin, "Ideology as Constraint", (1991) 43 *Stan. L. Rev.* at 1134.

85 H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univesity Press, 2000); H. Charlesworth, "Feminist Methods in International Law", (1999) 93 *American Journal of International Law* at 379; D. Kennedy, *International Legal Structures* (Nomos: Baden-Baden, 1987).

for the validation and recognition of personal experience that reflects the individual's contextualized reality in the form of narratives.[86]

The legacy of non traditional jurisprudence, such as feminism and Critical Legal Studies, shows that the law is essentially the preference of the adjudicator, who, as arises from our discussion of internal legal interpretation, is free to decide the fate of any case.[87] However, the open and full disclosure of the adjudicator's background, values, beliefs, ideology, gender, social class and ethnicity as proposed by feminist and other non traditional legal theory scholars in the form of narratives does not solve the problem of the adjudicator's liberty to decide a case. It merely acknowledges and highlights the problem of partiality. Thus, this acknowledgment does not preclude domestic courts from employing their own values and principles in deciding cases, to the detriment of non hegemonic and harmonic international solutions.

Karen Knop has proposed a model of application of international law based on the persuasiveness rather than on the bindingness of international law, where international law is always applied after a process of translation into the language of domestic courts.[88] Knop considers that the international norms, regardless of whether they have been domesticated or not, provide a relevant and persuasive source for interpretation of the provisions of national law. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Canadian Supreme Court held that an international law convention not ratified by Canada must nonetheless be taken into account so as not to bring about unconstitutional results in a case involving a deportation order. Based on the Supreme Court of Canada's non binding but persuasive application

86 D. Raigrodski, "Breaking Out of 'Custody': A Feminist Voice in Constitutional Criminal Procedure"(1999) 36 *Am. Crim. L. Rev.* at 1301.

87 Thus, we should seek some conceptual criterion or paradigm by which we can understand the adjudication process, which will be discussed at the end of this paper. Allan Hutchinson's non foundationalist theory does not provide a solution either. It is based on the premise that judges must engage with the legal materials in good faith and that the outcome might be anything (anything goes), provided that the judges make some genuine effort to support the conclusions by reference to the rules". In other words, "judges must hold a practical and actual belief that the rules do permit such a course of action." Allan Hutchinson, The Rule of Law Revisited in D. Dyzenhaus (ed.) *Recrafting the Rule of Law: the Limits of Legal Order*, Oxford, Portland, 1999 at 212–214. Allan Hutchinson's viewpoint ultimately depends on what the rules might permit, or what the judges perceive in good faith that they permit, which is useless because as arises from the foregoing, there is nothing in the legal texts and the legal rules that determine any specific outcome or that preclude any specific outcome. Thus, Allan Hutchinson's thesis that anything might go should be reformulated to state that there is nothing which may not go.

88 K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U. J. Int'l L. & Pol.* at 501.

of international law in *Baker v. Canada (Minister of Citizenship and Immigration),*[89] (again, some background to this case is necessary to make your point more effectively. Readers will not be overly familiar with these decisions) Knop's model attempts to juxtapose the substantive norms of international law with the court's own idiosyncratic understanding of the norms. This juxtaposition is done by freely translating and adapting the international norm to the culture and language of the law of the forum in a way more reminiscent of the role of comparative law than that of international law. For Knop, "the ideal [result of the applied law] is thus neither wholly international nor wholly national, but a hybrid that expressed the relationship between them." She favours resort to domestic interpretation as a form "to legitimize international law through a process of particularization."[90]

Knop's proposal shows a clear disregard for interpretations of international norms that respect the international consensus embodied in the norms, in advocating a translation of those norms into the culture and ideology of the court, even if the international norms are denuded their original significance. In other words, the problem with this approach is that it tends to reinforce the hegemonic effects of international law by allowing a national court to apply its own ideology through Knop's translation process, at the expense of the meaning and purpose of the international source.

B. *Transjudicial Models*

Anne Marie Slaughter has suggested a model of transjudicial communication where international law is invoked on the domestic plane through a network of decentralized horizontal communication among courts. She constructs her model upon her observance of the existence of an increasing phenomenon of cross-citation of decisions of foreign courts, reliance of foreign sources and a permanent exchange and dialogue between courts on a wide array of topics.[91] For Slaughter, this transjudicial communication fosters the acceptance and effectiveness of international obligations and permits a collective deliberation by judges from different national legal traditions in an open and

89 *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.

90 K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U. J. Int'l L. & Pol.* at 505.

91 A.M. Slaughter, "A Typology of Transjudicial Communication", (1999) 29 *U. Rich. L. Rev.* 99 (1994). For Slaughter "[t]hey are all forms of transjudicial communication: communication among courts—whether national or supranational—across borders. They vary enormously, however, in form, function, and degree of reciprocal engagement."

interactive dialogue. Furthermore, this model of transjudicial communication also fosters the dissemination of ideas from courts in one country to foreign and supranational courts. Similar to Knop's alternative proposal, the conception of law prevailing in transjudicial communication is based on persuasive rather than coercive authority.[92]

The weakest aspect of transjudicialism is that it has not developed a notion of persuasion that distinguishes it from political influence and it therefore does not solve the hegemony problem.[93] To use Slaughter's metaphor, transnational winds blow only in one direction. They originate in highly developed countries with a well functioning legal and judicial system and land in developing countries.[94] However, the transjudicialism vision of collective deliberation, if short of its hegemonic elements, is an appealing conception of international law which may help overcome most of the problems presented by the traditional model.

C. *Participatory Model*

From the above analysis, the non participatory mechanism of the prevailing models of adjudication, which are based on internal methods of interpretation, does not offer a viable solution for the resolution of international controversies, as it essentially applies the national interests of the state of the forum to the resolution of the controversy, usually intensifying the hegemonic nature of international law.[95] The

92 Patrick Glenn describes persuasive authority as "authority which attracts adherence as opposed to obliging it. H. Patrick Glenn, Persuasive Authority, (1987) 32 *McGill L.J.* at 261.

93 K. Knop, "Here and There: International Law in Domestic Courts" (2000) 32 *N.Y.U. J. Int'l L. & Pol.* at 505.

94 A.M. Slaughter, "A Typology of Transjudicial Communication", 29 *U. Rich. L. Rev.* 99 (1994) at 118.

95 The gist of the proposed model is based upon the teachings of the law reform and participatory theory doctrines, which in turn also borrow their foundations from the strong criticism to the International Court of Justice's unduly restrictive approach to third-party intervention in international litigation. Legal reform is conceived as a multifold dynamic process, which requires a national effort based on high level of State and private sector participation. Law reform is the instrument for guiding and legitimizing the processes of change in society with due account of reconciling diverse interests. Participatory theory requires that an act or any other regulation contemplate procedures allowing the industry, those affected by the law and the general public to participate in the elaboration of the regulations. C. Chinkin, *Third Parties in International Law* (Oxford: Oxford University Press, 1993); S. Rosenne, *Intervention in the International Court of Justice* (Dordrecht; Boston: M. Nyhoff, 1993); J.R. Nolon, "Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina" 13 *Pace Envtl. L. Rev.* 1996 at 726; I.F.I. Shihata, "The Role of Law in Business Development", (1197) 20 *Fordham Int'l L.J.* at 1578. Under this conception a legal reform must necessarily rest on three basic pillars:

alternative models proposed in the international legal literature have not provided adequate solutions to overcome the weaknesses of the traditional method. However, the transjudicial model's conception of collective deliberation provides a desirable vision of an acceptable solution for the application of international law in the domestic sphere. Unfortunately, transjudicialism alone is incapable of materializing this vision due to the hegemonic consequences which it brings about, especially since it leaves the transjudicial communication to the spontaneous exchanges between courts. Given the inequalities of the resources, prestige and power of different courts, transjudicial communication in practice is a unilateral dialogue where the speaking courts are those belonging to highly developed countries and the listening courts are those in less developed states.

Since there is no uncontroversial theory to avoid this hegemonic phenomenon, a new model of application of international law is proposed. This model is based on the full and open participation of all those interested and affected players. The concept of interested and affected player is conceived in a broad sense so as to permit participation of those that have an interest in the outcome of a decision. For this purpose, for example, the International Law Commission's concept of injured state could serve as a basis for elaboration of the notion of affected and interested parties of the international community, in the adjudication process in municipal courts, coupled with an extrinsic method of interpretation of international sources.

The proposed model aims to involve the wide participation of the international community, including state and non state actors, in the adjudication process on the domestic plane with the view toward shaping decisions that are interpreted in a manner that considers the views of concerned international actors with respect to the interpretation of treaties they are parties to. This reduces the likelihood of a national court imposing its own parochial values with respect to interpreting an international norm.

Under the participatory model, whenever there is a controversy in a domestic court whose resolution depends upon interpreting a treaty norm, the court should give adequate notice to all parties to the convention.[96] The participation of the states parties to the convention should be compulsory for the forum court which should always admit their intervention. Furthermore, there should be clear guidelines for

(i) adequate rules, (ii) appropriate processes through which those rules are made and enforced and (iii) well functioning public institutions appropriately staffed with trained individuals.

96 This could include all other interested subjects of international law that have voiced their intention to participate in these proceedings.

adjudicating court, which should include an express obligation in the treaty as well as in the necessary implementing domestic norms for the forum court to consider and make decisions in accordance with the prevailing and most persuasive arguments of law forwarded by participating intervening states, as well as the adversarial presentation of arguments made by the parties to the controversy.

By permitting the participation of all state parties to an international agreement towards resolving a question of treaty interpretation, this model permits a wider variety of views and voices to be reflected in all adjudicative decisions. In this way, the transjudicial objective of collective judicial deliberation is materialized without reproducing the hegemonic effects which arise under the current model of non compulsory participation. This will reduce the element of mistrust stemming from the application of international law by a court of another state party to the international convention, permitting a more consistent and non hegemonic application of international treaties.

This open participation does not completely eradicate the possibility of a court imposing its national policy interests detrimental to international obligations, However, it has the virtue of openly providing a basis for reducing this possibility to isolated and exceptional cases, facilitating a more democratic mode of dispute settlement.[97]

In order to strengthen the legitimacy of decisions and to render the outcomes more transparent, less hegemonic and more attuned with the spirit of the consensus reflected in the international treaty, the participatory model proposes that disputes be addressed through an interpretation model based on an extrinsic methodology and through an open disclosure of all the material conditions affecting the adjudicator as put forward by feminist and Critical Legal Studies scholars.[98] This open acknowledgment of the adjudicator's political and ideological biases may help provide the decisional outcome with more persuasive force. At the same time, it will permit the communication between courts and collective deliberation to flow in a more open and transparent manner.[99]

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97 Knop's model tries to solve the hegemony problem by acknowledging the inequalities of the sources of international law and by trying to find a method of application of international law which may freely deviate from the sources. At the very least, this model provides the opportunity for the judicial decision to have a persuasive force so that it can be applied to similar factual and legal patterns in other domestic jurisdictions.

98 J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), at 5.

99 Therefore, we propose that the judges fully and openly disclose their personal experience and position in society in their judicial decisions. In this respect the judges should exteriorize, materialize and acknowledge their experiences, subjective positions, personal values and economic and social standing in society, their identification with

IV. Conclusions

The traditional non-participatory and bilateral model of how domestic courts apply international law has given domestic courts ample leeway to apply their state's national interests in deciding international disputes. This has entailed the hegemonic interpretations of international sources, often in a manner contrary to international consensus behind the adoption of international norms.

The gist of the proposed model of the application of international law is based on the full and open participation of all those interested and affected players of the international community in the adjudication process in municipal courts, coupled with an extrinsic method of interpretation of international sources. This model tries to rescue the vision and objectives of transjudicialism without reproducing its hegemonic consequences and it reflects a profound discontent with the International Court of Justice's narrow conception of judicial intervention. The adoption of the proposed model would promote cooperation and participation and would limit the domestic courts' power by permitting all those—state and non state—actors to influence the outcome of the judicial decision. This, however, entails a reform of international and domestic law.

social groups, their gender, race and all the relevant subjective and unique aspects that shape their identity and that ultimately shape their decision making process[99]. Infusing the courts' opinions with the particular experiences of the adjudicator in the form of narratives will also help overthrow the partiality and perspectivity of the universal abstract claims of the law.