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The Dynamic Law of Occupation: Inaugurating International Thematic Constitutionalism

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I. INTRODUCTION

Law, by its nature is not static, but dynamic. This creates questions of interpretation of documents or institutional arrangements that have been shaped or taken place hundreds of years ago or under different legal and factual circumstances.[1] In U.S. constitutional law, this discussion has been framed as the "living constitution" debate.[2] Could there also be an equivalent "living constitution" debate in international law? The answer appears to be yes.

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[1] *See, e.g.* John Vallamattom and Anr. v. Union of India, (2003) 1 Supp. S.C.R. 638, ¶ 36 (India) (holding that "even if a provision was not unconstitutional on the day on which it was enacted….by reason of facts emerging out thereafter, the same may be rendered unconstitutional" in reference to a provision preventing Christians from bequeathing property for religious or charitable purposes).

[2] David A. Strauss, THE LIVING CONSTITUTION 43–45 (2010).

The U.N. Charter is largely viewed as an international constitution.[3] Moreover, on account of the views held by various international judicial organs, international documents are subject to an evolutionary interpretation. [4] The Charter is a "living" constitution,[5] in essence introducing a "living international law" debate. This is reinforced by voices in international theory calling for international law's "functional" reading. This functional element is nothing more than a re-baptized dynamic approach to the international legal framework.[6]

Such an approach is sometimes called for by the exigencies of international developments. In a highly decentralized international community, this "living international law" debate faces the danger of losing its vigor. This debate must be included in a more general, systemic framework. Detailing how these dynamic interpretational endeavors have to take place in order not to end up being arbitrary and norm-destructive.

This holds a particular importance in international law fields which have traditionally appeared to be highly positivist. It is these fields, where change is bound to meet hurdles and where the incorporation of new elements is not self-evident, that provide the best indicator of if and how the living international law continues to respire. The law of occupation is such a field. It has been traditionally more reserved and reluctant to flexibility. Two recent cases seem to portray the opposite; both of them involve prolonged occupations in the Middle East. The present note will analyze how they aspire to influence the law of occupation, with human dignity concerns being posed as the outmost limit of any dynamic interpretation endeavors

Moreover, the fact that human dignity serves as a guiding principle and ultimate limit in an international legal field not prone to change, awards a modulating role to the notion. International law is interpreted and shaped under its lens, the same way human dignity appears as a guiding principle in domestic constitutional orders. Thus, the dynamic approach of the law of occupation signals the dawn of international thematic constitutionalism.

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[3] Rudolf Bernhardt, *Article 103*, in 2 THE CHARTER OF THE UNITED NATIONS-A COMMENTARY (Bruno Sima ed., 2002) 1292. *But see* Martii Koskienniemi & Paivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 LEIDEN J. INT'L. L. 553, 559 (2002) (expressing doubts over whether the Security Council was envisaged under article 103 to have primacy over human rights treaties).

[4] *See, e.g.*, Demir and Baykara v. Turkey, 1345 Eur. Ct. H.R., ¶68 (2008); Caso de la Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶ 148 (Aug. 31, 2001).

[5] Bardo Fassbender, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 1, 130 (2009).

[6] *See, e.g.*, Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yael Ronen*, 8 J. INT'L. CRIM. JUST. 329 (2010).

II. THE DYNAMIC LAW OF OCCUPATION

As a general rule, the law of occupation favors continuation and preservation of the status quo ante.[7] Yet, as with every norm, there are exceptions. Thus, the legal or factual reality can be altered, if this is for the betterment of the local occupied population's life.[8]

This is particularly true in cases of prolonged occupation. The European Court of Human Rights, in relation to Turkey's prolonged occupation of Cyprus' northern part, has come to conclude that "life must be made tolerable and be protected by the de facto authorities, including their courts."[9] The whole notion of "transformative occupation" lies on the premises that the occupying power can intervene in the legal status quo of the occupied territory and legislate, if this is for the benefit of the local population.[10]

However, the occupying power cannot change the occupied territory's factual and legal status quo to serve the needs of the occupying power instead of the local populace.[11] Nevertheless, domestic courts, especially of countries which have been involved in prolonged occupations, have condoned an expansive interpretation of notions like that of military necessity. This in essence puts the needs of the state's civilians residing in an occupied territory on the same scale as the needs of the occupying power's army.[12]

A more revolutionary approach, which yields the same results, advocates the dynamic adaptation of occupation law to the exigencies of time.[13] Thus, it has been argued that the law of occupation should not apply under all circumstances and in all times, but

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[7] *See* The International Committee of the Red Cross, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 43. Oct. 18, 1907.

[8] Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION 246 (2012)

[9] Cyprus v. Turkey, 2001 Eur. Ct. H.R. ¶ 96.

[10] Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006); Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 680 (2005).

[11] *See* International Committee of the Red Cross, Convention (IV) relative to the Protection of Civilian Persons in Time of War art 49. Aug. 12, 1949.

[12] *See* HCJ 7957/04 Mara'abe v. Israel, PD 1, 12 [2005] (holding that parts of the fence constructed in the West Bank could be meant to protect not only the army but also the Israeli citizens living there).

[13] *See also* Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L. L. 571, 575-576 (2011) (discussing recent works of major publicists in the field of interpretation of rules and referring to Robert Kolb's assertion that international law is "law in action" as well to the works of Richard Gardiner and Isabelle Van Damme, both of whom underscore the important role context plays in the interpretation of international norms).

only whenever and wherever the occupying power is capable of exercising the authorities it is expected to exert.[14]

Such an approach certainly shakes the field's static foundations. The question is whether such a dynamic interpretation can lead to a cosmogony in the law of occupation and if the answer is yes, whether this adaptation is only factual or also legal. The next two subsections will analyze two examples of such a dynamic interpretational intrusion attempt in the law of occupation, on a de facto and de jure basis. The Israeli and Turkish prolonged occupations will be taken as a case study.

A. The de facto Dynamic Interpretation of the Law of Occupation

Turkey invaded northern Cyprus in 1974 and since then it has been occupying the island's northern part. A series of U.N. Security Council Resolutions have referred to Turkey as an occupier and have called on it to withdraw from the island. Similarly, on a judicial level, the European Court of Human Rights has issued a number of decisions declaring Turkey's occupation of northern Cyprus.[15]

Titika Loizidou, a Greek Cypriot who had fled the island's northern part after the Turkish invasion, was granted access to her property through a landmark court decision.[16] In all relevant cases that followed and were adjudicated similarly, the Court's standard position had traditionally been that the Greek Cypriots, who fled the island's northern part after the Turkish invasion, had not lost title to their property.[17] As such, the arguments of the Turkish side that the particular properties were inhabited by other civilians[18] or Turkish proposals for exchange between Greek Cypriot properties lying in the island's northern part with Turkish Cypriot property's in the island's southern part,[19] have been rejected by the Court along the absolute lines the law of occupation draws on the occupation status and the responsibilities of the occupying power.

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[14] Benvenisti, *supra* note 8, at 48; Valentina Azarov, *Operationalising Functionality: Questioning the Term "Functional,"* Opinio Juris (Apr. 27, 2012 5:15 AM) http://opiniojuris.org/2012/04/27/operationalising-functionality-questioning-the-term-functional/; Aeyal Gross, *Rethinking Occupation: The Functional Approach*, Opinio Juris (Apr. 23, 2012 10:00 AM) http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach/

[15] *See, e.g.,* Cyprus v. Turkey, 2001 Eur. Ct. H.R. ¶ 61; Xenides-Arestis v. Turkey, 2005 Eur. Ct. H.R. ¶ 27.

[16] Loizidou v. Turkey, Eur. Ct. H.R. (1996).

[17] *Id.* at ¶ 62; Demades v. Turkey, 2003 Eur. Ct. H.R. ¶ 37; Xenides-Arestis v. Turkey, 2005 Eur. Ct. H.R. at ¶ 28.

[18] Demades v. Turkey, 2008 Eur. Ct. H.R. ¶ 19.

[19] *Id.* at ¶ 20.

In the last two years, these absolute lines have become blurred. On a legal level, there has been no change in the international community's position. Yet, when dealing with issues of the prolonged Turkish occupation on the ground, the international community takes a more ambivalent approach, which is largely affected by the prolonged nature of the Turkish occupation.

The European Union Commission was asked to intervene by Greek and Cypriot European Parliament Members on the excavations taking place by Turkey in northern Cyprus and allegedly destroying archaeological treasures. The Commission refused to do so. While Cyprus is a European Union state and the island's northern part is under the law of occupation it is still considered part of Cyprus' territory. In its response, the European Commission repeatedly underlined that although legally northern Cyprus remained part of the state of Cyprus, other considerations rendered any intervention impossible.[20]

The Commission demonstrated the same ambiguity regarding the application of EU law also in the *Orams* case. There, the European Court of Justice correctly held that a European Regulation ordering the execution of judicial decisions in other EU states, applied also to Cyprus' northern occupied part, despite the European Commission's different opinion.[21]

There is a perception that while prolonged occupation may not change an occupied territory's legal status, it can have an influence on how the occupying power can exert jurisdiction over a particular territory. Thus, decisions which refused to even recognize the Turkish Cypriot Republic as a state entity still referred to the debate around the island's de facto division. The opinions argued this division should not deprive the occupied territory's residents of advantages and privileges granted to the State of Cyprus.[22] The importance this de facto division would exert on judicial pronouncements would become more evidently exemplified after two decades, in the *Demopoulos* case.[23]

Demopoulos and other Greek Cypriot citizens, who had fled the island's northern part after the Turkish invasion, refused to recognize the Compensation Claims Commission established by the Turkish Cypriot authorities of the island's occupied part. The question was thus whether this commission should be recognized by the Greek Cypriots as a local remedy which should be exhausted before resorting to the

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[20] *The EU Commission Cannot Terminate Excavations in the Occupied Archaeological Site of Salamina*, KATHIMERINI (Greece), Aug. 9, 2012, *available at* http://portal.kathimerini.gr/4dcgi/_w_articles_kathbreak_1_09/08/2012_456298

[21] Case C-420/07, Meletis Apostolides v. Orams, 2009 E.C.R. ¶ 39-40, 52.

[22] Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food, ex parte, S.P. Anastasiou (Pissouri) Ltd. and Others, E.C.R. ¶ 32, 37, 44, 47 (1994).

[23] Demopoulos et al. v. Turkey, 2010 Eur. Ct. H.R.

European Court of Human Rights. In its relevant decision in 2010, the Court answered in the affirmative.[24]

On a legal doctrinal level, the Court did not alter its stance and held that the Turkish occupation of Northern Cyprus cannot be acknowledged as legal.[25] Quite importantly, such illegality was not expressed in absolute terms, excluding any adjustments based on a dynamic reading of the reality the prolonged occupation had created. According to the Court the case before it should be viewed under its historical and political context. This reality, as well as the passage of time, must "inform the Court's interpretation and application of the Convention, which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances."[26]

The Court, inter alia, notes that "…..Some thirty-five years after the applicants, or their predecessors in title, left their property, it would risk being arbitrary and injudicious for it [the Court] to attempt to impose an obligation on the Respondent State [Turkey] to effect restitution in all cases….It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and re-housing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention."[27]

In *Demopoulos*, the Court endorsed a dynamic interpretation of the law of occupation since Turkish settlers had settled in the Greek Cypriots' houses and properties.[28] The *Demopoulos* judgment did not come in a vacuum. Voices like that of Judge Schermers who had argued that Turkish settlers should be granted the right to respect for their homes in the occupied territory and thus after a long period of time restoration to the status quo ante would not abide by the European Convention of Human Rights, were existent.[29] *Demopoulos* just rendered them a systematic tone as part of the Court's jurisprudence.[30]

As such, in the *Slivenko* case, the Court acknowledged that descendants of a former Soviet Union military officer could not be deported from Latvia.[31] In other words, civilians who had lived all or large part of their lives in the occupied country and had ties with this occupied country, could not be deported only because they shared the

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[24] *Id.* at ¶ 103
[25] *Id.* at ¶ 96
[26] *Id.* at ¶ 85
[27] *Id.*, at ¶ 116
[28] *Id.* at ¶ 84
[29] Cyprus v. Turkey, 15 Eur. H.R. Rep. 509, 560 (1993).
[30] *See* Cyprus v. Turkey, 2001 Eur. Ct. H.R. (Palm, J., dissenting).
[31] Slivenko v. Latvia, 2003 Eur. Ct. H.R. ¶ 126.

same ethnicity as the occupying power's population. Latvian domestic law acknowledged this when it granted citizenship to ex-USSR citizens.[32]

The illegality of occupation does not cease. However, the lapsing of a considerable amount of time makes it necessary to take the rights and interests of all parties living in the occupied territory into account, even if these pertain to the occupying powers' population.[33] In human rights law, this is also true in cases of illegal immigrants who are caught after years of illegal sojourn in a country and face deportation after having started a family; the interests of the family must be taken into account in any deportation decision.[34]

The entrance of the occupying population's rights in the occupation's legal framework is more vividly depicted in a recent land swap agreement that the Cypriot government approved. The swap involved Turkish-Cypriot property lying in the State of Cyprus and Greek-Cypriot owned property, lying in the island's occupied part.[35] The property's owner, Mike Tymvios, had accepted the land swap proposed by the Turkish-Cypriot side, yet it was the Cypriot government that refused to inscribe in the land registry the relevant Turkish-Cypriot land acquirement.[36]

Ultimately, this Cypriot government objection was lifted and the land swap was endorsed. The Cypriot government subsequently bought the previously Turkish-Cypriot owned property, upon which public Greek-Cypriot institutions have been built.

While Cyprus' Attorney-General declared that the decision was not setting a precedent, the Turkish-Cypriot side spoke of the decision as a "landmark case."[37] The influence of the *Demopoulos* judgment is evident. In the law of occupation, while the norm is that ex injuria jus non oratur, it has already been noted by the ICJ and further

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[32] *Id.* at ¶ 124.

[33] Solon Solomon, THE JUSTICIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL'S SECURITY FENCE AS A CASE STUDY 141 (2009).

[34] *See, e.g.*, Human Rights Comm. Of the Optional Protocol to the International Covenant on Civil and Political Rights (July 26, 2001), 72d Sess., Winata v. Australia, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000, at ¶ 7.2.

[35] Stefanos Evripidou, *IPC Insists Tymvios Case Sets Precedent*, CYPRUS MAIL, July 12, 2012, *available at* http://www.cyprus-mail.com/cyprus/ipc-insists-tymvios-case-sets-precedent/20120712.

[36] *Id.*

[37] *Id.*

stressed by international publicists that the consequences of this "injustia" may bear enforceable rights for good-faith third parties or for the local population.[38]

The legal landscape arising especially out of cases of prolonged occupation is not based on a "zero-sum game", where it is conceded that the occupier must unconditionally restore things to their previous condition. The dynamic interpretation of the law of occupation takes into account that time creates facts on the ground, in favor of the occupying power. These can be taken into account in the course of the occupation's termination.

With dynamic interpretation being able to de facto influence the law of occupation, the question is whether de jure such dynamic interpretation can bear the same results. In other words, the question is whether the lapsing of time in prolonged occupations can lead to the interpretational endorsement of dynamic legal arrangements that will also take into account the occupying power's population interests and rights. On this aspect, the recent conclusions of the report on the legality of Israeli outposts in the West Bank, broadly known as the 'Levi Report,"[39] are noteworthy.

B. The de jure Dynamic Interpretation of the Law of Occupation

In late January 2012, Israeli Prime Minister, Benjamin Netanyahu appointed a committee, headed by retired Supreme Court Justice Edmund Levi. The Committee, which included a retired District Court Judge and a former Foreign Ministry Legal Advisor, was formed to examine the legal status of unauthorized settlements in the West Bank.[40]

Recently, the Committee published its findings.[41] The Levi Report, as it is commonly known, held that Israel is not an occupying power in the West Bank.[42] Consequently, according to the Committee, the Fourth Geneva Convention does not apply. Article 49(6) of the particular Convention may thus not form the normative platform for the illegality of Israeli settlements.[43]

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[38] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Dillard, Separate Opinion at 167), (Castro, Separate Opinion at 218-219).

[39] LEVY COMMITTEE, REPORT ON THE STATUS OF BUILDING IN JUDEA AND SAMARIA, (2012) available at http://go.ynet.co.il/pic/news/09.07.12.pdf

[40] Tovah Lazaroff, *Legal Report on Outposts Recommends Authorization,* THE JERUSALEM POST (Jul. 9, 2012, 6:08 AM), http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=276749

[41] LEVY COMMITTEE, *supra* note 39

[42] *Id.* at ¶ 5.

[43] *Id.* at ¶5-6.

To reach these conclusions the Levi Report referred to the San Remo Resolution (1920). The Resolution was subsequently incorporated in the Mandate for Palestine and ultimately endorsed also by the League of Nations. The Mandate granted national statehood aspirations only to the Jews with parallel respect for the civil and religious rights of the other populations.[44] The fact that the U.N. Charter endorsed previous Mandate arrangements under article 80, led the Levi Report to argue that Jewish settlements can be legally built in all of the Mandate's territory.[45]

This is not the view held by the international community. They continue to consider the West Bank as occupied and Israel as the occupying power. This was palpably stated also in 2004 by the International Court of Justice in its Advisory Opinion on Israel's security fence.

As an occupied territory, Israel can neither annex nor transfer its population to the West Bank. As such, by characterizing the West Bank as "occupied" the Court has indirectly opined that Jewish settlement in all historical Palestine as provided by the Mandate for Palestine is no longer in effect. Similar to the case of Namibia,a U.N. General Assembly Resolution, the Resolution endorsing the Partition Plan back in 1947, has tacitly terminated the Mandate for Palestine. The Court does not explicitly state this, but this is the overall assumption from its stance as further stated more clearly albeit still not unequivocally in the separate opinion filed by Judge Elaraby[46] Apparently, the progress of time has changed the legal and factual parameters vis a vis regional actors, mainly Israel and the Palestinians.

By concluding that there is no Israeli occupation of the West Bank and by adhering to the original San Remo arrangements, the Levi Report apparently refuses to condone the de jure dynamic interpretation of the law of occupation. The same is true also regarding article 49(6) of the Fourth Geneva Convention that is read according to its historical and teleological context[47] and in total disregard of the interpretational evolution it has underwent through the advent of time. Thus its application in the case of the Israeli settlements is denied. Such an approach has been consistently rejected by the international community's political and judicial organs. [48]

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[44] LEAGUE OF NATIONS, COMMUNIQUE AU CONSEIL ET AUX MEMBRES DE LA SOCIETE, MANDATE FOR PALESTINE, arts. 2, 7, (1922).

[45] *Id.* at ¶ 7-8.

[46] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004) (Elaraby, Separate Opinion at 246, 251).

[47] International Committee of the Red Cross, Commentary to Article 49 of the Fourth Geneva Convention, (1949), available at http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument.

[48] S.C. Res. 446, U.N. Doc. S/RES/1325 (22 Mar. 1979); S.C. Res. 452, U.N. Doc. S/RES/452 (20 Jul. 1979); S.C. Res. 465, U.N. Doc. S/RES/465 (1 Mar. 1980); S.C. Res. 471, U.N. Doc. S/RES/471 (5 June 1980); The Venice Declaration on the Middle East (EC) 6

The Levi Report conclusions have been highly criticised.[49] While Israel's Prime Minister has reportedly appeared reluctant to endorse the Report, other voices are urging him to do so.[50] All the while important questions remain unanswered. If prolonged occupations can change the way they are de facto treated as the case of the Turkish occupation has demonstrated, why can't prolonged occupations change also the way they are legally viewed? Why should rights and the existence of the occupying power's citizens be acknowledged as a parameter on the ground, but not on the legal plain?

The answer is that they are, or at least should be. For example, assertion of the settlers' human rights cannot be denied by their mother state, even when they are located in an occupied territory, because such protection is inherent to their dignity. Thus human dignity puts also the settler's rights into the protection framework, altering traditional law of occupation arrangements and echoing a "living international law" approach. This does not mean though that such an approach is absolute. It stops where human dignity again, sets the barrier: at the dignity of the occupied population, which must be taken into account irrespective of the original intents of a Mandate's drafters.[51]

This is what the Levi Report disregards. It is the reason why the de jure law of occupation dynamic interpretation it proposes cannot ultimately be endorsed. International law becomes "living" when it resorts to human dignity and at the same time any interpretational human dignity-sourcing endeavours can last as long as human dignity itself permits it. Human dignity becomes an almost schizophrenic notion. It either endorses or limits interpretational expansion depending on whether it is the notion's negative or positive facet that reigns. The former serves as an outmost boundary to any interpretational attempt to alter the positivist status quo. The latter stirs novel interpretational approaches.

Bulletin of the European Communities ¶ 9 1980. *See also*, Statement by the Int'l Comm. of the Red Cross to the Conference of High Contracting Parties to the Fourth Geneva Convention, ¶ 5 (Dec. 5, 2001) (on file with author).

[49] *See e.g.*, Juan P. Schaerer, *The Levy Report vs. International Law*, HAARETZ (Nov. 4, 2012, 2:26 AM), http://www.haaretz.com/opinion/the-levy-report-vs-international-law-1.474129; Iain Scobbie, *Justice Levy's Legal Tinsel: The Recent Israeli Report on the Status of the West Bank and Legality of the Settlements*, EJIL!TALK (Sep. 6,2012), http://www.ejiltalk.org/justice-levys-legal-tinsel-the-recent-israeli-report-on-the-status-of-the-west-bank-and-legality-of-the-settlements/#more-5396

[50] Tovah Lazaroff, *MKs Call on Netanyahu to Approve Levy Report*, THE JERUSALEM POST (Sep.24,2012, 1:27 AM) http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=286027

[51] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution, Advisory Opinion, ¶ 53 (1970).

Human dignity thus takes on a Janus-like quality, resembling more of an interpretational principle than a mere right. This underlines the principle's function in international law, which is similar to the harmonization role it has in domestic constitutional law. This brings both international and constitutional law closer, with long-term impacts on international law's structure. These issues will be sketched in the next sections.

III. THE RIGHT TO HUMAN DIGNITY

In international law, the right to dignity is an important structural element of the legal order.[52] The Preamble of the international community's cardinal instrument, the UN Charter, calls on its member states to reaffirm "faith in human rights, in the dignity and worth of the human person." Other major international instruments encapsulate dignity as a cardinal value of the international system of relations they attempt to regulate.[53] The question is how human dignity hermeneutically interacts with the international legal system. The aforementioned occupation law cases demonstrate that in international law the right to dignity should be perceived as playing the role it has in domestic law. This role is that of an interpretational prism through which other constitutional provisions are read. In domestic law, human dignity is viewed as being deeply rooted in justice and fairness and expressing a fundamental, basic value, intrinsic to the harmonization of constitutional provisions.[54] At the same time, dignity limits the application of other constitutional provisions or freedoms.[55]

The German Basic Law, the equivalent of a German constitution, constitutes the major legal foundation of this approach towards the concept of dignity. It holds that in case of conflict of rights, the essential content of basic rights, such as that to dignity, is not meant to be encroached upon.[56] Dignity becomes the notion upon which all the constitutional structure is built. Almost a decade after the culmination of

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[52] Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, ¶ 54, (Int'l Crim. Trib. for the Former Yugoslavia Jun. 25, 1999); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L. L. 85,103 (2004).

[53] *See* Universal Declaration of Human Rights, art.1, Dec. 10 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 71 (1948); International Covenant on Civil and Political Rights preamble, Dec. 16 1966, 999 U.N.T.S. 171 ("recognizing that these rights derive from the inherent dignity of the human person"); African Charter on Human and Peoples' Rights, Jun. 27, 1981, 1520 U.N.T.S. 217.

[54] Henk Botha, *Human Dignity in Comparative Perspective*, 2 STELLENBOSCH L. REV. 171, 175-76 (2009); Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1925 (2000).

[55] Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 298 (1997); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 2 INT'L. J. CONST. L. 267, 271 (2008).

[56] Grundgesetz fur die Bundesrepublik Deutschland [CONSTITUTION] May 23, 1949, art. 19.

World War II, the German Constitutional Court, in the *Luth* judgment, declares that the Basic Law has erected an objective value system which revolves around the free development of personality and human dignity.[57] In a number of subsequent cases, ranging from the use of polygraph in criminal proceedings[58] to the downing of an airplane in order to save the lives on the ground,[59] this notion is repeated. It is now embedded in the Court's firm conviction that human beings can not be treated as objects.[60] The dignity of these persons is proclaimed as the interpretational guide to the balance of constitutional rights the Court is called to wage.

Rendering dignity as the interpretative lens of constitutional provisions has been echoed in other constitutional texts[61] as well in the jurisprudence of other countries with different legal systems, such as France and South Africa. In France, it is human dignity that ultimately defines the limits of certain activities which could infringe on constitutional rights.[62] Along these lines, the Conseil d'Etat ruled that the use of dwarf-throwing in relevant competitions violated these dwarfs' human dignity, even if the practice involved the dwarfs' consent.[63]

In South Africa, the country's Constitutional Court, in asserting the ban on prostitution, has affirmed that the fundamental dignity of the human body is not simply organic and it cannot be treated as a commodity.[64] The Court has heralded dignity as a fundamental constitutional value and as an enforceable right.[65] Moreover, it has tied dignity with the right to equality, permitting the former to reshape the legal landscape.[66] In a number of varied cases, spanning from adequate housing[67] and the extension of state-funded educational benefits[68] to the immigration policy towards

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[57] Bundesverfassungsgericht [BverGe] [Federal Constitutional Court] Jan. 15 1958, 7 BVerGe 198, (205) (Ger.).

[58] Kommers, *supra* note, 57.

[59] Elizabeth Wicks, THE RIGHT TO LIFE AND CONFLICTING INTERESTS 155–157 (2010); Olivier Lepsius, *Human Dignity and the Downing of Aircraft*, 7 GER. L. J. 761, 767 (2006).

[60] Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L. L. 848, 849 (1983); Matthias Mahlmann, *The Basic Law at 60-Human Dignity and the Culture of Republicanism*, 11 GER. L. J. 9, 30 (2010).

[61] For examples look at the constitutions of South Africa, art.39, Greece, art.2, Spain, art.10.

[62] Roger Brownsword, *Freedom of Contract, Human Rights and Human Dignity* in HUMAN RIGHTS IN PRIVATE LAW193 (Daniel Friedmann & Daphne Erez-Barak, eds, 2001).

[63] Id.

[64] S v. Jordan, 2002 (6) SA 642 at ¶ 74; South Africa v. Makwanyane, 1995 (3) SA 391 (CC)

[65] Khosa v. Minister of Social Development, 2004 (6) SA 505 (CC)

[66] Evande Grant, *Dignity and Equality*, 7 HUM. RTS L. REV. 299 (2007)

[67] Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC)

[68] Khosa v. Minister of Social Development 2004 (6) SA 505 (CC) at ¶ 80. For a similar argumentation in the realms of the U.S. jurisprudence regarding the support of the individuals' family-care needs see Maxine Eichner, *Families, Human Dignity and State Support for Caretaking:*

homosexual partners of South African citizens,[69] the Court has expanded the application of legislative provisions. This was done in order to cover people or categories that had not been originally in the scope of the legislator's intent, on the grounds that all humans should be treated equally on the basis of "equal concern and respect."[70]

Other jurisdictions also use dignity as a normative prism through which equality provisions are interpreted.[71] In addition, there is a general hermeneutic role reserved for the notion. Thus, the Indian Supreme Court has held that dignity, encompassing inter alia the bare necessities of life such as adequate nutrition, clothing and shelter,[72] can be invoked to determine the scope of fundamental rights.[73]

The same Court has stressed that human history shows that the struggle of man for democratic polity has been inspired by a desire to achieve equality, emphasizing that they should judge all actions on account of whether they promote this goal.[74] In other words, the struggles of man to achieve a more dignified life in the freedom democracy asserts are oriented towards equality, which is thus presented as inherent with human nature and surpassing any positivist dictates.

This is true also in the Canadian and U.S. legal orders. Although in both jurisdictions criticism has been voiced towards the inconsistent way the Court has referred to the notion of dignity in its jurisprudence.[75] In Canada, in the case of *Corbiere*, the country's Supreme Court has held that in the realms of the Canadian Charter's equality clause, any parameter impairing human dignity can be deemed as fostering inequality.[76]

In *Vriend v. Alberta*, concerning the firing of a college employee due to his homosexuality, the Supreme Court determined that the Canadian Charter had taken a

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Why the United States' Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government's Basic Responsibilities, 88 N.C. L. REV. 1593 (2010)

[69] National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, 2000 (2) SA 1

at 31,42

[70] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 277 (1977)

[71] Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 2 Int'l. J. Const. L. 267, 279 (2008)

[72] Francis Coralie v. The Admin., Union Territory of Delhi, (1981) 68 A.I.R. 1981 S.C. 746,747

[73] Keshavananda v. State of Kerala, (1973) SC 1461

[74] Islamic Acad. of Educ. v. Karnataka, (2003) 6 S.C.C. 697, 698 (India)

[75] *See, e.g.*, Rex Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011); Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 17 (2004). *See also* Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 553

[76] Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, ¶ 5

further step in the recognition of the innate dignity of the individual and this was essential to the achievement of equal dignity for all.[77] Moreover, in a number of cases, the Canadian Supreme Court has acknowledged human dignity as an essential value that underlines the rights and freedoms guaranteed in the Canadian Charter.[78]

Similarly, in the U.S., the California Supreme Court, in relation to same-sex marriages, asserted the right of everyone to have their family relationship accorded dignity, even if this relationship is not a union traditionally designated as marriage. Same-sex marriages must thus enjoy equal dignity and respect.[79]

While the U.S. constitution does not have a dignity clause, dignity has been depicted as the fundamental value constitutionalism protects.[80] In a number of cases, such as prohibition of self-incrimination,[81] the imposition of cruel punishment[82]or of the death penalty to a mentally disabled person,[83] the U.S. Supreme Court has treated human dignity as a lens through which the individual rights' guarantees are to be interpreted.[84]

Moreover, and as a capping stone of the way human dignity interacts with domestic constitutional orders, U.S. jurisprudence offers examples of cases where human dignity functions both as an inviolable right as well as a right restricting other constitutionally-protected rights.[85]

This is particularly palpable in the abortion jurisprudence of the U.S. Supreme Court in the *Cahart* and *Casey* cases.[86] Upholding the Partial-Birth Abortion Ban Act and relying on *Casey*, the Court in *Cahart* describes the banned method as bearing

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[77] Vriend v. Alberta, [1998] 1 S.C.R. 493, 567

[78] *See, e.g.,* R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 346 (Can.); R. v. Morgentaler, [1988] 1 S.C.R. 30, 166 (Can.); Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, 812, 816 (Can.).

[79] *In re* Marriage Cases, 183 P.3d 384, 399–400 (Cal. 2008).

[80] *See* Eichner, *supra* note 70, at 1596. For views that the non-depiction of dignity in the U.S. Constitution means that the notion is alien to the American tradition see James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1221 (2004).

[81] *See* Miranda v. Arizona 384 U.S. 436,460 (1966)

[82] *See* Gregg v. Georgia 428 U.S. 153,182 (1976); Hope v. Pelzer 536 U.S. 730, 745 (2002)

[83] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002). For a more thorough analysis of the issue of human dignity in U.S. jurisprudence see Jackson, *supra* note 77, at 16–17; Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 748–61 (2006).

[84] Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L. J. 1694,1736 (2008)

[85] Craig Smith, Thomas Fetzer, *The Uncertain Limits of the ECJ's Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 451 (2004)

[86] *See* Gonzalez v. Carhart, 550 U.S.124 (2007); Planned Parenthood v. Casey, 505 U.S. 833 (1992). See also Siegel, supra note 86, at 1696

similarities with killing a newborn infant, and thus the ban "expresses respect for the dignity of human life."[87] At the same time, Cahart adds a parameter that did not exist in Casey namely that the ban comes to protect some women who would otherwise be led to a decision of terminating the life of the fetus, a decision they would later regret.[88]

Thus, *Cahart* brings into the framework also the dignity of the women as human actors in the relevant debate of the constraint of their right to freely proceed with the abortion. As Yale law professor Reva Siegel puts it, *Cahart* stresses the distinction between dignity as life and dignity as freedom.[89]

The relevant U.S. jurisprudence makes the question of human dignity's identity crisis more demanding. Is human dignity a basis for rights, a right in itself or simply a synonym for rights?[90] The answer is that it is all of the above,[91] and this is true also in the international arena. There, on a negative basis, dignity serves as the outmost frontier to any dynamic interpretation endeavour. Its positive facet focuses on the exact opposite, namely on how to stir rather than stop international law's dynamic expansion. The interplay between human dignity's two facets is antagonistic and pulling in opposite directions.

This is true in a number of international law fields, apart from the law of occupation. For instance, in international criminal law, human dignity has led to the hermeneutical expansion of certain provisions, in order for certain crimes to be asserted.[92] But at the same time, it has augmented calls for a strict interpretation of the international criminal statute provisions, in order for the rights of all criminal trial participants to be upheld.[93]

In jus ad bellum, human dignity dictates that the preservation of life should be the highest priority and thus resort to force can not be condoned except under certain preconditions. Sometimes, massive human rights violations and atrocities render the

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[87] Gonzalez, 550 U.S. at 157

[88] *Id.* at 125

[89] Siegel, *supra* note 86, at 1738.

[90] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L. L. 655, 656 (2008).

[91] Glensy, *supra* note 77, at 111.

[92] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeal Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2007).

[93] *See e.g.*, Thomas Weigend & Khalid Ghanayim, *Human Dignity in Criminal Procedure: A Comparative Overview of Israeli and German Law*, 44 ISR. L. REV. 199, 207-209 (2011) (stating that human dignity is linked with defendant as well as victim rights); Anat Horovitz & Thomas Weigend, *Human Dignity and Victims' Rights in the German and Israeli Criminal Process*, 44 ISR. L. REV. 263 (2011).

use of force synonymous with saving civilian lives.[94] Similarly, in jus in bello, the core of international humanitarian law stems from considerations of humanity and the other person's human dignity.[95] Nevertheless, it is human dignity of the soldiers that sometimes can sanction an operation, if these soldiers' lives are going to be saved and the harm to the enemy civilian population is not going to be immense.[96]

Resorting to human dignity as a hermeneutical guide in international law can also take place in fields where the state, rather than the individual, is the subject. This is the case with state immunities. Recently, in international jurisprudence, the issue acquired an additional significance with the ICJ's ruling on the question of compensations owed by Germany for war crimes committed during World War II.[97] On one hand, human dignity makes the restitution of such compensation a moral imperative.[98] On the other hand, human dignity tied to the fact that such petitions can culminate in a dignified manner in German courts, has also impaired foreign courts and international judicial bodies from actually awarding reparations to victims of Nazi war crimes.[99]

Thus, the question each time regarding resorting to human dignity in the course of a dynamic interpretation of international law is: "which facet leads us to interpretations that are just?" and "How do we meet the demands of international developments, while at the same time maintaining international law structures?" In that sense, resorting to human dignity in international law reminds us of the interpreter's quest for harmonization between the various constitutional provisions, always with the purpose of enabling international law actors to enjoy to all the possibilities and rights international law confers to them.[100]

Not all fields of international law can be harmonized by using human dignity. It would be more difficult, albeit not impossible, to fathom human dignity solving norm

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[94] A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J. L. & PUB. Pol'y 725 (2004)

[95] McCrudden, *supra* note 92, at 667-68

[96] Solon Solomon, *Targeted Killings and the Soldiers' Right to Life*, 14 ILSA J. INT'L. & COMP. L. REV. 99, 116-120 (2007); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 108 (2006)

[97] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 20 (Feb. 3).

[98] For the fact that human dignity relates also to the dead see also Eckart Klein, *Human Dignity in German Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 152 (David Kretzmer & Eckart Klein eds., 2002).

[99] *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), I.C.J. 20, ¶ 73, ¶139 (citing inter alia cases of foreign courts).

[100] For a similar idea in domestic constitutional legal orders *See*, Nagaraj v. Union of India (2006) SC 4560

conflicts in fields like international trade law.[101] But then again, not all constitutional provisions can be harmonized. There are some constitutional provisions that stand on their own, particularly those referring to the way the State is going to be politically organized or those which are highly technical.

In all cases, resort to human dignity is not meant to serve as panacea, but rather as an indicator of how international legal order can be constitutionalized, not only textually, but also thematically. This is the subject of the next section.

IV. TOWARDS INTERNATIONAL THEMATIC CONSTITUTIONALISM

International constitutionalism is the doctrinal attempt to explain international law developments in domestic constitutional terms with the incentive of creating a new normative, internationalist framework.[102] This stems from the firm belief that there should be an international community with shared universal goals and principles and with the adequate organs to achieve them.[103] Thus, international constitutionalism argues that the international community should be structured on a vertical rather than horizontal model. States should comply with a normative hierarchy, which, like domestic constitutions, can be either substantial or instrumental, depending on whether it relates to how constitutional norms interact with ordinary legislation or to the organs that are bound to enforce the rules embedded in the constitution.[104] Yet, unlike in domestic jurisdictions, this hierarchy does not exist in the international arena.[105]

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[101] *See* ANDREAS ZIEGLER & BERTRAM BOIE, *The Relationship Between International Trade Law and International Human Rights Law* in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 278 (Erika de Wet & Jure Vidmar eds, 2012) (arguing that although a typical case of a conflict between classical trade liberalization rules and human rights rules is not easily found, still it could emerge on a theoretical level and supplying relevant examples).

[102] Thomas Kleinlein, *Non State Actors from an International Constitutionalist Perspective: Participation Matters* in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM 43 (Jean d'Aspremont ed., 2011).

[103] Thomas Giegerich, *The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well Considered Constitutionalization of International Law?"*, 10 GER. L. J. 31 (2009); Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L. L. 611 (2006).

[104] Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1980 MAX PLANCK Y.B. U.N. L. 1, 3, 19; Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 TEXAS INT'L. L.J. 527, 528 (2003).

[105] R. RAJESH BABU, REMEDIES UNDER THE WTO LEGAL SYSTEM 97 (2012); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 94 (2003); Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?,* 20 DUKE J. COMP. & INT'L L. 69, 74 (2009); ANDREAS ZIEGLER & BERTRAM BOIE, *supra* note 103, at 4; Prosecutor v. Delalic,

This absence of hierarchy has been attempted to be constructed internationally on both a textual and an institutional level. As such, it has been argued that such hierarchy can be traced in article 103 of the UN Charter, which states that in case of conflict between the obligations of U.N. Members that arise from the Charter and their obligations arising from other international agreements, the former will prevail.[106] Article 103 has been viewed by other scholars as entailing a plethora of uncertainties, ranging from the root of its meaning to points on interpretation[107] as well as its relationship with customary law.[108] Moreover, issues of conflict between the Charter and certain legal orders such as the European one, question the Charter's supremacy in the latter.[109]

Others have contended that such hierarchy exists in some UN Security Council Resolutions, which due to their legislative character set new general and abstract international norms.[110] Yet, these Resolutions also have to abide by the U.N. Charter,[111] and as such, the whole discussion once again returns to the supremacy clause in article 103.

Thus, an approach that restricts itself only to normative and textual hierarchy is not satisfactory on an international level. In contrast to the two-dimensional domestic law as far as hierarchy is concerned, in international law hierarchy is *three-dimensional*, as its aforementioned hierarchical facets are supplemented by thematic hierarchy. In domestic law, the various spheres of human activity, spanning from the way the society is organized, the state's allies and foes, the procedure under which the state

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Case No. IT-96-21-A, Judgment, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)..

[106] R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence, [2007] UKHL 58; Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT'L. L. & POL. 259, 286-87 (2007)

[107] Robert Kolb, *Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?*, 64 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 21 (2004)

[108] Dupuy, *supra* note 106, at 13

[109] Jean d'Aspremont & Frederic Dopagne, *Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders*, 68 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT, 939, 971 (2008).

[110] Aerial Incident at Lockerbie (Lybian Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3, 15, ¶ 39–40 (April 14); Aerial Incident at Lockerbie (Lybian Arab Jamahiriya v. U.K.), Preliminary Objections, 1998 I.C.J. 114, 126–27 (Feb. 27); Happold Matthew, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L. L. 593 (2003)

[111] David Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUR. J. INT'L. L. *89, 92-93 (1994)*; Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of the United Nations Security Council Resolutions*, 16 EUR. J. INT'L. L. 59,69 (2005).

goes to war or signs peace agreements or how the individual develops their personal or economic sphere, are all included in the constitution in the form of distinct provisions.

As such, in domestic law, the whole discourse is between constitutional provisions, which are called to interact either with other parts of the constitution, or with ordinary legislation. International law addresses basically the same issues as domestic law,[112]not on the level of different provisions, but rather of different thematic fields. Issues such as war proclamation, human rights and freedoms as well as facets related to a person's financial activity, are entrenched in separate constitutional provisions in domestic law. In international law, they form separate legal fields. While domestic constitutional law has various constitutional provisions, on an international level the quest is the harmonization of the different fields and not the blunt erasure of one by the other.[113]

It can be argued that this harmonization can be provided through recourse to notions such as jus cogens, which have an intense normatively supreme character.[114] Yet, any solution that jus cogens norms provide cannot but be drastic, in essence nihilistic, towards the provision that is called to be sacrificed and subdued. Ultimately, it cannot be easily condoned.[115] International law searches for another alternative, same result-yielding notion that nevertheless will appear softer, more humanistic. That notion is dignity.[116]

Thus a new international constitution is created. In tandem with national constitutions, human dignity constitutes the prism through which not only provisions but whole legal fields are interpreted. International constitutionalism thus becomes

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[112] Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. J. INT'L. L. 223, 226 (2006)

[113] *See* Al-Adsani v. United Kingdom, App. No. 3563/97, Eur. Ct. H.R. ¶ 55 (2001).

[114] Vienna Convention on the Law Of Treaties, May 22, 1969, art. 53, 1155 U.N.T.S. 331; Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L. L. 72,73 (2005)

[115] Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?,* 20 DUKE J. INT'L. & COMP. L. 69, 71–72 (2009).

[116] *See e.g.*, *Al-Adshani*, App. No. 35763/97, Eur. Ct. H.R. ¶ 3 (Rozakis, J., and Vajic, J., dissenting) (opining that Kuwait's state immunities arguments should not be accepted, because they collided with the prohibition of torture, a jus cogens norm. A more correct conclusion would have been reached if state immunities arguments would not have been accepted due to their collision with torture and ultimately to the applicant's human dignity, an inviolable right); Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 20, ¶ 93 (Feb. 3) (refusing to bypass the issue of state immunity, on account of the fact that jus cogens violations were in question); *See also Id.*at ¶ 40, (Judge Cancado Trindade dissent) (arguing for the Court not to resort to state immunity, since the issue involved violations of human dignity).

thematic, and the two recent cases in the arteriosclerotic law of occupation form its litmus test. They have both shown that even in occupation law, a legal field not susceptible to drastic changes, human dignity can ultimately reshape existing arrangements as well put the necessary barrier to any expansive readings of the relevant provisions. Consequently, international constitutionalism is not just textual or institutional, but thematic.

The fact that human dignity can serve as a guiding interpretational principle, bears great importance to a much fragmented field like international law, both on a normative as well as on a jurisdictional level. Courts want to avoid norm conflicts.[117] As such, they may resort to patterns and solutions such as that of lex specialis.[118]

Yet, resort to the lex specialis principle cannot so easily offer solutions, in cases where two international law fields overlap without being in conflict or without the one supplementing the other.[119]

This has been discerned for example in the ICJ's Advisory Opinion on Israel's security fence.[120] The Court stated that both international humanitarian law and human rights law are to apply in Israel's West Bank occupation. However, it did not clarify how interaction and conflict between the two fields will be handled.[121] This ambiguity from the Court resulted in its inability to offer a credible solution to the question of how the rights of the Israeli settlers, under human rights law, should be reconciled with the rights of the Palestinian population under international humanitarian law.[122]

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[117] *See* Milanovic, *supra*, at 71.

[118] The Courts have usedex specialis to resolve disputes. *See e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996 226, 240, ¶ 25 (July 8); *Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 ¶ 106 (July 9).

[119] Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L. L. 27, 31, 42, 44 (2005); William Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592, 597 (2007).

[120] *See* Louise Doswald-Beck, *International Humanitarian Law and the International Court of Justice on the Legality or the Threat of Use of Nuclear Weapons,* 316 INT'L. REV. RED CROSS 35 (1997). (Describing how the relationship between international humanitarian law and human rights law is mutual)

[121] *See*, Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 Isr. L. Rev. 355, 377, 382 (2007)

[122] *See* Solon Solomon, THE JUSTIFIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL'S SECURITY FENCE AS A CASE STUDY 140 (2009); Yael Ronen, *Status of Settlers Implanted by Illegal Territorial Regimes*, 79 BRIT. Y.B. INT'L. L. 194, 236 (2008) (declaring that human rights law should apply in cases of populations who have settled a territory in contravention to international humanitarian law)

The issue would have merited a totally different treatment if the Court harmonized the two international law fields through the concept of dignity. In fact, this is the road that was opted for by Israel's Supreme Court in deciding whether the security fence could also protect an Israeli settlement in the West Bank. Based on previous jurisprudence, the Court held that even though international law might not sanction their presence in the West Bank, Israeli settlers had a right to life. Their right to human dignity was thus balanced with that of the Palestinian population. The Court concluded that the security fence could be erected in the particular part of the West Bank, but its route should be altered in order not to disproportionately infringe on Palestinian rights.[123]

Thematic constitutionalism can prove efficient not only in issues of substantial but also of institutional hierarchy, where international institutions find a difficulty to efficiently tackle them. This difficulty further blurs international normative transparency,[124]particularly in cases where international courts and tribunals interact but do not issue a unified voice in the application or interpretation of the same norm. Between two different and sometimes even conflicting solutions, thematic constitutionalism promotes the approach which, based on human dignity, augments protection for these whose human rights are infringed by the conflicting international jurisprudential approaches. [125]

But thematic constitutionalism's function does not end here. Even if international courts and tribunals do not appear willing to endorse dignity as a decisive factor in their judgments, international law's multi-level character allows for the issue to be ultimately solved by domestic jurisdictions.[126] Through the casting of the lots behind one of the possibilities already brought forward in the realms of the international judicial debate, national courts-acting as a filter[127] are called to decide between

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[123] HCJ 7957/04, Mara'abe v. Israel, ¶ 19, 24, 115-116 [2005]; Nihal Jayawickrama, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL, AND INTERNATIONAL JURISPRUDENCE 254 (2002); *See also* Villagran-Morales et al. v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 63, ¶ 144 (Apr. 6, 2006) (holding that the right to life included in its realms also the right to dignity).;

[124] *See e.g.*, U.N. Int'l Law Comm'n, *Report of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006); Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT'L. L. & POL. 259, 260–61, 268–70 (2007).

[125] *See* Leathley, *supra* note 126 at 261

[126] For the perception of international law as a multi-level system, see Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L. L. J. 321, 324 (2011).

[127] While focus has been put on the role of international law in national court decisions, the opportunity domestic law has to shape international law has remained at large underestimated. *See* Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy and the Evolution of International Law*, 20 EUR. J. INT'L. L. 59, 64 (2009) (declaring that during the past few years

competing interpretational versions. They also invest the solution they endorse with an authoritative cloak, further re-introducing it to the international arena as an absolute dictum. In contemporary international law, the human nature of mankind stands in the epicentre. This increases the chance that any solution national courts render will have an intense humanistic and consequently human dignity scent even in cases that are not about human rights. [128]

In international jurisprudence there have been norm-interpretation conflict cases. One such case with a particular interest refers to the question of the degree of control required in order for non state actors' activities to be attributable to a state.[129] This particular issue is one of the few where the norm interpretation had the opportunity to complete the aforementioned circle.[130] It was born in the international judicial world and it was after a continuous interpretational analysis there that it finally passed to the domestic jurisdiction, in order for the latter to be crowned as the ultimate arbitrator of the interpretational dispute.

In 1986 the ICJ viewed such state responsibility as existent only when non state actors were under the effective control of a state and acted in essence as the latter's agents.[131] The International Tribunal for Former Yugoslavia (ICTY) and subsequently the ECHR found that mere "overall control" was sufficient to assert state attribution.[132] International jurisprudence seemed enchanted by the "overall criterion" because it can lead to easier state attribution, augmenting protection of victims of these non state actors' activity.[133] In essence, this jurisprudential tendency constitutes the facet of a

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international courts have functioned as courts of appeal for decisions rendered by domestic courts).

[128] *See e.g.*, Cogan, *supra* note 128 at 324; Arnold Pronto, *'Human Rightism' and the Development of General International Law,* 20 LEIDEN J. INT'L. L. 753 (2007); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866, 872 (1990).

[129] Geir Ulfstein, *The International* Judiciary in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 138–39 (Jan Klabbers et al. eds., 2009); Jeffrey Dunoff and Joel Trachtman, *A Functional Approach to International Constitutionalization* in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 6–7 (Jeffrey Dunoff and Joel Trachtman eds., 2009).

[130] *See e.g.*, Ulfstein, *supra* note 131, at 136–140; For such a conflict in the field of international arbitration *See* Frank Spoorenberg & Jorge Vinuales, *Conflicting Decisions in International Arbitration in Yuval Shany* in THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 91–102 (Chiara Giorgetti ed., 2009).

[131] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. ¶ 115 (June 27).

[132] *See e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia July 30, 1999); Cyprus v. Turkey, App. No. 25781/94, 2001 Eur. Ct. H.R. ¶ 77

[133] Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* 18 EUR. J. INT'L. L. 649, 654 (2007)

dignity-based approach. A dispute on how the international norm should be interpreted culminates to the endorsement of the version that seeks to protect most the interests of the people whose human rights, and most importantly their right to life and physical integrity, have been infringed.[134]

In light of all these, the ICJ returned to repeat its Nicaragua stance, denouncing at the same time the ICTY's holding on the issue.[135] This leaves the ultimate decision to the domestic judge. On account of international jurisprudence's fragmentation, the domestic judge is called to decide which of the two approaches should be sanctioned. Since in domestic trials litigants are in front of the judge and the case has an intensely personal facet, ultimately the sanctioned approach cannot but abide by the applicants' legal woes, in particular if the latter have been victims of non state actors' illegal activities. For the domestic judge, the human dignity of the persons asking for legal redress is his primary concern. The U.S. jurisprudence on claims against states like Iran and Syria for terrorist acts perpetrated by their proxies is indicative.

Under the Foreign Sovereign Immunities Act (FSIA), a state is found liable even it provides material support for non state illegal activities, such as terrorist acts.[136] As such, in a number of decisions, U.S. courts have held that once material support has been provided to non-state actors, it also renders these non-state entities agents of the particular state and thus state attribution for the actions of the former can be asserted.[137] Yet, it would be inaccurate to assume that U.S. jurisprudence simply overrides the *Nicaragua* effective control doctrine in favour of the stance taken in *Tadic*.

Undoubtedly, a state can be held accountable for non-state actions even if these non-state actors receive only material or moral support from the state. While the

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[134] The European Court of Human Rights insistence that jurisdiction be distinct from attribution as matters of the degree of control over a territory come into question is doctrinally correct. In practice the lower the threshold required for such control, the easier not only the assertion of jurisdiction but also the assertion of state attribution. *See* Catan and Others v. Moldova and Russia, App. Nos. 43370/04, 8252/05, 18454/06, Judgment, 2012 Eur. Ct. H.R. ¶115.

[135] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 404, 406 (Feb, 26) (referring to the ICTY's dictum as "unpersuasive" and "unsuitable.")

[136] *See* 28 U.S.C. § 1605A(a)(1) (2006).

[137] *See e.g.*, *In re: Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, 837 (S.D.N.Y. 2011); *Wultz v. Islamic Republic of Iran*, 864 F.Supp.2d 24 (D.D.C. 2012); *Blais v. Islamic Republic of Iran*, 459 F.Supp.2d 40, 48 (D.D.C. 2006); *Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229, 265 (D.D.C. 2006); *Botvin ex rel. Ellis v. Islamic Republic of Iran*, 604 F.Supp.2d 22, 26 (D.D.C. 2009).

Nicaragua doctrine still applies,[138] U.S. courts, in an attempt to protect the right to dignity of the deceased have held that even in cases a state-supported entity aids non-state actors the actions of the latter can be attributable to the state.[139]

The right to dignity becomes thus the conduit through which U.S. courts have come to dynamically interpret the *Nicaragua* "agency doctrine." The organ providing the material support to non-state actors has to be a state organ and this precondition is satisfied, pursuant to the *Tadic* doctrine of "overall control" even in cases of state-supported organizations, which provide assistance to these non-state actors.

Taking into consideration the dignity of the victims, dead or alive, the judge cannot leave victims of non-state illegal activities such as terrorism, without any legal redress. Ultimately, the judge sides with an interpretation of the accountability doctrine that in essence maximizes protection for these victims. In the jurisdictional dichotomy between *Nicaragua* and *Tadic*, the domestic judge comes to ultimately leave his own imprint, not by trotting on Nicaragua, but by integrating it in subsequent jurisprudence through a dynamic interpretation and according to the exigencies of international law and humanity.

V. CONCLUSION

Whether international law can be subject to a dynamic interpretation, depends on fields like that of the law of occupation, which have been traditionally reluctant to change. Under this framework, two recent cases of such dynamic interpretation involving prolonged occupations, acquire additional importance. This note aspires to demonstrate that while this dynamic interpretation can be described as de facto or de jure, depending on whether it aspires to shape facts on the ground or the legal landscape, the ultimate parameter that defines whether such interpretative extension should be condoned lies in human dignity and the question of how people's rights are influenced or harmed.[140]

Furthermore, the note aspires to demonstrate that the proclamation of dignity as a balancing banner in the law of occupation's dynamic interpretation has also systemic consequences and contributes to international law's further constitutionalization. In occupation law in particular, human dignity becomes the normative prism through which international legal norms are applied; the same way constitutional provisions

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[138] *See e.g.*, *Wultz* 864 F.Supp.2d at 29; *Rimkus v. Islamic Republic of Iran*, 575 F.Supp.2d 181, 189 (D.D.C. 2008).

[139] *In re: Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, (Holdng Iran accountable for Hezbollah has providing material support to Al Qaeda).

[140] Aeyal Gross, *If There are o Palestinians, There's No Israeli Occupation*, Haaretz, (July 10, 2012) http://www.haaretz.com/news/diplomacy-defense/if-there-are-no-palestinians-there-s-no-israeli-occupation.premium-1.449988

are interpreted in light of the right to dignity in domestic law. Invocation of dignity, in order for field conflicts to be solved in international law, awards a systemic character to international law. This transmits an aura of certainty to norm creation and their subsequent application.

Ultimately, the two recent occupation law cases have a wider impact in the structure of international law than that envisioned by these cases' protagonists. They set a precedent regarding the potential that exists in international law for its structural configuration and its resemblance more with constitutional law. Nevertheless, in this case, the potential field of normative application is not constrained to the limits of a specific country but encloses the whole world in a globalized par excellence manner. The moment international law is globalized and can remain on pars with international developments, is the moment international law remains "living," still relevant, in an ever-changing world.