International Human Rights Law within the Palestinian Legal System

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ABSTRACT

The hierarchical status of international treaties within the domestic system of states varies from one to the other depending on each state’s approach and understanding of international law. While most states do not differentiate between the constitutional hierarchical status of international human rights treaties and other types of international law treaties, some states accord human rights treaties a special constitutional status. In Palestine, the legal system does not establish the constitutional hierarchy of international treaties within Palestine. The Palestinian Supreme Constitutional Court (SCC) dueled upon the issue recently. This article provides a critical review of the SCC’s decisions on the constitutional hierarchy of international law in Palestine, while advancing the argument that international human rights treaties should be accorded a special constitutional status.

Keywords: International Law, International Human Rights Treaties, Palestine, Constitutional Law, Constitutional Courts.

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1. **INTRODUCTION**

In 2012, the United Nations General Assembly recognized Palestine as a non-member observer State and thus confirmed that, setting aside the contentious nature of recognition in international law, the international community believed that the State of Palestine (SoP) was competent to ratify international treaties. When Palestine ratified seven core human rights treaties (HRT), it did not submit a reservation to any of the treaties.

States that join international treaties are responsible for enforcing their international obligations domestically, but the method they use is entirely their own concern. The principle of sovereignty establishes that each state is free to determine how it enforces its International obligations at the domestic level. But this does not mean that they can cite national law as ‘justification’ when they fail to act accordingly.

Monism and Dualism have traditionally been the two approaches used to determine the relationship between a state’s national law and conventional international law. Monism treats national law and conventional international law as components of a single legal system. It holds that international law becomes part of the state’s national legal system when a treaty is ratified, which means there is no need for future legislation. Monism generally upholds the supremacy of international law by elevating it over national law.

Dualism maintains that national and conventional international law have different legal subjects and different sources, and it therefore maintains that conventional international law cannot be

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6 Unless a treaty is not self-executing.
enforced within a state’s domestic legal system unless it has first been transformed into a domestic law. Common law states such as Australia, Canada and the United Kingdom usually implement international treaties on the domestic level by transforming it into laws or instead rely on case law provisions. To take one example, in 1998 the United Kingdom (UK) passed the Human Rights Act, and this enabled it to incorporate the European Convention on Human Rights (ECHR) into domestic law.

The hierarchy of international treaties in each state’s domestic system has to be deduced from its case law, constitution or other indicators. Some constitutions accord international treaties the same constitutional power as ordinary laws, and others give international treaties a status that is higher than ordinary law but lower than the constitution; more progressive constitutions, meanwhile, distinguish HRT from other international treaties, and give the former primacy by elevating them over ordinary law and giving them a constitutional status. Very few constitutions however make conventional international law superior to the constitution. Finally some constitutions, such as Palestine’s, may not address the position of international law within their domestic system at all.

This article proposes that Palestinian political and legal decision-makers should grant HRT a special constitutional status. It first determines the hierarchical status that general international treaties have within the current Palestinian legal system and then outlines the comparative experiences of states that do and do not accord HRT a constitutional status. It concludes by presenting political and legal arguments that have been advanced in support of its initial proposal.

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10 Grundgesetz Fur Die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBI. I (Ger.) art. 25. 2014 Const. art. 93 (Egypt).
11 1958 Const. arts. 54, 55 (Fr.), 2014 Const. art. 20 (Tunis.).
12 Constituicao Federal [C.F.] [Constitution] art. 5 (3) (Braz.). 2008 Const. art 84 (Ecuador). 1991 Const. art. 20 (Rom.) 1992 Const. art. 11 (Slov.).
13 Grondwet voor het Koninkrijk der Nedelanden arts. 91 (3), 94 (Neth.).
2. The General Status of International Treaties in the Palestinian Legal System

The Palestinian Amended Basic Law of 2003 does not address the constitutional hierarchy of international treaties (including HRT) within the Palestinian legal system. Article 10 (2) does however refer to international HRT when it calls on the Palestinian Authority (PA) to accede, without delay, to international declarations and covenants that protect human rights (HR).

In 2017, the Supreme Constitutional Court (SCC or the Court) issued a decision\(^\text{15}\) that gave international treaties primacy by elevating them over national laws (without distinguishing between ordinary and constitutional law). The Court delivered its ruling after a first instance court referred a case in which UNRWA\(^\text{16}\) was a party to, in which the UN agency pleaded immunity before the lower court by referring to its headquarters agreement with the PA. The Court asked if the granting of this immunity breached Article 30 of the Palestinian Basic Law, which prohibits administrative decisions from being immunized from judicial review.

The SCC first established that the Basic Law did not address the incorporation of international treaties or their hierarchical status, and then expressed the view that international treaties are not administrative decisions (in the meaning of Article 30 of the Palestinian Basic Law) but are instead sovereign acts that fall beyond the scope of judicial review.

After referring to international obligations, the Court referred to Article 27 of the Vienna Convention on the Law of Treaties (VCLT), and thereby clarified that a state cannot invoke national laws as ‘justification’ when it fails to uphold international obligations. It then cited the ICJ’s advisory opinion of 1988, which held that the US could not shut down the Palestinian Liberation Organization’s (PLO) office because of the existence of headquarters agreements between the US and the United Nations, and the PLO and the United Nations.

These international obligations had not been incorporated into the domestic legal system, and the Court therefore needed to establish if national or international law had primacy. It eventually established that the latter does have primacy and observed that this applies even when the item is

\(^{15}\) Al-Mahkama al-Dostoreya al-Ula [The Supreme Constitutional Court], decision No. 4 of 2017 (Palestine). Available at: https://www.tscc.pna.ps/pages?id=court_provisions.

\(^{16}\) United Nations Relief and Work Agency for Palestinian Refugees.
not published in the official Gazette. The Court then ruled that the only exception to that rule is when international law contradicts Palestinian cultural, political and religious morals.\textsuperscript{17} The precise nature of these ‘morals’ was however subsequently a subject of debate among the public and in legal circles.

The Court cited the special status of the Palestinian State and the Palestinian struggle as one of the reasons for its conclusion and also reiterated, on more than one occasion, that the SoP needed to affirm its commitment to international law and human rights. Its decision was however short and vague, and the majority opinion failed to explicitly clarify if international law takes precedence over Palestinian Basic Law.

An added complication arose from the fact that the SCC’s competence on this issue was questioned, most notably by those who argued that the 2017 decision did not fall under any of the Court’s competencies established by Article 103 of the Basic Law or Article 24 of the Court’s mandate.\textsuperscript{18} The SCC clearly did not review the constitutionality of a law or a statute; interpret any of the Basic Law provisions while referring to a conflict between the three branches of authority; adjudicate a conflict of jurisdiction between administrative and judicial authorities; adjudicate a conflict that arose in the execution of two contradictory final judgements; or adjudicate on a challenge to the President’s legal capacity.\textsuperscript{19}

The case was referred under Article 27 (2) of the SCC’s mandate, which allows lower courts to refer cases to the Court in situations where there is a suspicion that a decision, decree, law (including a provision in a law) or regulation is unconstitutional. If the Court wished to exercise proper jurisdiction, it should have first established that it was competent to review a provision of an international treaty. Article 27 does not clarify whether the SCC has this competency and it is also unclear if Article 28’s reference to “[l]egislative [p]rovision” covers the provisions of

\textsuperscript{17} A concurring opinion by one of the judges assigned primacy to international treaties and held they are infraconstitutional.

\textsuperscript{18} Constitutional Law Unit at Birzeit University, Position Paper on Constitutional Court Judgement Concerning the status of international conventions in the Palestinian legal system (Arabic), Birzeit’s Working Papers Series in Legal Studies (12/17), Constitutional Law Unit, Faculty of Law and Public Administration: Birzeit University (2017) See also on the scope of constitutional review in Palestine: Mahmoud Abu Sway, International Treaties: Among the References for Constitutional Review in Palestine and Inclusion [Arabic], Birzeit’s Working Papers Series in Legal Studies (7/2020), Constitutional Law Unit, Faculty of Law and Public Administration: Birzeit University (2020).

international agreements. But the Court ignored this open question of competence and proceeded to assert the primacy of international treaties over a constitutionally protected right. The Court should have referred the case back to the first instance court, which was the competent body in this instance. Its failure to do so was a denial of justice.\(^{20}\)

In 2018 the Minister of Justice, in implementing SCC-related provisions set out in Article 103 of the Basic Law,\(^ {21}\) asked the SCC to interpret Article 10 of the amended Basic Law.\(^ {22}\) The Court considered the status of international treaties within the Palestinian legal system, the process through which international treaties are implemented domestically and the nature of Palestine’s HR obligations and responsibilities. The Court opened by asking if it is appropriate for a constitutional court to answer such questions when there is a constitutional vacuum. It answered that a constitutional judge can play an active role in reforming and interpreting a state’s constitution and may seek to improve a state’s constitutional and legal system.

After establishing itself as the competent body, the Court then addressed the hierarchical status of international treaties. In concluding that such treaties are of a rank higher than ordinary law but lower than the constitution (Basic Law), it established that constitutional rules are integral to the foundation of any legal system, and accordingly inferred that no legal document can claim precedence over it. This created a new constitutional provision by giving international treaties primacy over ordinary national law.

Although Palestine has a written Basic Law that functions as the constitution, the Court sought to define the documents that constitute the Palestinian constitution: it returned to the 1988 Palestinian Declaration of Independence, declared it to be of constitutional status and then elevated it as the highest constitutional document, above even the amended Basic Law. The Court held the Declaration defined the identity of the Palestinian State and its commitment to international obligations, including HR, and also observed that the Basic Law was adopted after the Declaration and was in any case only intended to operate for a transitional period.


\(^{21}\) Al-Mahkama al-Dostoreya al-Ula [The Supreme Constitutional Court], decision (constitutional interpretation) No. 5 of 2017 *issued on* March 3, 2018 (Palestine).

\(^{22}\) Al-Mahkama al-Dostoreya al-Ula [The Supreme Constitutional Court], decision (constitutional interpretation) No. 5 of 2017 *issued on* March 3, 2018 (Palestine).
The preamble of the amended Basic Law only referred to the Declaration of Independence on one occasion and it did not accord it constitutional status. Although a constitutional court is permitted to improvise when interpreting what constitutes a state’s constitution, the SCC went further when it ruled that the Declaration presides over the amended Basic Law.

The Court addressed Palestine’s HR obligations and observed that respect for HR is achieved when they are incorporated into the domestic system and are aligned with Palestinian cultural and religious identity – if a right was not compatible in this sense, it would not be enforced in Palestine and the SoP would fall short of its international obligations. This identity-based criterion, which the SCC invoked on more than one occasion, resembles the reservations that a state registers when it ratifies a treaty. But it is not clear how the constitutional court can improvise a criterion/criteria that might alter the domestic application of an internationally protected right when the government did not express a reservation at the time of ratification.

In referring to the incorporation of treaties into the Palestinian legal system, the Court held that international treaties are not, per se, laws to be enforced domestically but are instead enforced by their incorporation through domestic laws – international treaties are therefore of a higher status than ordinary national laws, and courts apply them when dealing with cases. This suggests that the SCC went out of its way, and ultimately beyond its mandate, to establish international treaties as a new source of law. In making the domestic enforceability of international treaties and their superiority over ordinary national laws subject to publication in the official Gazette, it clearly recalled the enforcement criterion of ordinary national laws. Subject to this requirement, international treaties are higher than ordinary national laws, and courts elevate them over ordinary national laws when they encounter inconsistency. At the time of writing, none of Palestine’s treaties have been published, but this does not mean that Palestine’s obligations to the international community are not effective.

If Palestine attempts to ratify a treaty that conflicts with provisions of the amended Basic Law, then it is possible to envisage the treaty being reviewed before ratification (to determine its constitutional compatibility) and recommendations for reservations are issued; alternatively, the

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23 Palestine amended Basic Law, supra note 13, art. 116.
24 VCLT, supra note 5.
constitution could be amended. But review and recommendation in the event of a contradiction are not envisaged by the Palestinian legal system and accordingly there is no regulation in place. Amendment, meanwhile, does not seem feasible because there is still no Palestinian Legislative Council (PLC).

A further complication derives from the fact that if a treaty that contradicts the constitution is ratified, then the SCC cannot rule on its unconstitutionality. This is because Article 24 of its mandate clearly establishes this matter does not fall within its jurisdiction. The Court would however be entitled to rule on the constitutionality of the law implements the treaty domestically (through incorporation). While this could solve the Palestinian legal system’s dilemma, it would only insert an additional complication, as Article 27 of VCLT makes it clear that states cannot cite national laws to ‘justify’ non-compliance with international obligations.

The Court created two constitutional rules when it elevated international treaties over ordinary national law and also made these treaties, subject to publication, a source of law. Its action however exceeded the immediate request and possibly even its more general mandate. It also did not distinguish between bilateral and multilateral agreements, and this created the possibility that any bilateral agreement, including future agreements with Israel, could override Palestinian ordinary national laws. In stating that international treaties are not laws per se in Palestine, the Court also appeared to indicate Palestine’s adoption of a Dualist approach – if this was the case, then Palestine would be obliged to harmonize its national laws with ratified international treaties. But this only introduced a further problem as there is no PLC and the President does not have the authority to amend the Basic Law.

### 3. Comparative Experiences

This article now provides comparative perspective by considering different approaches to the hierarchy of international human rights treaties. It identifies if different legal systems accord HRT a special constitutional status, and distinguishes between them on this basis.

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25 Law of the Supreme Constitutional Court, supra note 16.
26 [Anonymous, last visited Jan. 25, 2019].
3.1. Legal Systems that Do Not Accord Human Rights Treaties a Constitutional Status

The majority of legal systems do not accord HRT a special status and instead register them as general international treaties before deriving their hierarchical position from this status. Egypt, Jordan, and Morocco provide regional examples of this arrangement. The West Bank was ruled by Jordan for more than three decades and the Gaza Strip was administered by the Egyptians, and the influence of both countries was later identifiable in the Palestinian legal system. Both countries are therefore obvious points of reference while the example of Morocco, which is reforming in response to popular demands for democracy and HR, is clearly relevant to the contemporary Palestinian situation.

Some legal systems make international treaties superior to ordinary laws but inferior to the constitution while others give them the same status as ordinary laws. Egypt adopted multiple constitutions after it declared independence.\(^{27}\) The 1923 constitution does not refer to the hierarchical status of international law but the 1956,\(^{28}\) 1964,\(^{29}\) 1971,\(^{30}\) 2012,\(^{31}\) and 2014\(^{32}\) appeared to give international treaties the same status as ordinary law. Throughout this period, the country’s political parties also issued political notes that did not refer to international law or HRT.\(^{33}\) In 2012, local HR organizations called for the constitution to explicitly refer to ratified international HRT, but without success.\(^{34}\) The constitution that followed two years later was the only one that referenced IHRL (International Human Rights Law) – its preamble explicitly referred to the Universal Declaration of Human Rights (UDHR) and reiterated the country’s commitment to ratified HRT.\(^{35}\)

\(^{27}\) For further insight into Egypt’s constitutional history, see: http://www.constitutionnet.org/country/constitutional-history-egypt.

\(^{28}\) 1956 Const. art. 143 (Egypt).

\(^{29}\) 1964 Const. art. 125 (Egypt).

\(^{30}\) 1971 Const. art. 151 (Egypt).

\(^{31}\) 2012 Const. art. 45 (Egypt).

\(^{32}\) 2014 Const. art. 93 (Egypt).

\(^{29}\) محمد المساوي، المرجعية الدولية لحقوق الإنسان في الدساتير العربية الجديدة: المغرب ومصر نموذجا، المجلة العربية للعلوم السياسية 29، 39 (2016).

\(^{33}\) [International Human Rights Reference in Modern Arabic Constitutions: The Examples of Morocco and Egypt] [Hereinafter Modern Arabic Constitutions].

\(^{34}\) رجب طه، "حقوق الإنسان تحت مطرقة دستور الإسلاميين"، مجلة رواق عربي (مركز القاهرة لدراسات حقوق الإنسان) العدد 63، 6 (2012).

\(^{35}\) Egypt’s Constitution, supra note, art. 93.
Article 33 of the 1952 Jordanian constitution briefly addressed international treaties when it established that the king is responsible for concluding international treaties and agreements. Its second paragraph established that treaties and agreements that involve a financial commitment or affect the public or private rights of Jordanians will not be valid unless they are approved by the national assembly (this second condition is also upheld by Jordanian Penal Law). Although the constitution does not address the hierarchical status of international agreements, HRT do not infringe the aforementioned rights of Jordanians and can therefore be ratified without parliamentary approval.36

In practice, Jordanian courts have settled on the primacy of international law over ordinary national law.37 The Jordanian delegation to the Human Rights Committee confirmed this in 2010,38 when they committed to implementing the International Covenant on Civil and Political Rights (ICCPR) and reiterated that ratified international treaties have primacy over ordinary laws. In support, they referred to Article 24 of the Civil Jordanian Code, which states that the code’s provisions are not active if they contradict an enforced international treaty.

More recently in 2020, the Jordanian Constitutional Court issued an interpretative decision confirming, in case of contradiction, the primacy of international law over ordinary national law.39

The preamble of the 1996 Moroccan constitution affirmed the country’s commitment to obligations, principles and rights in charters and conventions and also reiterated its commitment to universally recognised HR. But it stopped short of giving international treaties a higher status than ordinary laws. In February 2011, Moroccans who had been inspired by the ‘Arab Spring’ marched through the streets of more than 50 cities and demanded change and democracy.40 A new


37 Mahkamat al-Tamiez (Court of Cassation), decision No. 936 of 1993. (Jordan). Mahkamat al-Tamiez (Court of Cessation), decision No. 7309 of 2003 (Jordan).


Constitution, which included a majority of the UDHR’s rights, was then introduced. Its preamble established that constitutional provisions, published international treaties and the “laws of the Kingdom” were the supreme laws of the land. This instituted a hierarchy in which international treaties were superior to ordinary laws but below the constitution. The supremacy of international treaties over national laws is also subject to the condition that they are compatible with the Kingdom’s “immutable national identity”. This criterion, it will be noted, clearly recalls the criteria put forward by the Palestinian SCC.

Article 55 provided the king with the power to ratify and sign treaties. When international obligations or provisions contradict the constitution, the constitutional court can make the revision of the constitution a condition for ratification. The vague terms of the constitution can be attributed to its drafters’ intention to reconcile the agendas of HR organizations and political and religious parties. The former insisted on the explicit primacy of international law and the latter made no secret of their animosity to HR and international law.

3.2. Legal systems that Accord Human Rights Treaties a Constitutional Status

In this trend, states give HR norms a constitutional status by explicitly incorporating specific international HR treaties into the constitution or by making a general reference to all ratified HR treaties.

Article 35 (1) of South Africa’s 1993 interim constitution established that the country’s courts must examine international law in HR cases. Section 39 (1) of the final constitution, which explicitly stated that “international law is an important interpretive tool”, followed three years later. It also clarified that courts who interpret its bill of rights must consider international law and may take foreign law into account. To take one example, the country’s constitutional court relies on non-binding decisions issued by international HR bodies, such as the United Nations Committee on

43 Morocco Const., supra note 36, preamble.
44 Modern Arabic Constitutions, supra note 29, at 44.
45 Christian Education South Africa v. Minister of Education 2000 (10) BVLR 1051, para. 13 (S. Afr.).
Human Rights and the Inter-American Commission on Human Rights, when referring to this document.\footnote{State v. Makwanyane 1995 (3) SA 391; 1995 (6) BCLR 655, para. 35 (S. Afr.).}

Article 75 (22) of Argentina’s 1994 constitution, which set out congressional powers, established that treaties and concordats are above ordinary laws in the hierarchy. The following paragraph then set out HRTs and declarations that have a constitutional status.\footnote{Including: The American Declaration on the Rights and Duties of Man; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the UDHR. See Art. 75, Constitucion Nacional [Const. Nac.] (Arg.).} Nicaragua’s constitution adopts a similar approach.\footnote{Art. 46, Constitucion Politica De La Republica De Nicaragua [Cn].}

Colombia’s constitution provided a general statement that international treaties that recognize HR have domestic priority.\footnote{Constitucion Politica De Colombia [C.P.] art. 93.} Although it did not list specific treaties, it clarified that HRs that are explicitly expressed do not negate those that are not stated.\footnote{Id, art. 94.} In seeking to define these unstated rights, the country’s constitutional court adopted a “constitutional block”. While it is not clear how a relevant right can be identified, the court’s case law provides some guidance by suggesting they will be contained in all HRT ratified by the country.\footnote{Alejandro Chehtman, International Law and Constitutional Law in Latin America (July 3, 2018) Forthcoming, Conarado Gubner Mendes and Roberto Gargarella (eds.),The Oxford Handbook of Constitutional Law in Latin America, at 9, 10. Available at: \url{https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207795}.}

The amendments that Mexico added to its constitution in 2011 enhanced the country’s protection of HR. Article 1 established that all of the country’s citizens are entitled to HR granted by the constitution and international treaties; furthermore, it held that these rights can only be restricted or suspended in situations and conditions that are clearly stated in the constitution.\footnote{Constitucion Politica de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federacion [DO], 5 de Febrero de 1917, art. 1 (Mex.).} In 2014, the country’s supreme court issued a decision that interpreted this article and which clarified that HR rules, regardless of their source, have a constitutional rank and can only be restricted by the constitution.\footnote{Summary of decision available at: \url{www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/ame/mex/mex-2014-1-001?f=templates$fn=document-frameset.htm$Q=%5Bfield,E_Country%3AMexico%5D%20$X=server$3.0#LPHit1}, (last viewed Mar. 31, 2019).}
Until Brazil adopted its 1988 Constitution, it placed international treaties at the same level as ordinary laws, which raised the prospect they could be superseded by future laws. Its supreme court confirmed this in a 1977 decision after it was requested to determine the validity of Executive Order No. 427/1969.\(^{54}\) In its judgement, the court ruled that even though the Convention is binding on Brazil, it does not prevail over a country law that is validated by the constitution.\(^{55}\)

International treaties and their position and monitoring were addressed in different parts of the 1988 constitution. Article 5 (2) clarified that the constitution’s fundamental rights and guarantees do not exclude other rights derived from international treaties that included Brazil as a party. Second, Article 49 stipulated that international treaties required congressional approval (by a simple majority of those present). And Article 102 provided the Supreme Court with the authority to adjudicate when it was asked to consider if a treaty or federal law was unconstitutional.

In 2004, Article 5 was altered by a constitutional amendment, which established that: “[i]nternational treaties and conventions on human rights approved by both houses of the national congress, in two different voting sessions, by three-fifths votes of their respective members, shall be equivalent to Constitutional Amendments” [emphasis added]. This amendment produced two processes for the incorporation of treaties into the Brazilian system; one for HR treaties (three-fifths majority in two voting rounds); and another for treaties not related to HR (simple majority in one voting round).\(^{56}\) Prior to this amendment, the country’s courts did not consider HRT to be a special category of treaties, and they also regarded all treaties as ordinary laws. After it was introduced, HRT incorporated into the Brazilian system before 2004 were treated as infra-constitutional and those incorporated after 2004 were regarded as constitutional.\(^{57}\)

\(^{54}\) One of this order’s provisions contradicted the Geneva Convention by adopting a uniform law on bills of exchange and promissory notes.
\(^{56}\) Ibid.,
\(^{57}\) Ibid, at 32.
4. A CALL FOR GRANTING HUMAN RIGHTS TREATIES A CONSTITUTIONAL STATUS IN PALESTINE

This article has established the current status of treaties in the Palestinian system and it has also surveyed regional and international legal systems. It will now propose that international HRT should be accorded a constitutional status in Palestine. It maintains that if this is not achievable, then at the very least these treaties should be established as a normative force that guides the interpretation of constitutionally protected rights.

The 1952 Jordanian constitution that was enforced in the West Bank provides an insight into how this proposal could be developed in Palestine. Its potential contribution is further underlined by the fact that it arguably still applies to matters not governed by the Palestinian Basic Law as it was never actually explicitly superseded. But a clear problem arises in the fact that this constitution does not establish a specific hierarchical status for international treaties in general. This is shown in contemporary Jordan where international treaties, including HRT, are regarded as of lower status than the constitution.58

The features of the Palestinian legal system could also be considered. Palestine applies a civil law system and it would therefore appear logical to apply Monism, as this is the approach most frequently associated with such systems. In this arrangement, international law would have primacy over national laws. But even states which accord international law this status still consider international treaties -including HRT- to be of a status lower than the constitution. This applies in Egypt, France, Jordan and Tunisia.

Another approach would be to argue that the Basic Law accords international HRT a constitutional status. Article 10 (a) establishes that basic rights and liberties must be respected; and (b) calls on the Palestinian government to ratify and join HRT. When both paragraphs are read in conjunction, and recognition is extended both to constitutional protections (for a number of basic HR and liberties in Palestine) and the constitution’s call to join HRT, it appears logical to conclude that the constitution’s drafters sought to use international treaties to protect HR in Palestine. It is

58 This also applies to the Egyptian documents used to govern the Gaza Strip. See Council of Ministers, Law No. 255 for the year 1955, Basic Law for the Palestinian territories under Egyptian military authority, May (1955) (Egypt). See: muqtafi.birzeit.edu/InterDocs/images/160.pdf
therefore their human rights content, rather than their international character, which underpins the
claim that international HRT in Palestine have a constitutional status.

The SCC’s findings on the constitutional status of the Declaration of Independence are a useful
point of reference here. The Declaration declared that the Palestinian state will respect the
principles of the UN charter and the UDHR. Taking into account this commitment and the
obligation imposed by Article 10 of the Basic Law, it could be argued that international HRT that
embody the UDHR (e.g. the Covenant on Civil and Political Rights and the Covenant on
Economic and Social and Cultural Rights) have constitutional status. At the least, UDHR rights
explicitly referenced in Palestinian Declaration of Independence need to be interpreted in the
context of standards of international HR law.

Finally, the Palestinian Declaration of Independence, which embodies the Palestinian struggle for
independence, is considered by the SCC to be the highest constitutional document in the
Palestinian system. It could accordingly be argued that the UDHR’s rights have a constitutional
status. At a minimum, constitutionally protected rights within the Palestinian system must be
interpreted in the context of the UDHR. This proposition however gives rise to the same criticism
as the SCC’s decisions – namely that the Court was asked to go beyond the explicit terms of the
amended Basic Law. But there is a clear difference – namely that the Declaration of Independence
explicitly referenced the UDHR and the Basic Law and called on the PA to join regional and
international HR treaties. When the Court arguably creates new constitutional rules, it does not
therefore exceed its mandate but instead concerns itself with progressively interpreting the written
provisions of Palestinian constitutional documents.

5. Conclusion
The status of international treaties in a state’s legal system is a matter of domestic concern but this
does not mean that domestic law can be cited as a ‘justification’ for failing to meet international
obligations. Palestine’s Basic Law does not regulate the hierarchical status of international treaties
within the Palestinian legal system. When the SCC concluded that international treaties are higher
than ordinary laws but lower than the constitution, it aligned itself with the majority of legal
systems across the world. This does not however mean that the SCC should not interpret the
relevant provisions of the Declaration of Independence and the Basic Law to grant human rights
treaties a constitutional status. This article has demonstrated that the Court could achieve this without exceeding its power or mandate by granting human rights and freedoms, as per the HRT, a constitutional status, based on article 10 of the Basic Law.
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