International Law within the Palestinian Legal System: A Call for Granting Human Rights Treaties a Special Constitutional Status*

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I. Introduction

In 2012, Palestine was recognized as a non-member observer state by the United Nations General Assembly.[1] Regardless of the debated nature of recognition in international law,[2] Palestine was now competent to ratify international treaties. In April 2014, Palestine ratified seven core human rights treaties and an optional protocol.[3] Notably, Palestine did not submit any reservation to any of the treaties it joined. When states join an international treaty, they take upon themselves the responsibility to respect and uphold their obligations under the treaty domestically and internationally. A state cannot invoke its national laws as a justification for not upholding its international obligation.[4] However, while all states are responsible for domestically enforcing their international obligations, the method by which they do so is purely of the state's concern.[5] In line with the notion of sovereignty, each state is free in determining the way it enforces its international human rights obligations on the domestic level. In the case of Palestine, it is not clear where does international law stand within the domestic Palestinian system.

Traditionally, two approaches determine the relationship between a state's national law and conventional international law: Monism and Dualism. The monist approach treats national law and conventional international law as components of one legal system. Accordingly, international law becomes part of the national legal system of the state upon ratification of a treaty, and without any need

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[1] G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (Dec. 4, 2012).

[2] Malcolm Nathan Shaw, International Law 322-324 (Cambridge Univ. Press. 7th ed. 2014).

[3] Press Release, U. N. High Commissioner for Human Rights, Spokesperson for the High Commissioner for Human Rights Press Brief on Palestine (May 2, 2014), https://unispal.un.org/DPA/DPR/unispal.nsf/0/262AC5B8C25B364585257CCF006C010D. (Last viewed Mar. 31, 2019).

[4] Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 115 U.N.T.S. 331.

[5] Swedish Engine Divers' Union v Sweden, App. No. 5614/72, 1976 Eur. Ct. H.R. 50. *See also*, Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20-21 (Feb 21).

for future legislation (unless a treaty is not self-executing). This approach usually accords supremacy to international law over national law.[6]

The dualist approach on the other hand considers that national law and conventional international law have different legal subjects and different sources. Therefore, conventional international law cannot be enforced within the domestic legal system of a state unless it has been transformed into a domestic law.[7] Common law states such as the United Kingdom, Australia and Canada usually incorporate international law into their domestic systems through transforming it into laws or by relying on its provisions within their case law. The United Kingdom for example enacted the Human Rights Act of 1998 in order to incorporate the European Convention on Human Rights.[8]

The Hierarchy of international treaties within the domestic system of each state has to be deduced from its constitution, case law or any other indicator. Some constitutions accord international treaties the same constitutional power as ordinary laws.[9] Other constitutions accord international treaties an infra-constitutional but supra-national status.[10] Other more progressive constitutions accord human rights treaties a special status that is different from other international treaties. These constitutions provide for the primacy of human rights treaties over ordinary laws and accord them a constitutional status.[11] Very few constitutions would grant conventional international law a status that is superior to the constitution.[12] Finally, some constitutions such as that of Palestine do not address the hierarchy of international law within their domestic system at all.[13]

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[6] Jan Klabbers, International Law 287-298 (Cambridge Univ. Press.) *See also,* European Commission for Democracy Through Law Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, study no. 690/2012, 18-23 (Oct. 2014).

[7] Grainne Burca, Oliver Gerstenberg, The Denationalization of Constitutional Law, 47 (1) Harv. Int'l L.J. 243, 245 (2006).

[8] For a deeper analysis of the Human Rights Act of 1998, See: David Fledman, The Human rights Act 1998 and Constitutional Principles, 19 Legal Stud. 165-206 (1999).

[9] Grundgesetz Fur Die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBI. I (Ger.) art. 25. 2014 Const. art. 93 (Egypt).

[10] 1958 Const. arts. 54, 55 (Fr.), 2014 Const. art. 20 (Tunis.).

[11] Constituicao Federal [C.F.] [Constitution] art. 5 (3) (Braz.). 2008 Const. art 84 (Ecuador). 1991 Const. art. 20 (Rom.) 1992 Const. art. 11 (Slovk.).

[12] Grondwet voor het Koninkrijk der Nedelanden arts. 91 (3), 94 (Neth.).

[13] Al-Qanoun al-Assasi al-Palestinian al-Mouadal [The Amended Basic Law] of 2003 (Palestine). 1952 Const. (Jordan).

The article puts forward the proposition that the Palestinian legal system should grant international human rights treaties a special constitutional status. In arguing this, the article shall first determine what hierarchical status do general international treaties hold within the current Palestinian legal system. Second, the article will outline comparative experiences of states that do and states that do not grant international human rights treaties a constitutional status, and finally, the article will present political and legal justifications that call for according international human rights treaties a constitutional status in the Palestinian legal system.

II. 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 human rights treaties) within the Palestinian legal system. Only Article 10 (2) makes a reference to international human rights treaties when it calls upon the Palestinian authority, to accede without delay, to international declarations and covenants that protect human rights.

In 2017, the Supreme Constitutional Court (SCC or the Court) issued a decision[14] according primacy to international treaties over national laws. The issue came before the SCC when a first instance court referred a case to the SCC in which the United Nations Relief and Work Agency for Palestinian Refugees (UNRWA) was a party. The agency pleaded immunity before the lower court in light of the headquarters agreement between the Palestinian authority and the agency. The court was faced with the question of whether this immunity, if granted, would be in breach 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 issue of incorporation of international treaties or their hierarchical status. It then moved to clarify that - in its view- international treaties are not administrative decisions that fall within the meaning of Article 30 of the Palestinian Basic Law, but rather, they are sovereign acts that fall outside the scope of judicial review.

With regards to international obligations, the Court first cited Article 27 of the Vienna Convention on the Law of Treaties (VCLT) to reaffirm that a state cannot invoke its national laws as a ground for not upholding its international obligations. The Court strengthened its position by citing the ICJ's advisory

[14] 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.

opinion of 1988 concerning the United Nations' headquarters agreement, where the ICJ was of the opinion that the United States, in light of the headquarters agreement with the UN, cannot cite its national laws to shut down the Palestinian Liberation Organization's office.

Based on the aforementioned, the Court had to deal with one remaining question: since these international obligations were not incorporated within the domestic legal system, which is accorded primacy, national law or international law? The court found that international law is to be accorded primacy over national law, even if not published in the official Gazette, unless it contradicts with the Palestinian religious, political and cultural morals. A concurring opinion by one of the judges went further to clarify that while international treaties take precedence over national laws, they are infra-constitutional.

The Court noted that the special status of the Palestinian state and the Palestinian struggle is one of the reasons that drove it to such conclusion. It reaffirmed in more than one instance that the Palestinian state needs to affirm its commitment to international law and human rights.

The decision was short, vague and the majority opinion did not address explicitly whether international law takes precedence over the Palestinian Basic Law. The decision also stated that international law would take precedence over national law as long as it does not conflict with the religious, political and cultural morals of the Palestinian people. Naturally, the decision sparked debate regarding its implications and how could this criterion of religious, political and cultural morals be interpreted.

It should be noted that debate also arose as to whether the SCC was competent to look into the issue in the first place. It had been argued that the nature of the SCC decision in 2017 does not fall within any of its competencies under Article 103 of the Basic Law or Article 24 of its mandate.[15] The SCC clearly did not review the constitutionality of a law or a statute, did not interpret any of the Basic Law provisions to resolve a conflict between the three branches of authority, did not adjudicate a conflict of jurisdiction between administrative and judicial authorities, did not adjudicate a conflict that arose with regards to the execution of two contradicting final judgements, and did not adjudicate a challenge to the legal capacity of the President. [16] The decision of 2017 does not fall within any of these competencies.

[15] 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).

[16] Law of the Supreme Constitutional Court, Al-Waqaeh al-Palestinian [Palestinian Official Gazette] No. 62 of Mar. 25, 2006.

The case was referred under Article 27 (2) of the SCC's mandate, a provision which allows lower courts to refer cases to the SCC in situations where a suspicion of unconstitutionality of a provision in a law, decree, by law, regulation or a decision is manifested. If the SCC wanted to exercise proper jurisdiction, it should have first addressed the question of whether it is competent to review a provision within an international treaty, given the fact that Article 27 does not establish that. It also had to address whether the phrase "Legislative Provision" in Article 28 of its mandate includes provisions of international agreements as well. Instead, the Court ignored the issue and went on to protect the primacy of an international treaties over a constitutionally protected right. The SCC should have referred the case back to the first instance court, which is the competent body to rule on the subject matter or else it would be in denial of justice.[17]

In 2018, the SCC received a request from the Minister of Justice to offer its interpretation of Article 10 of the Basic Law, the power to interpret the provisions of the Basic Law is established for the SCC through Article 103 of the Basic Law.[18] Among the questions the Court considered; the hierarchical status of international treaties within the Palestinian legal system, the process of incorporating international treaties within the Palestinian legal system and the nature of Palestine's human rights obligations and responsibilities. The SCC opened its opinion by answering the question of whether a constitutional court can answer such questions in light of a constitutional vacuum. The SCC affirmed that a constitutional judge plays an active role in reforming and interpreting the constitution of a state. It clarified that a constitutional judge seeks to improve the constitutional and legal system in a state in face of the different political and social circumstances.

After establishing itself as the competent body, the Court answered the question of the hierarchical status of international treaties as follows: international treaties are supra-national but infra-constitutional. In reaching its conclusion, the Court established that constitutional rules are the cornerstone for the foundation of any legal system. Therefore, no legal document can take precedence over it. The SCC created a new constitutional provision by according international treaties primacy over national law. Furthermore, despite the fact the Palestine has a written Basic Law that functions as the constitution, the Court attempted to define the documents that constitute the Palestinian constitution. The Court went back

[17] Constitutional Law Unit, *supra note* 15, at 2, 3.

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

to the Palestinian declaration of independence of 1988 and declared it to be of a constitutional status. It went even further to declare it the highest constitutional document that presides even above the Amended Basic Law. The Court justified its finding by stating that the declaration of independence defined the identity of the Palestinian state and its commitment to international obligations including human rights. More importantly, the Court noted that the Basic Law was adopted in light of the declaration of independence only for a transitional period.

It should be noted that the Basic Amended Law makes only a single reference -in its preamble- to the declaration of independence without giving it any constitutional status. While a constitutional court may improvise in interpreting what constitutes the constitution of a state, the SCC went a step further in ruling that the declaration of independence presides over the Amended Basic Law.

The Court addressed the question of Palestine's obligations towards human rights by stating that the respect of human rights is achieved through the incorporation of these rights within the domestic system while due regard is paid to their compatibility with the Palestinian religious and cultural identity. In other words, if a ratified treaty of human rights establishes a right that is not compatible with the Palestinian religious or cultural identity, such a right would not be enforced in Palestine. This means that Palestine would not adhere to its international obligations. Furthermore, it appears that this criterion of religious and cultural identity - which was introduced by the SCC in more than one instance - functions in a manner similar to reservations that a state would put forward at the time of ratifying a treaty. The problem however is that it is not clear how can the constitutional court improvise such a criterion that might alter the domestic application of an internationally protected right when the government did not express such a reservation at the time of ratification.

As whether treaties are directly incorporated within the Palestinian legal system, the Court was of the opinion that international treaties are not laws to be enforced domestically per se, but rather, they should be enforced by incorporation through domestic laws. When incorporated, international treaties are supra-national, and courts would apply them when dealing with cases. This evidently means that the SCC went out of its way and ultimately its authority under its mandate to create a new source of law; international treaties. Furthermore, the SCC made the domestic enforceability of international treaties and their superiority over national laws conditioned on their publications in the official Gazette. A process

similar to that required for the enforceability of ordinary national laws.[19] When published, international treaties are supra-national, and courts apply them over national laws in case of inconsistency. At the time of writing, none of the treaties ratified by Palestine had been published yet, this however does not mean that Palestine's obligation towards the international community are not in effect.[20]

In case Palestine attempts to ratify a treaty that runs in contradiction with the constitution, two scenarios arise: First, the treaty is reviewed before ratification to determine its constitutional compatibility and recommendation for reservations are made - a process which is not regulated or provided for within the Palestinian legal system-. Second, the constitution is amended, a scenario that does not seem feasible in light of the absence of the Palestinian legislative council. Furthermore, if a treaty that contradicts with the constitution is ratified, the SCC cannot rule on its unconstitutionality, as it does not fall within its jurisdiction under Article 24 of its mandate.[21] The SCC could however rule on the constitutionality of the law that incorporates it. While this might solve the dilemma for the Palestinian legal system, it would create problems for Palestine before the international community as Article 27 of VCLT explicitly prohibits states from citing their national laws for the non-compliance with their international obligations.

The decisions of the SCC have been the subject of debates among Palestinians. The Court clearly functioned outside the request it received and even its mandate. It created two constitutional rules: First, when it granted supremacy to international treaties over national laws, and second, when it made international treaties a source of law upon publication. The decision also did not differentiate between bilateral agreements and multilateral ones, this could possibly make any bilateral agreement (including possibly agreements with Israel) - if published - superior to Palestinian national laws.[22] In addition, the SCC stated that international treaties are not laws per se in Palestine, a statement that appears to indicate that Palestine follows a dualist approach. If so, Palestine has an obligation to harmonize its national laws with ratified international treaties. The problem however, as aforementioned, lies in harmonizing the Basic Law with our international commitments in light of absence of the Palestinian Legislative Council. The

[19] Palestine amended Basic Law, *supra note 13*, art. 116.

[20] VCLT, *supra note* 4.

[21] Law of the Supreme Constitutional Court, *supra note* 16.

[22] [Anonymous, last visited Jan. 25, 2019).

President on the other hand does not have the authority to modify the Basic Law through a presidential decree as the Amended Basic Law does not provide him with such powers.

III. Comparative Experiences

After establishing what appears to be the current status of international treaties in Palestine, the article shall now turn to survey comparative experiences and the different approaches to the constitutional hierarchy of international human rights treaties. For the purposes of this survey, the distinguishing factor between the different legal systems shall be whether Human rights treaties are accorded a special constitutional status.

A. Legal Systems that Do Not Accord Human Rights Treaties a Constitutional Status

The majority of legal systems around the world do not provide international human rights treaties with any special status. Instead, international human rights treaties are dealt with as part of general international treaties, making their hierarchical status similar to any other international treaty within that system.

Examples of legal systems from the region that accord human rights treaties the same status as other international treaties include Egypt, Jordan and Morocco. Due to the fact that the West Bank was under the Jordanian rule for more than three decades and the Gaza Strip under the Egyptian administration, the Palestinian legal system is greatly affected by the Egyptian and Jordanian legal systems. Therefore, it is useful and practical to understand the approaches adopted by these systems. As for Morocco, the state has been adopting reforms after popular demands for democracy and human rights. An experience that might be useful for the Palestinians. It should be noted that some of these legal systems accord international treaties a status that is superior to ordinary laws but inferior to the constitution while others accord them the same status as ordinary laws.

- **Egypt**

Within the Egyptian legal system, multiple constitutions had been adopted since independence.[23] The 1923 constitution does not make any reference to the hierarchical status of international law, the

[23] For the Constitutional history of Egypt, *see*: http://www.constitutionnet.org/country/constitutional-history-egypt.

1956,[24] 1964,[25] 1971,[26] 2012[27] and 2014[28] constitutions appear to follow an approach of according international treaties a status that is similar to ordinary law. With regards to international human rights law (IHRL), all constitutions but the 2014 constitution lacked any reference to IHRL.

The history of Egypt clearly indicates that international law in general was not a topic much addressed in constitutional reforms, the majority of political parties in Egypt do not reference international law or human rights treaties in their political notes.[29] Therefore, despite calls from local human rights organizations in 2012, the constitutions failed to explicitly reference ratified international human rights treaties.[30] The 2014 constitution on the other hand explicitly referenced the Universal Declaration of Human Rights (UDHR) in its preamble and reaffirmed Egypt's commitment to the Human Rights treaties it ratified.[31]

- **Jordan**

The Jordanian constitution of 1952 briefly addressed the issue of international treaties in Article 33. The Article provides that the king is responsible for the conclusion of international treaties and agreements. The constitution does not address the hierarchical status of international agreements. Paragraph two of Article 33 provides that treaties and agreements which involve financial commitment or affect the public or private rights of Jordanians shall not be valid unless approved by the national assembly.

The question arises as to whether human rights treaties "affect" the public or private rights of Jordanians. The term "affect" appears also in the negative sense in the Jordanian Penal Law. It had been interpreted

[24] 1956 Const. art. 143 (Egypt).

[25] 1964 Const. art. 125 (Egypt).

[26] 1971 Const. art. 151 (Egypt).

[27] 2012 Const. art. 45 (Egypt).

[28] 2014 Const. art. 93 (Egypt).

[29] محمد المساوي، المرجعية الدولية لحقوق الانسان في الدساتير العربية الجديدة: المغرب ومصر نموذجا، المجلة العربية للعلوم السياسية ٢٩، ٣٩ (٢٠١٦). [International Human Rights Reference in Modern Arabic Constitutions: The Examples of Morocco and Egypt] [Hereinafter Modern Arabic Constitutions].

[30] رجب طه، "حقوق الانسان تحت مطرقة دستور الإسلاميين"، مجلة رواق عربي (مركز القاهرة لدراسات حقوق الانسان) العدد ٦٣، ٦ (٢٠١٢). [Human Rights under the Hammer of Islamists Constitution) (Egypt).

[31] Egypt's Constitution, supra note, art. 93.

to mean prejudice or to have negative effect. Therefore, human rights treaties may be ratified without the approval of the Parliament as they do not negatively affect Jordanians' rights.[32]

In practice, Jordanian courts have settled towards the primacy of international law over national law.[33] This position was reaffirmed by the Jordanian delegation before the Human Rights Committee in 2010. The delegation stated that Jordan is committed towards the implementation of the International Covenant on Civil and Political Rights (ICCPR) and that it considers its ratified international treaties to take primacy over ordinary laws. In this regard the delegation cited Article 24 of the Civil Jordanian code which stipulates that the provision of this code would not be enforceable in case it contradicts with an enforced international treaty. [34]

- **Morocco**

The Moroccan constitution of 1996 affirmed in its preamble that Morocco is committed to subscribe to the principles, rights and obligations enounced in their respective charters and conventions, and it affirmed the state's commitment to human rights as they are universally recognized. However, the constitution did not accord a higher status to international treaties than ordinary laws. In February 2011, Moroccans, inspired by the ongoing Arab Spring, marched the streets of more than 50 city demanding change and calling for democracy.[35] In light of these demands, a new Constitution was introduced. [36] The new constitution covers the majority of rights contained in the UDHR.[37] The preamble stated that published international treaties along with the provisions of the constitution and the "laws of the Kingdom" were considered to be the supreme laws of the land. This meant that international treaties were

[32] Mohamed Aljaghboub, The Implementation of Human Rights Treaties by Jordanian National Courts: Practice and Prospects, in Kreca, M., Novakovic, M., & Institut za Medunarodnu Politiku i Priverdu. (2013). *Basic concepts of public international law; Monism and dualism.* Belgrade: Faculty of Law, University of Belgrade, Institute of Comparative Law, Institute of International Politics and Economics. 387-407, at 393.

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

[34] Human Rights Committee, Replies of the Government of Jordan to the List of Issues to be taken up in connection with the consideration of the fourth periodic report of Jordan, CCPR/C/JOR/Q/4, at. 1 Sep. (2010).

[35] Mohamed Madani, the 2011 Moroccan Constitution: A Critical Analysis, International IDEA resources on Constitution Building 6, (2012).

[36] 2011 Const. (Morocco). Available at: https://www.constituteproject.org/constitution/Morocco_2011.pdf.

[37] For a full list of constitutionally protected rights: https://www.cndh.org.ma/an/bulletin-d-information/human-rights-provided-moroccan-new-constitution. Last viewed Jan. 20, 2019.

superior to ordinary laws but still hierarchically lower than the constitution. Furthermore, the supremacy of international treaties over national laws is also conditioned on the treaties being compatible with the "immutable national identity" of the kingdom.[38] A criteria that functions in a manner similar to that put forward by the Palestinian SCC.

Article 55 provides the king with the power to ratify and sign treaties. The Article goes on to provide that the constitutional court may declare that an international commitment contains an obligation or a provision that is contrary to the constitution, in that situation, ratification is only possible after the revision of the constitution.

Such vagueness in the Moroccan constitution could be attributed to the attempt of the constitutional drafters to reconcile between the interests of human rights organizations demanding the explicit primacy of international law and the demands of different political and religious parties that still show animosity towards human rights and international law.[39]

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

Within this trend, states accord human rights norms a constitutional status by either explicitly incorporating specific international human rights treaties in the constitution or making a general reference to all ratified human rights treaties.

- **South Africa**

The interim constitution of 1993 provided in Article 35 (1) South African Courts must examine international law in Human Rights Cases. The final Constitution of 1996 provides in section 39 (1) that when interpreting the bill of rights in the constitution, the court must consider international law and may consider foreign law. The constitution of south Africa explicitly "affirms that international law is an important interpretive tool".[40] The South African Constitutional court also relies on non-binding decisions of International Human Rights bodies in interpreting the South African Bill of Rights.[41]

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[38] Morocco Const., *supra note 36*, preamble.

[39] Modern Arabic Constitutions, *supra note* 29, at 44.

[40] *Christian Education South Africa v. Minister of Education* 2000 (10) BVLR 1051, para. 13 (S. Afr.).

[41] *State v. Makwanyane* 1995 (3) SA 391; 1995 (6) BCLR 655, para. 35 (S. Afr.).

- **Argentine, Colombia and Mexico**

In Argentine, Article 75 (22) of the 1994 constitution provides that treaties and concordats have a higher hierarchy than ordinary laws. This statement is followed a paragraph that enumerates a number of human rights treaties and declarations of a constitutional status. The American Declaration on the Rights and Duties of Man, the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights are among these treaties.[42] The Constitution of Nicaragua[43] adopts a similar approach.

Colombia's Constitution took a different approach by providing a general statement that international treaties that recognize human rights have domestic superiority,[44] no specific treaties were listed. The constitution went on to clarify that the enunciation of human rights within the constitution does not negate other rights which are not expressly mentioned.[45] The Constitutional Court of Colombia adopted a "constitutional block" in order to better define un-enumerated human rights norms of constitutional status. While it is not clear how a particular norm is found to belong to the constitutional block, the case law of the constitutional court generally indicates that the constitutional block encompasses all human rights treaties that are ratified by Colombia.[46]

Lastly, Mexico amended its constitution in 2011, the amendments enhanced the protection of human rights within the Mexican system. Article 1 of the constitution establishes that all individuals in Mexico are entitled to human rights granted by the constitution and international treaties, these rights shall not be restricted or suspended except in situations and under conditions established by the constitution itself.[47] In 2014, the supreme court of Mexico issued a decision interpreting Article 1 of the constitution,

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[42] Art. 75, Constitucion Nacional [Const. Nac.] (Arg.)

[43] Art. 46, Constitucion Politica De La Republica De Nicaragua [Cn].

[44] Constitucion Politica De Colombia [C.P.] art. 93.

[45] *Id*, art. 94.

[46] 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: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207795.

[47] 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.).

the court clarified that rules on human rights, regardless of their source, have a constitutional rank, and that they can only be restricted by the constitution.[48]

- **Brazil**

Until the adoption of the 1988 Constitution, Brazil had the understanding that international treaties are on the same hierarchical level as ordinary laws, meaning that the former could be superseded by future laws. This understanding was affirmed by the Supreme Court in a decision in 1977 where the court had to determine the validity of the Executive order no. 427/1969. The Executive Order contained a provision that would contradict the "Convention for the adoption of a uniform law about bills of exchange and promissory notes" (The Geneva Convention). The court ruled that even though the Geneva Convention is binding on Brazil, it does not prevail over a country's law that derives its validity from the constitution. [49]

Brazil adopted a new constitution in 1988. International treaties, their position within the Brazilian system and their implementation were dealt with in different parts of the Constitution: First, Article 5 (2) clarified that the fundamental rights and guarantees within the constitution do not exclude other rights derived from international treaties to which the Federative Republic of Brazil is a party. Second, Article 49 addressed the requirement of Congress approval of international treaties (simple majority of people present). And Third, Article 102 provided the Supreme Court with the authority to adjudicate cases submitted regarding the unconstitutionality of a treaty or federal law.

In 2004, a constitutional amendment to Article 5 of the constitution was introduced. The amendment established that: "International 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".* The amendment led to the emergence of two processes for the incorporation of treaties into the Brazilian system; a process for human Rights

[48] Summary of decision available at: http://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).

[49] Gustavo Ferreira Santos, Treaties X Human Rights Treaties: A Critical Analysis of the Dual Stance on Treaties in the Brazilian System, 15 Eur. J.L. Reform 20, 20-33 (2013).

treaties (Three-fifth majority in two rounds of voting) and a process for treaties not related to Human Rights (simple majority in a single round of voting). [50]

Before the constitutional amendment of 2004, Brazilian courts did not consider Human Rights treaties as a special category of treaties within the legal system. All treaties were accorded the status of ordinary laws. After the constitutional amendment, Human Rights Treaties that were incorporated into the Brazilian system before the amendment of 2004 are infra-constitutional while Human Rights Treaties that were incorporated after 2004 are of constitutional value.[51]

IV. A Call for Granting Human Rights Treaties a Constitutional Status in Palestine

After establishing what appears to be the current status of treaties within the Palestinian system and surveying a number of comparative regional and international legal systems, the article shall now put forward the proposition that international human rights treaties should be accorded a constitutional status in Palestine. Or, at least, form a guiding normative force for interpreting constitutionally protected rights.

If we were to look into the possible means by which international human right treaties could be accorded a constitutional status in Palestine, one could look into the 1952 Jordanian constitution that was enforced in the West Bank under the Jordanian rule. It could be argued that the Jordanian constitution of 1952 is still applicable in matters not governed by the Palestinian Basic Law as it was never superseded explicitly. The problem however is that the Jordanian constitution does not establish a specific hierarchical status for international treaties in general and therefore could not be relied upon. Even in Jordan, today, international treaties including human rights treaties, are infra-constitutional. The same applies for the Egyptian documents that governed in the Gaza strip.[52]

One can also consider the features of the Palestinian legal system. It could be argued that since Palestine is a civil law system, it would follow the approach that most civil law systems adopt; monism. Therefore, international law takes primacy over national laws. Again, the problem with this argument is that even monist states that accord primacy to international law over national laws still consider

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[50] *Id.*

[51] *Id*, at 32.

[52] Council of Ministers, Law No. 255 for the year 1955, Basic Law for the Palestinian territories under Egyptian military authority, May (1955) (Egypt). *See*, http://muqtafi.birzeit.edu/InterDocs/images/160.pdf

international treaties -including human rights treaties- to be infra-constitutional. This is the situation in Egypt, Jordan, France and Tunisia for example.

Another approach would be to argue that by interpreting Article 10 (a) and (b) of the basic law, international human rights treats are of a constitutional status. While Article 10 (a) provides that basic rights and liberties must be respected, Article 10 (b) calls upon the Palestinian government to ratify and join human rights treats. One cannot interpret paragraph (a) of Article 10 in isolation of paragraph (b) as these paragraphs need to be read in conjunction. Consequently, since a number of basic human rights and liberties in Palestine are constitutionally protected, and in light of the call within the constitution to join human right treats, it is logical to argue that the constitutional drafters had the intent to enhance the protection of human rights in Palestine through international treaties. Therefore, international human right treaties in Palestine are of a constitutional status not because of their international character but rather because of their human rights content.

The findings of the SCC with regards to the constitutional status of the Declaration of Independence can be useful here. The Declaration of Independence declares that the Palestinian state shall respect the principles of the UN charter and the UDHR. In light of this commitment in the Declaration of Independence and the obligation imposed by Article 10 of the Basic Law, it could be argued that international human rights treaties that embody the UDHR (i.e. the Covenant on Civil and Political Rights and the Covenant on Economic and Social and Cultural Rights) are of a constitutional status. Or, at the minimum, UDHR rights that are explicitly referenced in the Palestinian Basic Law must be interpreted in light of international human rights law standards.

The proposition being put forward can be subject to the same criticism as the SCC's decisions. Mainly; asking the SCC to go beyond the clear words of the Amended Basic Law. The difference however lies in the explicit reference of the UDHR in the Declaration of Independence, and the call in Article 10 of the Basic Law to join regional and international human rights treaties. Therefore, the SCC will not be acting outside of its mandate by creating new constitutional rules, but rather, it will be progressively interpreting written provisions of Palestinian constitutional documents.

V. Conclusion

The status of international treaties within a state's domestic system is a matter of domestic concern. At the same time, states cannot cite their domestic law for non-adherence to their international obligations. As for Palestine, the Basic Law does not regulate the hierarchical status of international treaties within the

Palestinian legal system. The SCC's findings that international treaties are supra-national but infra-constitutional is in line with the majority of legal systems around the world. This however does not mean that the SCC could not or should have not interpreted the relevant provisions of the Declaration of Independence and the Basic Law to grant human rights treaties a constitutional status. As seen, the SCC could have advanced arguments that would allow it to establish the constitutional status of human rights treaties without having to act outside its power or mandate.