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In Pursuit of Statehood: Palestinian Performativity in Human Rights Treaty Bodies

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Abstract

This article uses the theoretical framework of "performative sovereignty" to analyze the role of sovereignty in the Palestinian Authority's interactions with human rights treaty bodies and to the judicial decisions of the Palestine Supreme Constitutional Court. We argue that, in contrast to dominant views of sovereignty as a threshold, sovereignty is performed through a series of discrete (yet related) interactions and practices that—when accepted by their designated audience—result in rights and privileges being granted, accompanied by sovereign status. Analyzing both Palestinian communications with human rights treaty bodies and cases brought before the Palestinian Supreme Constitutional Court, we argue that the drive to perform sovereignty helps explain states' actions in joining and reporting to human rights treaty bodies and the responses those actions have elicited. We also find that sovereignty operates as an iron cage—an almost ubiquitous framework—that structures (both constrains and enables) the possible actions of different actors in the field of human rights. The inquiry deepens our understanding of the development and operation of human rights and the role of statehood in shaping the global legal order.

Keywords: International Human Rights Law; Palestinian Sovereignty; Palestinian Constitutional Law

Introduction

Why do states opt to join human rights treaties (HRTs)? This is a core issue for international relations and international law scholarship. In this article, we outline a valuable theoretical lesson that the case of Palestine has to offer in response to this fundamental question. In 2014, the Palestinian Authority (PA) joined key international HRTs. It did so explicitly as part of its broader international effort to advance Palestine's statehood (Abbas 2011). This move met stark opposition from Israel and

the United States. The Israeli minister of justice at the time and the head of negotiations with the PA declared: "[I]f the Palestinians truly want a state, then the way to achieve it is through direct negotiations with Israel and not through international pressure on Israel" (Livni 2014). In the face of this move, alongside a reconciliation agreement between the Palestinian Liberation Organization and Hamas, and the PA's accession to the International Criminal Court, Israel retaliated by withholding taxes collected from the Palestinian population rather than channeling them back to the PA for re-investment in services, clearly illustrating its de facto financial control over Palestinian affairs (Eglash 2015).

Fast-forward eight years to April 2022, when a letter to the United Nations (UN) Human Rights Committee inadvertently made a case for Palestinian statehood. The identity of the letter's author might come as a surprise: NGO Monitor, an Israeli right-wing non-governmental organization (NGO) claiming to expose "'politicized' NGOs critical of Israel" (*New Vilna Review* 2011). The letter focused on "the rampant campaign of anti-[S]emitic and anti-Israel incitements within the 'State of Palestine'/PA." But, while it constantly referred to the State of Palestine in quotation marks, NGO Monitor, in effect, underlined the PA's state-like governance, conveying, among other messages, that the PA has clear international obligations since it joined the HRTs in 2014; that "[m]ore than 95% of the Palestinian population falls under the control of the Palestinian Authority";[1] that "the PA has Jurisdiction and control over many aspects of life for Palestinians living in East Jerusalem and Area C of the West Bank"; and that international obligations "do not cease in the context of armed conflict or situations of occupation" (*NGO Monitor* 2022, 1). It further urged the committee to recommend that the PA "specify what measures it has adopted to combat campaigns of anti-[S]emitism"; "document what it is doing to combat the recruitment and use of child soldiers"; "address its policy, as codified in Penal Law No 16"; and "specify what steps it is taking to protect Jewish cultural heritage" (4).

By taking this approach, a right-wing Israeli NGO was using the framework of international human rights law (HRL) to urge the PA to act like a sovereign while using speech marks to deny or trivialize the political and legal implications of doing so. This occurrence, while anecdotal, is far from trivial, being illustrative of a substantive part of the PA's communication with HRT bodies and NGOs (Palestinian and Israeli alike). This article exposes and elaborates on the why and how of issues of sovereignty featured in the PA's correspondence with HRT bodies, providing new explanations for the actions of various actors and the resulting institutional dynamics. We further use the case study to exemplify the theoretical and methodical contributions that law and society literature offers to the study of international relations, specifically those that focus on performance (Butler 1997; Ariela Gross 2001; Yoshino 2006; Schechner 2020; Mulcahy 2022; for recent applications, see Huntington 2013; Waldman 2022). In international relations scholarship, discussions exploring why states opt to join HRTs or the extent of state compliance with the ensuing obligations do not place questions of sovereignty center stage. In contrast, we propose that one important explanation for states' choice to join and engage HRTs is their desire to perform their sovereignty on the stage of human rights reporting cycles.

[1] The claim is clearly grossly exaggerated, yet what it signals to us is NGO Monitor's linking of (Palestinian) territory—(Palestinian) authority—and (Palestinian) population.

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In the first section, we explain our choice of theory and method—performative sovereignty. Viewing sovereignty as a performance rather than as a threshold enables us to perceive legal entitlement in terms of discrete interactions and practices and, thus, discern how the actions of different actors produce legal meaning. In the second section, we move to the international arena to demonstrate how the question of statehood plays out in the PA's engagement with HRTs, based on an analysis of HRT bodies' communications, including official state reports, lists of issues, replies, and shadow reports. While the communications reflect the PA's attempts to advance its claim for Palestinian statehood (Abbas 2011; see also Yoffie 2011; Azarova 2013, 2014; compare Imseis 2020), they also show how those attempts are accepted—inadvertently or otherwise—by international actors. Furthermore, they expose how the PA subtly performs its sovereignty by engaging with an international law system not initially designed for such a purpose. We find that the PA does so by moving between three roles, which we define as those of a member state, an occupied state, and a hindered state. These three roles enable the PA to simultaneously strengthen its statehood and put Israel on trial on an international stage.

In the third section, we continue our exploration domestically, demonstrating how the PA's performance as a member state is asserted at home. We focus on three decisions of the Palestine Supreme Constitutional Court (SCC) to show how it reinforces the PA's "member state" performance for a domestic audience. We also illuminate how, in its acceptance of the PA's performance, the SCC emphasizes its own role as the legitimate constitutional court of that state. We finalize our inquiry with a return to the international level, where the SCC's decisions feature in the PA's correspondence with HRT bodies. We illustrate how the content and tone of that correspondence further the legitimacy of the SCC and the PA's performance as a member state. In the fourth section, we conclude by showing how the actions of each of the actors we surveyed, and the arguments they produce, are structured by sovereignty. We finalize the article by briefly discussing the implications of a performance-based approach to studying international relations and law.

Palestine and the performance of sovereignty

The two overarching questions that typically feature in international relations scholarship on human rights treaties are concerned with why states opt to join HRTs and under what circumstances they comply with them. Despite the multiplicity of answers given to these questions by scholars, the extant literature takes for granted that the subjects of inquiry are exclusively fully-formed sovereign states, thereby marginalizing contested and liminal cases such as political communities that are yet to be universally recognized as sovereign states (Risse, Ropp, and Sikkink 1999, 2013; Farber 2002; Moore 2002; Merry 2006; Hathaway 2007; Oberdörster 2008; Simmons 2009; Trachtman 2012; Goodman and Jinks 2013; Nielsen and Simmons 2015; de Búrca 2017; Hong and Uzonyi 2018; Cope, Creamer, and Versteeg 2019). While the nature of the sovereign regime or the fact that it is newly established has been an important variable for some of the studies (Hafner-Burton, Mansfield, and Pevehouse 2013; Moravcsik 2000; Ginsburg 2006), few have addressed cases in which the political entity in question was seeking recognition as a state.

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In this article, we approach the liminal case of Palestine to illuminate the scholarship's blind spot that results from its focus on formally established states. We suggest another explanation for why states join HRTs—in pursuit of statehood, simultaneously sacrificing some of their sovereignty in return for elevating their very claim to it (Benhabib 2009).[2] The Palestine case highlights the need to consider statehood not only in the context of capacities for compliance (Börzel and Risse 2013) but also when endeavoring to explain why some states choose to join HRTs in the first place.[3] By studying how the PA engaged human rights treaty bodies, we move away from the normativity usually attached to discussions of HRT commitment and compliance toward "the everyday life of law" and demonstrate that, in some cases, interactions with HRL are shaped by the pursuit of sovereignty.

We investigate how sovereignty is positioned in Palestinian communications with HRT bodies and SCC decisions in light of the theoretical framework of performative sovereignty (Weber 1998; Grzybowski and Koskenniemi 2015; Brundage 2023; Grasten and Grzybowski 2023). In contrast to traditional understandings of sovereignty as a threshold, by which, once recognized as sovereign, a state is bestowed with a bundle of obligations and entitlements, we view sovereignty as a performance. Sovereignty, we contend, is performed via discrete yet interrelated interactions and practices; it is continually (re)constituted and informs the expectations and actions of actors in repeated iterations. A performative assessment of sovereignty provides fresh insights into the ongoing role of sovereignty in shaping both states' initial commitment to HRL and their continued compliance with it.

A theory of performativity

As noted earlier, the traditional doctrinal conception of sovereignty in international law is as a threshold of recognition.[4] It culminates at a certain point when factors of territory, population, government, and a capacity for relations with other states converge (Knop 1999, 288). An entity is either a state or it is not (Caplan 2005; Crawford 2007; compare Ronen 2014).[5] But liminal cases of "limited" or "contested" statehood (*inter alia*, Palestine, Somaliland, Kosovo, Western Sahara, and Taiwan) can teach us that there are at least instances in which the entitlement to sovereignty is not about a coherent bundle of factors. Instead, it is bestowed by a series of specific (albeit interconnected) exchanges between the sovereignty-claiming party, international bodies, states, corporations, NGOs, and individuals. In the words of Janis

[2] See Seyla Benhabib's (2009) metaphor of states as akin to Gulliver being "pinned down by hundreds of threads of international law." For Palestine, the "hundreds of threads" serve a broader purpose for, instead of solely pinning the state down, they are also, in fact, holding the state up (see also Allen 2013).

[3] In declaring international human rights treaty bodies another avenue for raising claims against Israel, the Palestinian Authority (PA) is already being innovative with human rights law (HRL): it declares its intention to use this arena to hold another state legally accountable (see also Sakran 2019).

[4] In this article, we do not wish to contribute to the polarizing normative constitutive/declaratory debate regarding international recognition of sovereignty. This question has few implications, if any, for the performance of sovereignty as it plays out in the case of human rights treaty (HRT) communication. For more on the debate, see Crawford 2007, 20–28.

[5] Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19; ICC, Decision on the "Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine," Case no. ICC-01/18-143, February 5, 2021, https://www.icc-cpi.int/court-record/icc-01/18-143.

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Grzybowski and Martti Koskenniemi (2015, 31), "statehood is a 'performance' in the legal vocabulary, the point of which is either to defend or to deny some entity the rights, duties, privileges and competencies that statehood endows" (see also Grzybowski 2017, 432).

Performative notions of sovereignty have their heritage in the broad turn to view basic concepts of international relations as socially constructed (Bartelson 1995, 1998; Weber 1998). As Cynthia Weber (1998, 92; emphasis in original) notes, "sovereignty should be understood as the discursive/cultural *means* by which a 'natural state' is produced and established as 'prediscursive,'" and she has argued that state sovereignty is performative in that it has no fixed ontological meaning but is only enacted through repeated varied citational practices between performers and audiences (see also Campbell 1992). Performativity thus focuses our view on the interactions between different actors instead of on the actions of state officials or the responders to those actions (Grasten and Grzybowski 2023, 133).

We poise that performance is enacted through three acts: assumption-challenge-(re)assertion. These acts are illustrated as follows: (1) the assumption of a role by the actor ("I am a clown"); (2) a challenge to the assumption of the role by the designated audience ("are you acting like a clown?"); and (3) the (re)assertion of the credibility of the resulting act by both the actor and the audience ("I am a clown!"; "You are indeed a clown!"). A performance is successful not according to an assessment of its substance ("you are not a funny clown") but, rather, when the audience accepts the very premise on which the performing is based ("you look/act like a clown therefore you are a clown").[6] This process is repeated for as long as the performance continues. It might be possible to break character (by wiping off the make-up and removing the red nose). Yet there are more than one possible variation of the role (a sad clown, a happy clown, a scary clown, and so on). Improvisation is part of any performance. All performances include all (known) previous ones as they inform the audience's expectations. However, change within variations is always feasible and can be judged only in hindsight (think of Joaquin Phoenix's unique interpretation of the Joker).

We invoke the clown analogy to illustrate a fundamental feature of how performances work. When we read the word "clown," certain features come to mind. We might think of white make-up and a painted smile; we might think of comically oversized shoes and colorful clothing. We might think of an electrifying handshake or experience a rush of childhood memories and emotions from watching the movie *IT* for the first time. There are many variations. And for those who have experienced clowns, the associated elements might differ from person to person. What matters is that some of those elements are shared (probably in the Wittgensteinian family-resemblance sense of overlapping similarities and not one essential common feature), and most performances of clowns would be recognizable to most of us in a similar way that would set expectations of what the performance might entail. The iterations of assumption-challenge-assertion constitute the process by which those overlapping similarities are repeatedly tested, continually (re)constituting the notion of a clown. Thus, while the initial shared vision of a clown is implied, it evolves one performance

[6] In this, we deviate from everyday terms of "success." Judging a performance on its merits and accepting that it is a performance (even if a poor one) are two separate acts.

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at a time, resulting in a divergence of variations still unified by overlapping similarities.

We believe that international relations and law can also be understood as performances that evolve through successive iterations, leading to diverse yet still unified conceptualizations, and we apply this understanding specifically to the notion of sovereignty. Similarly to the clown analogy, we do not view sovereignty as a unified concept with essential common features. Instead, it is a series of overlapping similarities that result in the temporal granting of legal goods (rights, and so on) that come about through iterative assumption-challenge-assertion processes. Our notion of performance confirms with recent accounts of "performative sovereignty" in that we view legal institutions as the stage that enables "socio-structural alignment between agents (performer) and audience" (Brundage 2023, 1350; see also Wille 2019; Černy and Grzybowski 2023). It is the statist commitments and assumptions of international law and its practitioners—state officials, civil society activists, and HRT body workers—that form the stage (the "conditions of possibility," as Jonah Brundage [2023, 1337] described) on which the performance of liminal states is conducted and which provide the possibility of legal gains from such a performance. While legal institutions do not offer the same social separation and suspension that a theatrical stage provides (as Butler 1988, 527) shows with respect to an audience and actors who note "this is only a play,"), law's relative autonomy—the general assumption that the law can be momentarily compartmentalized from "non-legal" practices of international relations such as diplomacy—invites performers and audiences to adhere to scripted roles while partially and momentarily suspending associated implications. Thus, when NGO Monitor referred to the PA as the "State of Palestine," it was willing to repress its objection to such recognition in the specific legal context that "demanded" such reference for its voice to be heard by HRT bodies. Thus, our focus on performance instead of on performativity—and our use of a dramaturgical metaphor—does not negate performative theory but, rather, refers to our confinement in our research to instances of legal performance, structured in certain institutions (compare Weber 1998, 81–82, 88).

Our focus on legal performance further reveals the connections between international and domestic staging of sovereignty. International law and domestic constitutional law enable similar socio-structural alignments that enable performance at one stage to be cited on the other and foster iterative processes both on the international and domestic levels. The performance of sovereignty thus sits amid two competing logics—the international and the national. The international implies mutual recognition based on similarity to dominant kinds of states and demands adherence to the international norms of "civilized" nations. The national invokes self-determination, which implies domestic supremacy over any other authority and demands adherence to national decisions of the body politic. The result is a performance that continuously oscillates between the standardization of statehood and plural manifestations of actual states. This oscillation neither mandates specific outcomes nor enables free-form performance. It structures possible and plausible actions, fostering expected variations while allowing maneuvers by actors, which might result in unexpected variations on the notion of a sovereign state.

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A method of performance

Viewing sovereignty as an oscillating performance makes apparent that entitlements are, in fact, unbundled, provided through discreet yet related acts, which implies indeterminacy. But it also brings to the fore the relational aspect of sovereignty. It is enacted before an audience through a "performative endeavor that comprises patterned and fluid routines, repetition, practices, and spontaneous activities" (Visoka 2018, 9). Whether such practices succeed in being considered a good-enough performance of statehood depends "upon the audience that surveys the performance and [whether it] is or is not willing to reward it by the grant of rights and privileges accompanied by that status" (Grzybowski and Koskenniemi 2015, 36). In other words, sovereignty is continually constituted and reaffirmed through active performance, although, in most instances—except for liminal cases—it is rarely contested.

The main actors who perform sovereignty are state officials, but performance is not limited to them (Wille 2019). Sovereignty is assumed, challenged, and then asserted by international and domestic actors (Grzybowski and Koskenniemi 2015, 32). They act and react for myriad reasons, some convincingly explained by existing accounts. Yet their conduct and arguments are bound by an iron cage of sovereignty—in the Weberian sense of a social order forced upon a person or entity, such that alternative orders remain unimaginable. Hence, they must negotiate an entanglement of imaginations, myths, practices, and forms of what a state is that shapes the kind of narratives that performing officials (and counter-performing audiences) might produce and accept as valid.[7] Our focus on Palestine is not incidental. Writing in 2015—after Palestine joined HRTs but before it produced meaningful correspondence with relevant bodies—Grzybowski and Koskenniemi (2015, 40–41) noted that the case of Palestine is the epitome of performative sovereignty. Similarly, Lori Allen (2013) has argued that the "human rights industry" in Palestine—referring to the Independent Commission for Human Rights (ICHR)—has achieved few material gains and has only legitimized the PA's use of force. Alluding to Louis Althusser's (1971) notion of interpellation, Allen (2013, 141) argues that, in "hailing" the PA for its human rights abuses, the ICHR "bolsters both the legitimacy of the law as a standard and the legitimacy of the PA as being at once the implementing mechanism of the law and beholden to it."

Allen (2013) and Grzybowski, and Koskenniemi (2015) highlight how, in the liminal case of Palestine, the performativity of sovereignty becomes apparent and salient. Unable to extract the legal entitlements that a universal recognition of Palestinian sovereignty would confer, correspondence between officials, international entities, and domestic actors acquires a special prominence. These written interactions can be understood as moments that hold a dual potency: as temporal markers of points in time when specific entitlements (coveted for myriad reasons) are bestowed and as part of a cumulative process toward universal recognition of sovereignty (Allen 2013, 141; Grzybowski and Koskenniemi 2015, 43). The role of HRT bodies in the performance of sovereignty is especially illuminating. Seemingly, an HRT's authority

[7] In this, we also follow John Meyer and colleagues (1997, 157), who argue that "[g]lobalization certainly poses new problems for states, but it also strengthens the world-cultural principle that nation-states are the primary actors charged with identifying and managing those problems on behalf of their societies."

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is based on its members' sovereignty. Thus, the participation of its bodies in asserting legal sovereignty is quite paradoxical for traditional theories but is entirely expected from a performative outlook.

Palestine thus provides an excellent case study for investigating how sovereignty comes into play in the working of HRT bodies. Moreover, in light of the explicit assertion by Mahmoud Abbas (2011), president of the PA, that joining HRTs is part of a Palestinian national project, the hypothesis that sovereignty would be a salient factor in the PA's engagement with HRT bodies is more than reasonable. Given these remarks, it seems the question of why the PA joined HRTs has already been answered. But the how is important to understand the why. Not only did joining a HRT assert the PA's status as an equal sovereign, but the interaction with its bodies played an important role. Lastly, since the PA's first report to the Committee on the Elimination of Discrimination against Women (CEDAW) in March 2017, up until the autumn of 2022, the UN Treaty Body Database (UNTBD) accumulated ninety-nine substantive documents related to Palestine,[8] providing us with a substantial dataset for research.

More specifically, in less than six years, the PA has produced twenty-three communications directed at HRT bodies, including reports, statements, and replies. In turn, these bodies produced twelve texts of their own, comprising "concluding observations," "follow-up letters," and "lists of issues." Civil society organizations (both Palestinian and Israeli) contributed fifty-six letters and other forms of communication to HRT bodies. Finally, the UNTBD includes eight summary records of public meetings of the committees. These documents stand at the center of our analysis. They serve as evidence of the unfolding performance enacted by the PA and offer an account of how that performance was received. Returning to the clown analogy, they enable us to determine whether the "clown" was convincing enough to be perceived and acknowledged as such and to analyze the "kind" of protagonist that was portrayed. More specifically, as a primary resource, the documents provide us with the opportunity to investigate the iterative process of committee communication and the unfolding iterations of assumption-challenge-assertion that embodies a performance (Rodley 2013; Chen 2018; Creamer and Simmons 2020; Kleinlein and Steiger 2022). Through them, we encountered a thick account of the discourse and the practice induced by joining the human rights conventions. As we read the texts in depth, we looked for instances of sovereignty-related arguments. We documented and categorized those instances, arriving at the three aforementioned variations of Palestinian sovereignty: member state, occupied state, and hindered state. We then returned to the texts to identify the iterative processes underlying the performance of each one.

Not all variations of this performance feature in the correspondence of all actors or are present in all reports. In fact, a report might feature seemingly conflicting variations, highlighting that to perform sovereignty not only means unbundling the bestowment of entitlements into discrete interactions but also that the disentanglement can be accomplished within a specific interaction (a report, a letter) to accommodate complex situations and needs. The PA does so by moving between

[8] The database includes five additional annexes and six lists of delegates. Since the writing of this article, this database has grown to include 171 such documents. A cursory look at them seems to reveal that they confirm the article's main argument.

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conceptions—while other actors may challenge or accept those moves—thereby facilitating new arguments. Thus, as we shall demonstrate, Palestine utilizes its liminality, and the variety of roles it might perform in legible and plausible ways, to accomplish various objectives. These roles might seemingly be in tension, yet they are held together not only by the PA's commitment to a HRL framework but also by the shared commitment of various actors to a state-based regime of international law.

Performative interactions with international human rights treaties

Member state

The most prevalent conception of sovereignty in the various communications that we analyzed is that of Palestine as a member state of the international order. In these communications, Palestine is (self-)positioned as a sovereign that is obliged to respect and promote the different human rights specified in the treaties as part of its domestic authority, and can do so, but it faces a series of obstacles—political, economic, cultural, social, and geographical—that challenge their fulfillment. In this performance, it acts as a state like all others. In many regards, this conception is embedded in the forms and structures of HRTs but becomes salient in the case of Palestine (Kelly 2009). As "member state" is the prevalent framing in the correspondence studied here, it is almost ubiquitous across communications and is expressed in myriad forms. The rest of this segment details the most central and intriguing forms, highlighting those that resonated with our prior expectations and those that most surprised us.

In terms of the forms that we expected to find, the most obvious is that the interactions of the PA with HRT bodies themselves fostered performative practices of sovereignty. The initial accession to the treaties is evident as a ritual of assumption and assertion of sovereignty as a member state (Brundage 2023, 1369–70). It is there in the name: the body recognized by the committees is the State of Palestine (SoP). This use is sometimes challenged, as exemplified by the grammatical "dart" thrown by NGO Monitor when it deliberately added speech marks around the term, but, regardless, it is asserted by the whole HRT apparatus.

More substantively, the reporting cycles of each treaty present the PA with recurring opportunities to perform through the three acts of assumption, challenge, and assertion. Each state report opens with an acknowledgment of the international obligations that the SoP has assumed by acceding to the treaties. Each report then details how the state complies with its obligations. By the very act of producing its report, the PA assumes the mantle of sovereignty. Next, challenges by shadow reports from NGOs and committees to its reported conduct enable the PA to (re)assert sovereignty in two ways. First, the very questioning of conduct implies a recognition of obligations and the capacity to uphold them. Second, NGOs and the committees raise concerns over substantive obligations and doubts regarding the institutional capacities of the PA. They also provide recommendations for action (Al-Haq 2021, para. 16; Women's Centre for Legal Aid 2021, 5). Thus, when the SoP responds to those concerns—by reporting on laws enacted (SoP 2018b, para. 50), bureaucratic capacities that were developed (SoP 2018c, para. 3), and changing social conditions—it reasserts the initial assumption, reconciling the concerns raised, sometimes by reporting on progress to refute the challenges that confront it and reasserting its commitment to

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its obligations. By seizing the opportunity to articulate its (seemingly) proven capacities as a state, only for those to be challenged once again, Palestine propels and embeds its performance of sovereignty, iteration by iteration (SoP 2019a, para. 216; 2019b, para. 65; 2020b, paras. 18, 27, 113).

The reports are thus ripe with assertions of the PA's capacities in areas of governance that usually lie at the core of sovereignty. Economic policies are discussed in the Committee on Economic, Social and Cultural Rights (CESCR). In CEDAW, personal status and criminal sanctions are central (SoP 2017). In the Committee on the Elimination of Racial Discrimination (CERD), the conduct of law enforcement officials is foregrounded (SoP 2018b, paras. 60–64). In the Committee against Torture (CAT), Palestine details its "correctional and rehabilitation centers," discusses its treatment of prisoners, and explains its legal framework of "[j]urisdiction over accused persons who are foreign nationals" and "[d]ue process measures for foreign nationals" (SoP 2019a, paras. 72–79, 137–42, 201–9). To the Human Rights Committee (HRC), Palestine reports on its measures against terrorism and money laundering (SoP 2020c, paras. 108–10); in the Committee on the Rights of the Child (CRC), education of children takes center stage (SoP 2018c), and in the Committee on the Rights of Persons with Disabilities (CRPD), the issue of land-use and property governance regimes is discussed at length (SoP 2019b, paras. 90–102). Each of these interactions enables the PA to perform governance of essential facets of everyday life and sketch hierarchical relations with individuals that are recognized by the international bodies as such.

However, beyond this process, the kind of sovereignty performed is not one-dimensional. It is loaded with meanings and values (even if partially open to interpretation).[9] Thus, the performance of "member state" sovereignty also entails the performance of a certain kind of state. It is the kind that is sought in the international community: a liberal-facing state whose main instruments for promoting its ends are legal commands issued via bureaucratic machinery that aims to render society legible for its apparatus (Kelly 2009; Creamer and Simmons 2020, 24). The question of legal status plays a prominent role in these communications. Treaty bodies, the PA, and NGOs all frame laws, court decisions, and legal reforms as central to the PA's treaty obligations. By adopting this framing, the different actors reaffirm the idea that legal mapping of the domestic is also an appropriate mapping of social conditions (in the broad sense, including economic and political) (Kelly 2009; Creamer and Simmons 2020). Reporting on laws is roughly equated with reporting on social change. This notion implies a sense of legibility—ordering the social in a way that is operable by the state (Scott 1998). This framing also enables the PA to exhibit a sense of modernity, civilization, and progress by spotlighting its legal reforms (Tzouvala 2020).

One notable example is found in CERD. Explaining its mechanisms to combat racial discrimination, Palestine reported that "[t]he Cybercrime Act of 2017 takes account of technological and social shifts connected with racially discriminatory speech and hate speech" (SoP 2018b, paras. 50(f)–(g), 51(d)). By introducing Internet regulations, the

[9] On at least one occasion, Palestine sought to interpret a treaty obligation in one area as an instrument for pushing against its obligations in another, exemplifying this negotiation over the meaning of human rights values (see SoP 2018c, para. 126).

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PA claimed sovereignty of cyberspace, where it has been famously argued that states—the "weary giants of flesh and steel"—would have no such authority (Barlow 1996). But doing so also exposed that the workings of sovereignty are in tension with the liberal aspirations of HRL. As soon as Palestine reported on its Cybercrime Act, CERD bodies, urged by NGOs, raised concerns that the law would be used to prosecute journalists and human rights activists. These concerns not only led some to challenge the PA on the content of the Act and the potential actions of the government but also, as a byproduct of this challenge, asserted the performance of sovereignty.

The contestation over the Cybercrime Act further asserted a performance of progress. In 2020, the SoP reported that "the Committee for the Harmonisation of Domestic Legislation [with international treaties and standards] held meetings with the relevant civil society institutions to discuss objections raised in the community against the Cybercrime Act, which was subsequently amended to bring it into line with international standards and the recommendations of civil society" (SoP 2019b, para. 3; 2020a, para. 18;). By seemingly discussing objections and amending the law in response, the PA not only reassured the world of its continued commitment to international standards but also performed sovereignty by assuming the role, meeting the challenge, and (re)asserting its credibility in that role.

Legibility also entails the capacity to see society. Thus, through its discussions with HRT bodies, the PA is involved in a process of constructing the capacities worthy of a state and producing the legibility of Palestinian society—of "seeing" and acting as a state, such as when it responded to the CESCR's request to produce a sophisticated set of statistics regarding the economy concerning different articles of the convention. For instance, the CESCR asked the PA to generate "statistical data, disaggregated by age group, disability, sex and region, in relation to the levels of employment, unemployment and underemployment, and on the size of the informal sector" (CESCR 2021, para. 13; see also SoP 2019b, para. 31(b)–(c); 2020c, paras. 66, 93, 99, 192; CESCR 2021, paras. 8, 15, 18, 20, 25, 27–28) and to do so according to international standards (SoP 2019b, para. 38).

Again, CERD provides a vivid example of how interactions with HRT bodies shape Palestine's bureaucratic capacities. In 2018, the state reported that it recognized several groups that are protected by CERD in Palestine and that it had held several meetings with representatives of those groups for information-gathering purposes, in addition to consulting "relevant Palestinian institutions" (SoP 2018b, para. 25). This approach did not satisfy either CERD or the various NGOs. The ICHR (2019a, 5) lamented that Palestine had not implemented measures to compile "statistics and information on protected groups" and criticized the lack of action from the Palestinian Central Bureau of Statistics (PCBS) (see also SoP 2020b, para. 3). The 2019 concluding observations of CERD adopted these arguments, observing that it "regret[ted] the lack of comprehensive statistics on the demographic composition of the population," *vis-à-vis* relevant groups, and recommended providing the required information (CERD 2019b, paras. 7–8). In 2020, Palestine responded, reporting its plans to provide training for PCBS personnel, delivered by the Office of the UN High Commissioner for Human Rights (SoP 2020a, para. 25; see also CRC 2019, para. 17; SoP 2019c, para. 128).

Our analysis showed that the PA's performance as a "member state" is central to its communication with HRT bodies and finds its fullest expression in instances such

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as those surveyed above. HRL obligations are portrayed not as the threads that pin states down but, rather, as the ones that support and elevate them (Benhabib 2009). It occurs internationally, through iterations of assumption-challenge-assertion around sovereignty, and domestically, as those communications provide visions, instruments, and legitimization for the developing manifested authority of the PA regarding Palestinian society.

Yet, within this framing, the PA is open to scrutiny from an unexpected source. Mirroring the Palestinian strategy of using the treaties as an international instrument in its struggle against Israel (Abbas 2011), Israeli right-wing NGOs submitted shadow reports accusing the PA of infringing Israelis' human rights. Note, however, that, while those reports are intended to undermine Palestinian international efforts and constrain the actions of the PA, they ironically also strengthen Palestinian claims to sovereignty. That is, in making their case, Israeli NGOs both draw on the international obligations to which Palestine committed and simultaneously take for granted that Palestine, as an entity, is qualified to submit to international obligations as a corollary to infringing those obligations (NGO Monitor 2019, 1, 7). Moreover, those reports also backhandedly recognize that Palestine's obligations extend not only to its own citizens—even insisting that the PA's jurisdiction encompasses Gaza (NGO Monitor 2019, 1; International Human Rights Clinic 2022, paras. 42–49)—but also to Israeli citizens (and other foreign Jews) who are allegedly affected by its conduct.[10] More substantial challenges, however, push the PA to perform another form of statehood, to which we turn next.

Occupied state

While most of the PA's interactions with HRT bodies are framed as those of a member state, there are also many instances in which its ostensible sovereignty is threatened and the brutal reality of the decades-long Israeli occupation becomes apparent. This reality renders Palestinian assertions of control over certain parts of the territory and population and the PA's "member state" performance implausible. The seeming contradiction between an assertion of statehood and the contra-assertion of (indefinite) occupation is momentarily resolved by "bracketing" the occupation. In its correspondence, the PA distinguishes between certain realities of Palestinian and Israeli control, with the latter being framed as an exception to the former. One prominent means by which Palestine "brackets" the Israeli occupation in its communications is via the Oslo Accords' distinction between Area C and Areas B and A and by differentiating between the West Bank and Gaza (see, for example, SoP 2020b, paras. 50–52, 82, 158–60, 163).[11] The treatment of Gaza is especially intriguing. The inability of the PA to assert its sovereignty over the area is the result of not only the occupation and the spatial separation between Gaza and the West Bank but also the political division following the 2007 election and Hamas's takeover of the Gaza Strip (SoP 2019a, para. 9).

[10] "Despite the clear obligations mandated by the CERD, the PA systematically promotes hatred and violent incitement against Jews and Israelis" (NGO Monitor 2019, 3).

[11] Declaration of Principles on Inter Self-Government Arrangements (Oslo Accords), Doc. A/48/486, September 13, 1993, file:///C:/Users/USER/Downloads/il20ps930913declarationprinciplesnterimself-government28oslo20accords29.pdf.

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Answering this challenge, as reflected in the 2019 CAT report, the PA portrays Gaza as a region under Israeli occupation (in contrast to the West Bank) and Hamas's actions as illegal (in contrast to the legal authority of the PA) (SoP 2019a, para. 9; SoP 2020b, para. 49).[12] Building on the distinction between Palestinian control and Israeli occupation, the PA accuses Israel of "[v]iolations committed by Israel, the occupying Power, of the Convention against Torture during the Israeli aggression against the occupied Gaza Strip in 2014" (SoP 2019a, paras. 181–82). It chronicles the devastating impact of the 2014 Gaza War, including the loss of life, irreversible damage to private and public property, and the incapacitated infrastructure, such as water and electricity supplies. Indeed, this kind of bracketing is asserted by HRT bodies and does bear some fruit for the PA's international struggle against Israel. For example, in its 2021 list of issues, the CESCR (2021, para. 2) adopted the wording of the International Court of Justice: "Israel, as the occupying Power since 1967, was bound by the provisions of the Covenant in the Occupied Palestinian Territory, and . . . was under an obligation not to raise any obstacle to the exercise of the rights enshrined in the Covenant in those fields where competence had been transferred to Palestinian authorities." The committee thus asked Palestine to provide information on "the obstacles to the exercise of the Covenant rights in the context of the occupation . . . [and on] how the occupation affects the State party's fulfillment of its human rights obligations under the Covenant in East Jerusalem, Area C, the H2 area of Hebron, and the Gaza Strip (para. 2).

By successfully bracketing the occupation, evidenced by the response of HRT bodies, the PA navigates the "the sovereignty-occupation duality" (Aeyal Gross 2017, 211)—the product of a prolonged occupation and a sovereignty that emerges in its midst. Moving between "member state" and "occupied state" performances enables the PA to stress that the occupation precludes Israel from claims of sovereignty (which is held by the occupied state, Palestine) and that, at the same time, Israel has HRL obligations (which it infringes). Switching between variations in its performance enables the PA to retain its legal claim to sovereignty while raising claims against Israel. However, it does so not from the standing of a group but, rather, from the standing of a sovereign that is obliged to protect the members of its body politic in the face of the actions of an unlawful occupier.[13] Understood in this way, "member state" and "occupied state" performances are not contradictory but complementary. While one enables the PA to perform its sovereignty, the other enables it to utilize HRL to hold Israel accountable before the world,[14] effectively setting up a record of human rights violations by documenting instances in which Israel infringes upon the human rights of Palestinians in the occupied territories.

This is most evident with the Convention on the Rights of the Child, in which Palestine momentarily forsakes the spatial brackets, exposing Israeli violations regarding Palestinians under the PA's authority.[15] Palestine's report to the CAT is ripe

[12] "The Gaza Strip is legally subject to the authority of the State of Palestine and the actions taken by Hamas there since that time are inadmissible and illegal in the eyes of the Government of the State of Palestine" (SoP 2019a, para. 9).

[13] This also provides the PA with a legal pathway to bypass the debate over the applicability of both HRL and international humanitarian law in the occupied territory.

[14] Compare with the notion of "political trial" (Nouwen and Werner 2010).

[15] Convention on the Rights of the Child, 1989, 1577 UNTS 3.

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with direct allegations of violations of human rights perpetrated by Israel (Azarova 2014, 84). Among other condemnations, the report mentions the "arbitrary refusal of the occupying Israeli authorities to hand over the bodies of Palestinian martyrs as a form of harsh collective punishment"; "[t]he Israeli occupiers' policy of demolishing the homes of Palestinian civilians as a form of harsh collective punishment"; "[s]olitary confinement of Palestinian prisoners in the jails of the occupying Israeli authorities"; "[c]onditions of detention for Palestinian children in the prisons of the Israeli occupiers"; and the "[a]rbitrary administrative detention of Palestinians in Israeli occupation prisons, a form of inhuman and degrading treatment" (SoP 2019a, paras. 54–61, 162–67, 190–94, 195–96, 197–99; see also SoP 2020c, paras. 310, 378).

In discussing these allegations in its CAT state report, the PA embraces a complete performance of an "occupied state." It repeatedly refers to Israel as the "occupying Israeli authorities,"[16] asserts that Israel has an obligation "to ensure that people it has subjugated are not tortured," and stresses that "the submission of this report does not absolve Israel, the occupying Power, of its legal responsibility under international law, in particular international humanitarian law and human rights law." It also emphasizes that Israel has direct obligations "*vis-à-vis* the Palestinian people, who have been subjected to its colonial authority and are afflicted by its repressive and arbitrary practices, and the need for legal accountability" (SoP 2019a, paras. 10–11).

Strikingly, however, the CAT state report's conclusion does not mention Israel. Instead, it contends that the "State of Palestine is a peace-loving country that believes in justice, democracy and human rights and abides by the Charter of the United Nations and the international conventions to which it has acceded." Further, it asserts that its efforts documented in the report "are an embodiment of the national political agenda and vision of the State of Palestine, of which respecting human rights, in particular those that prescribed in the Convention, is of paramount importance" (SoP 2019a, paras. 214–16). Thus, Palestine's CAT report emphasizes the severity of Israeli violations, ending on a note that ensures that the status that enables the PA to raise these accusations in the first place is that of sovereignty as a member state.

Hindered state

Sometimes, though, brackets are not enough. The Palestinian strategy of constructing strong distinctions based on spatial divisions is instrumental for compartmentalizing some of Israel's conduct but not all. In cases in which the performance of neither "member state" nor "occupied state" is plausible, Palestine assumes arguably its most sophisticated role in the performance of sovereignty. On issues in which the PA neither asserts a fully functioning member state role nor wholly submits to Israeli occupation, it opts to switch to a "hindered state" performance (SoP 2020c, paras. 15, 254, 302, 438).

Within this framing, Israeli actions are portrayed not as direct violations of the human rights of Palestinians but, rather, as the indirect curtailing of apparent Palestinian efforts to implement the decrees of the various conventions. This role enables the PA to combine both the member state and the occupied state framework, accusing Israel of misconduct while asserting its commitment to HRL. Thus, in its 2020

[16] This phrase is used fifty-eight times throughout the report.

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HRC report, Palestine argues that Israel "imposes severe restrictions on Palestinians' freedom of travel thereby hindering the movement of voters and of staff of the central electoral commission" (SoP 2020c, para. 438). It tells of how a program for the automated registration of births and deaths in Palestine is delayed because registers are "under the control of the Israeli occupiers and this hinders the implementation of the programme" (para. 302; see also para. 4) and how the "ongoing violations being committed by Israel, the occupying power, and its systematic and widespread racist policies effectively prevent the State of Palestine from acting to guarantee Palestinians' right to culture" (para. 448). Most outspoken of all, it claims that Israeli actions are "the main obstacle preventing the Palestinian people from enjoying their fundamental and inalienable rights, chief among which is the right to self-determination" (para. 2).

Similar positioning is found also relating to Hamas's rule over Gaza. The ICHR (2019b), for example, argued in its 2019 CRC report that, due to Hamas's omnipresence, "enforcement of international laws, resolutions and conventions, to which the Palestinian government is committed, has been practically obstructed in Gaza." While the discourse of a hindered state is close to that of an occupied state, we find a clear distinction in communications. Thus, some NGOs explicitly differentiated in their communications between direct "Israeli violations of the rights of Palestinian children" and "Israeli violations that prevent the State of Palestine from meeting its obligations under the Convention" (Defense for Children International – Palestine 2019, sec. 1.4). This dual role is also adopted by Palestinian NGOs to accuse Israel and to call the Palestinian state into action at the same time. In its CESCR shadow report, the NGO Al-Haq (2021, para. 21) argues that, while it acknowledges the "legal obligations of Israel, the Occupying Power" and the restrictions it imposes on the PA, there are still measures the PA can take to fulfill its obligations.

Interestingly, the PA chooses to present some of Israel's most intrusive violations of human rights and sovereignty not solely as violations but also as an obstruction of its own conduct. According to Palestine's CAT state report, between 2014 and 2017, Israel detained 454 "military personnel" and raided 1,132 homes of said personnel (SoP 2019a, paras. 143–44). Performing raids on the homes of security officers seemingly violates sovereignty on three fronts. First, it necessarily implies the unauthorized breach of Palestinian jurisdiction by Israel. Second, it infringes on private property (denying the ultimate sovereignty of Palestine). Lastly, it is a direct attack on representatives of the state. Yet the PA chooses to frame these frequent attacks differently: "Israeli violations against Palestinian security and law enforcement institutions and personnel are standing in the way of the rule of law in the State of Palestine. Ever since Israel began its occupation of Palestinian territory, it has been trying to undermine the Palestinian justice and security sector" (SoP 2019a, para. 143).

This framing was obviously unnecessary. The PA could have focused on the direct implications of those acts on human rights. But it opted, instead, to frame the acts in sovereignty terms, underlining the narrative in which its role as a member state is undermined by Israel's hindering actions and "the Palestinian justice and security sector" is weakened because Israel obstructs the rule of law (with its indirect implications for human rights). In other words, Palestine's rightful ability to enforce the rule of law is infringed and undermined (SoP 2019a, para. 8). Arguably, then, the

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performance of a hindered state showcases perhaps the most evident implications of the iron cage of sovereignty. It structures the PA's arguments toward upholding its sovereignty claim and provides innovative opportunities to promote its claims against Israel. Notably missing is the individual whose rights are infringed upon and for whom the entire human rights system exists, as shown in the aforementioned examples. The result is an inverse of the HRL rationale – instead of the sovereignty of a state being the guarantee of individual rights, (infringed upon) human rights of the individual are there to assert the sovereign state.

Performance on the move

Through correspondence with human rights committees and civil society, the PA performs three distinct roles: member state, occupied state, and hindered state. The distinctiveness of each role is important, but just as important is the fact that Palestine resolutely remains a state, no matter which one it conveys in any given communication. Its liminality enables the SoP to switch between the variations of a "state" almost seamlessly. The PA manages to establish Palestinian sovereignty by performing it through the mechanisms of HRL; yet, as a result of joining any international treaty, it has to give up some of its sovereignty by putting itself under the scrutiny of various actors, international and domestic. The opposite goes for Israeli NGOs as they attempt to gain from the PA's entrapment by HRL. By insisting on the PA's international obligations toward Israelis, they de facto accept the legitimacy of those obligations and the PA itself (even if grudgingly).[17] Meanwhile, HRT bodies get to advance their cause, extending the human rights regime to the complex situation of the Israeli-Palestinian conflict, through extensive engagement with the PA, and to push for concrete changes. Instead of direct confrontation with the human rights infringements by the Israeli occupation, they can combine the indirect documentation of violations while forging a path of least resistance through Palestinian governance. They can do so only because they accept the PA's performance of sovereignty at face value and assimilate its free-form switching between member, occupied, and hindered state roles. In other words, they can critique the state and demand changes precisely because they acknowledge it as such, which sets the limits of their critique. The same is true for Palestinian NGOs that aim to criticize the PA for acting illegally. No matter how adamant and sharp in their critique of its actions, they are limited in the scope of that critique as it necessarily operates within the limits of the state, acknowledging its authority (see also Allen 2013).

Yet, while this entanglement of performances is acted upon an international stage, domestic actors also have meaningful roles to play. Alongside state officials and civil society organizations, HRT communications repeatedly mention the actions of one key domestic body: the SCC. Investigating the actions of the SCC thus enables us to see how Palestine's performance, like that of all states, is inward-facing as much as it is outward and to illustrate the importance of the international-domestic legal feedback

[17] Our account does not aim to exhaust the incentives of Israeli right-wing non-governmental organizations (NGOs). For a broader account of the relationship between said NGOs and the internationalization of the Israeli-Palestinian conflict, see Lamarche 2019.

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for international performance. In the next section, we analyze three decisions of the SCC (two of which we learn about from the communications of human rights bodies themselves) in which the place and applicability of international law in the Palestinian constitutional order were discussed. By examining the decisions and their reverberations on the international level, we can discern how the PA's international efforts enlist the SCC, alongside state officials and NGOs in the political project of Palestinian sovereignty. This, in turn, shapes domestic struggles regarding human rights and feeds a continued conversation between the national and the international levels that (re)affirms the state, its performance, and the iron cage of sovereignty.

When international law meets national courts

The SCC was established by the Supreme Constitutional Court Law no. 3 of 17 February 2006, under Article 103 of the Basic Law of March 18, 2003.[18] But it was formalized only in 2016 upon the Appointment of the Supreme Constitutional Court Law no. 57 of March 31, 2016.[19] Accordingly, the independence of the SCC is greatly debated (Awawda 2022; Schaaf 2022). And, yet, since it commenced its work, the SCC has presided over more than ninety cases. In at least ten of these, it declared a provision unconstitutional, and, in eleven cases that we found, it agreed to the request to interpret a provision and offered its interpretation.[20] Three of those decisions, delivered between November 2017 and December 2020, were central to determining the place of international law in the domestic legal system.

While the first decision was motivated by an unrelated claim, the second and third decisions were directly related to HRTs and their effects on Palestine. The legal proceedings were accompanied by public discussions at home and international interest—and concern—abroad. In those three decisions, the SCC repeatedly signalled to the executive its support for the international effort, stressing Palestine's need to "present itself as a state." The court further framed this need as "part of its legal struggle to embody the State of Palestine as one among the world's civilized [community] of States, [one] that respects its international obligations."[21] The SCC further framed these moves as acts of sovereignty, explaining that the "settled" understanding of international law is that "international treaties represent the will of states" and that "signing, ratifying, and joining international treaties are expressions of sovereignty." The court further asserted that joining treaties "entails the implicit willingness of the state to give up parts of its sovereignty."[22]

In *Decision no. 5/2017*, the SCC goes even further, asserting that

> [t]he importance of Palestine's [accession to multilateral treaties] stems from its respect for basic freedoms and human dignity [and] its [intention] to

[18] Law of Supreme Constitutional Court no. 3 of 17 February 2006, Palestine Gazette 62, March 25, 2006, 93; Basic Law of 18 March 2003, Palestine Gazette Special Volume, March 19, 2003.

[19] Appointment of the Supreme Constitutional Court Law no. 57 of 31 March 2016, Palestine Gazette no. 120, April 26, 2016, 53.

[20] For the complete list of references to these cases, please contact the authors.

[21] Supreme Constitutional Court, Decision no. 4/2017 of 19 November 2017, Palestine Gazette no. 138, November 29, 2017, 84, 87.

[22] Supreme Constitutional Court, Decision no. 4/2017, 85.

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> guarantee and preserve the legitimate national and legal rights of the Palestinian people as confirmed by the 1988 Declaration of Independence, [in order to] strengthen the rule of law and the principles of equality and non-discrimination, to lay the foundation for a pluralistic and democratic society, and as an embodiment of the legal and international status of the State of Palestine as it faces the occupation and places it under international legal scrutiny.[23]

Two of the roles we explored earlier are intertwined in these statements—those of Palestine as a member state and as an occupied state. The SCC operates within the performance of Palestine as a member state. Just like in a "normal" state, the SCC, a judicial body entrusted with the interpretation of the law, shapes its opinion on the implementation and incorporation of international treaties in the domestic legal system of Palestine (compare Contesse, forthcoming). The SCC used the HRT's constitutional questions to assume the role of arbitrator of constitutional values, bolstering its independence and institutional status (Schaaf 2022; compare Awawda 2022). These decisions later "leaked" back to the international level into the debates of the different HRT bodies, incidentally giving effect to the court's legitimacy. By association, the SCC's performance as a state organ effectuated the state's legitimacy.

The willingness of the SCC to explicitly engage with international law should not be surprising. Many of its members have extensive training and experience in international law, and the court as an institution even promoted such training.[24] Other decisions by the court also exemplify this willingness.[25] The capability of the court to speak internationally provided it with the ability to take part in performing Palestinian sovereignty both domestically and internationally by forging a doctrinal position that spoke both to international expectations and to domestic demands anchored in self-determination.

Three steps of HRT consolidation in Palestinian law

While the three decisions are not entirely doctrinally cohesive, they distill a shared legal imagination about the place of international law in Palestine's constitutional system and the court's present and future role (Hihi and Khalil 2020). In its first

[23] Supreme Constitutional Court, Decision no. 5/2017 of 12 March 2018, Palestine Gazette no. 141, March 25, 2018, 87, 88.

[24] Some of the justices who presided over the three cases discussed are familiar with the language and operation of international law. See, for instance, Mohhammed E. L. Haj Kacem, president of the Palestine Supreme Constitutional Court (SCC), who has an international law and international relations certificate; Justice Mohhamed Abdul Ghanni Al-Awwi, who has "represented the State of Palestine in several regional and international conferences"; Justice Rafik Abu Ayyash, who completed his master's degree in international law in Azerbaijan; Justice Abdel-Rahman Abu El-Nasr, who has a PhD degree in public international law from the Faculty of Law at Cairo University. He has taught international law and published extensively on international law issues. See their biographies published in the SCC's official website, https://www.tscc.pna.ps/en/. In addition to that, the SCC's website reported on a workshop with the Max Planck Institute aimed at training the SCC's judges on implementing HRTs domestically.

[25] One decision of the court where Abu El-Nasr resided over (alongside others), was full of references to international humanitarian law, general principles of international law, and human rights law. SCC, Explanatory Decision no. 01/2017 of 12 July 2017, Palestine Gazette no. 134, July 18, 2017.

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decision (*Decision no. 4/2017*), the SCC dealt with a question referred from a lower court regarding whether the granting of immunity from litigation to the UN Relief and Works Agency for Palestine Refugees (under an international treaty that Palestine signed in 1996) was unconstitutional due to an infringement of the basic right of access to justice for Palestinians.[26] The court was thus faced with a direct question about the relationship between international treaties and the Palestinian Basic Law. As mentioned earlier, the court framed Palestinian accession to international treaties as an act of sovereignty, placing it outside the scope of administrative judicial review.[27] It noted that the 2003 Basic Law is silent on the place of international treaties in the hierarchy of laws. In somewhat ambiguous language, it concluded that this silence is an affirmation to take the international and internal systems "as one legal unit."[28] But the ruling offered no final clarification of the hierarchy of norms:

> The Court, by majority, [affirms] the supremacy of international agreements over internal legislation, so that the rules of these agreements acquire a higher status than internal legislation, *in line with the national, religious and cultural identity of the Palestinian Arab people*, [affirming] the immunity of the United Nations and its institutions from national judicial procedures.[29]

Thus, the court affirmed the international efforts of the PA before a domestic audience, establishing Palestine as a seemingly monist system. Still, it conditioned the concrete applicability of treaties on their compatibility with the "national, religious and cultural identity" of Palestine.

In the second decision (*Decision no. 5/2017*), rendered in 2018, was prompted by a request from the minister of justice and the minister of foreign affairs asking the SCC to clarify the place of international treaties in the Palestinian hierarchy of laws and the mechanisms for the integration of international treaties in the domestic legal system.[30] Notably, the request was explained as a result of confusion in the lower courts over the applicability of international treaties on various legal matters. The ministers stressed that this situation

> [had] created a state of instability in the judicial system of regular courts whenever they apply international treaties. . . . Sticking to the status quo will push society to doubt the national will and ability of the State of Palestine to take its responsibilities, . . . especially those related to human rights and basic freedoms, seriously.[31]

[26] SCC, Decision no. 4/2017 of 19 November 2017, Palestine Gazette no. 138, November 29, 2017, 84.
[27] SCC, Decision no. 4/2017, 85.
[28] SCC, Decision no. 4/2017, 87.
[29] SCC, Decision no. 4/2017, 88 (emphasis added). A dissenting opinion (Justice Fawaz Sayma) did concur that international law prevails over national law but only with regard to regular laws—not the Basic Law, which represents the Constitution and prevails over international law. See SCC, Decision no. 4/2017, 89.
[30] SCC, Decision no. 5/2017 of 12 March 2018, Palestine Gazette no. 141, March 25, 2018.
[31] SCC, Decision no. 5/2017, 87–88.

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Deciding on the case, the SCC affirmed that the state president can sign treaties on its behalf. As for ratification, the court noted that the president has the authority to ratify treaties, except those that require a legislative act).[32] But, it added, given that the legislative council had not convened for some time, the president, in cases where the delay cannot be afforded, may pass decrees, which the legislative council must then review at the very first opportunity—in fact, protracting temporality (Miller 2014; Alsarghali 2017). The SCC confirmed *Decision 4/2017*, stressing that international treaties are above national law and adding that they acquire this status "after being ratified and published, and after they pass all of the formal procedural stages that must be met for them to be part of internal legislation binding upon individuals and institutions and that is in order [to make sure HRTs are] *compatible with the national, religious, and cultural identity of the Palestinian people.*"[33]

Regarding the hierarchy of laws, the SCC set the 1988 Declaration of Independence as the highest constitutional document, followed by the Basic Law that stemmed from it.[34] Only then does international law enter the picture, prevailing over primary national legislation. As for human rights and basic freedoms, the court held that these were to be incorporated within national legislation, taking all required measures to do so and stressing again that this should be carried out in a way that is compatible with the religious and cultural identity of the Palestinian people.[35] This positioning places the Palestinian legal system closer to a dualist model than a monist one. Invoking *Decision 4/2017*, Justice Hatem Abbas, in a partially dissenting opinion, agreed with the majority regarding the hierarchy of laws and the president's capacity to ratify conventions. Nonetheless, he posited that following the majority's logic should have led to different outcomes concerning the rest of the decision. According to Abbas J, ratifying these treaties (and publishing them in the *Palestinian Gazette*) should have been sufficient, requiring no further action for them to become part of the national legal system.[36] While, in some important ways, the second decision diverted from the first—for instance, in conditioning HRTs' applicability on legislative action—in many other ways, it was a direct continuation. The court upheld the government's power to join treaties and paved the way for executive action to incorporate treaty obligations into the national legal system. Moreover, it again conditioned those powers on cultural and religious compatibility.

The third decision (*Decision no. 32/2019*), rendered in December 2, 2020, was the first instance in which the international efforts of the PA were challenged domestically.[37] Seemingly building on the "cultural and religious compatibility" clause of the previous decisions, two claimants challenged the Palestinian accession to CEDAW, claiming that its global nature and its mostly Western outlook did not necessarily take

[32] SCC, Decision no. 5/2017, 91–92.

[33] SCC, Decision no. 5/2017, 93 (emphasis added). As far as we can discern, the president issued decree laws publishing only the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child thus far (Decree Law no. 14 of 21 February 2021, CERD, Palestine Gazette 179, May 26, 2021; Decree Law no. 25 of 8 July 2021: CRC, Palestine Gazette 181, July 27, 2021).

[34] Palestinian Declaration of Independence, Doc. A/43/827|S/20278, November 15, 1988, https://www.un.org/unispal/document/auto-insert-178680/.

[35] SCC, Decision no. 5/2017, 94–97.

[36] SCC, Decision no. 5/2017, 100–1.

[37] SCC, Decision no. 32/2019 of 2 December 2020, Palestine Gazette no. 174, December 24, 2020, 123.

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"civilizational, cultural and legal particularities" into account, arguing that the president was subject to external and internal pressure, including that of feminist organizations, in making the decision.[38] The SCC dismissed the petition. It proclaimed that the matter had already been settled in *Decision no. 5/2017*, affirming the hierarchy of laws and the place of HRTs in the Palestinian legal system. However, the court also highlighted the elements of its prior decision that stressed the need to harmonize national laws with the requirements of HRTs in a way that is compatible with "the religious and cultural identity of the Palestinian people."[39] Thus, in the face of a direct attempt to completely abandon HRL and thus undermine the PA's strategic efforts, the SCC chose instead to support the national effort of a member state performance while creating possible caveats for the future.

However, these decisions did not operate solely within a domestic setting. They fed into the international level, bringing the executive, Palestinian NGOs, and HRT bodies back into the conversation and into the PA's "member state" performance. *Decision no. 4/2017* was initially in response to an unrelated claim but was quickly brought to the attention of HRT bodies. Following communications from NGOs that raised concerns to CEDAW regarding the implications of the decision, the PA explained that a request for interpretation had been submitted to the SCC (the same request that resulted in *Decision no. 5/2017*) (General Union of Palestinian Women 2018, para. 3.2; ICHR 2018, para. 11.1). It argued that *Decision no. 4/2017* "provides that international conventions are superior to local legislation, as consistent with the national, religious and cultural identity of the Palestinian people. This means that international conventions must be incorporated into the laws in force through harmonization." Driving the point home, it provided an example of a draft law that stresses that "the customs and traditions prevalent in society shall not be deemed to authorize avoidance of the obligations set forth in the draft law" (SoP 2018a, paras. 1–2). However, following *Decision no. 5/2017*, NGOs argued that it "can be interpreted as a general reservation, in violation of the Convention," and that the SCC acted "without a constitutional or legal basis" as it was, itself, "formed by a decision made by the Palestinian President . . . and in violation of the Basic Law" (Al-Haq 2018, paras. 9, 18).[40]

At the July 2018 meeting of CEDAW, there was further discussion on the decisions and their implications. State representatives mentioned the work of the SCC with pride as part of the implementation efforts (CEDAW 2018a, paras 1–6). Yet CEDAW members expressed concern that, "although the Supreme Constitutional Court had ruled that the Convention prevailed over domestic legislation, certain legal exceptions had been applied, which seemed to indicate a dualist approach to the application of international law." State representatives retorted that the SCC's decision does not constitute a reservation to the convention, reiterating its commitment to uphold international law (paras. 17–19). The committee still found it necessary to stress this point in its concluding observations, recommending that the

[38] SCC, Decision no. 32/2019, 124.

[39] SCC, Decision no. 32/2019, 126. Note that there is a certain variation in the SCC's formulation of this interpretative umbrella, with the words "Arab [people]" or "national [identity]" lacking at times.

[40] Scholarship on the decisions explored whether that framing constitutes a reservation to the Committee on the Elimination of Discrimination against Women (CEDAW) only to dismiss the legal possibility of it (Qafisheh 2018a, 43–44; see also Qafisheh 2013, 2018b). For more on CEDAW and, generally, on questions of Sharia and gender in Palestine, see Schneider 2021.

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state ensure "that the interpretation of the Supreme Constitutional Court ... does not absolve the State party of its obligations under the Convention" (CEDAW 2018b, paras. 12–13).

This cycle of performance was repeated under other HRTs. Palestine's representatives alternated between celebrating the decisions as pillars of Palestine's constitutional order (CERD 2019a, paras. 16, 25, 27; SoP 2018b, paras. 19–22, 27(e), 36; 2018c, paras. 19–20; 2019b, para. 16; 2019c, para. 1; 2020a, para. 14; 2020b, para. 44; 2020c, paras. 27, 111) and arguing that the "cultural compatibility clause" was limited to CEDAW (CRC 2020a, para. 27).[41] Palestinian NGOs, on the other hand, claimed that the rulings entirely jeopardized HRL in Palestine and emphasized that the SCC lacked competence in its decisions (Defense for Children International – Palestine 2019, paras. 2–9; Al-Haq 2020, paras. 2, 8–13; 2021, para. 4; ICHR 2021, 5; 2022, para. 2). Members of the various committees repeatedly asked for clarifications and raised concerns (see, for example, CERD 2019a, para. 47). While the first CEDAW recommendations were to ensure the state's obligations, further recommendations were to "[e]nsure that the interpretation of the Supreme Constitutional Court [decisions] and their application do not prevent people living in the territory of the State party from fully enjoying their rights under the Convention" (CAT 2022, para. 9(b); see also CERD 2019b, 10(b); CRC 2020b, para. 7(c)).

The discourse between the state, HRT bodies, and NGOs resulted in the reassertion of the competence of the SCC. Requesting interpretation from the SCC reaffirmed Palestine's international "member state" performance, with its separation of powers, placing the SCC as a central actor in international law politics in Palestine. Challenges by NGOs framed the SCC as a rogue player, both in international law (the SCC issuing an informal general reservation) and in constitutional law (the SCC acting without authority). But the various committees asserted the court's position. They made no mention of the "usurping" allegations of NGOs, focusing only on the question of interpretation—thereby implicitly recognizing the SCC as a valid source of Palestinian law. By urging the state to affirm and guarantee its fulfillment of obligations, it thus transformed the assertion of the SCC into an assertion of Palestinian sovereignty (Huneeus 2011).

Conclusion

At the core of this inquiry is the case of the PA and its effort to use HRTs strategically to advance Palestinian statehood (Anghie 2005, 210). By analyzing the extensive correspondence between the PA and human rights bodies, alongside shadow reports, we have seen how this case offers a new explanation for why states might join HRTs and why they would attempt to show their compliance. We suggest that, at least in liminal cases, HRTs both constrain a state and afford it "sovereignty gains," realized through its ongoing interactions with international organizations, civil society, and domestic actors such as the SCC in the case of Palestine. Palestine's choice to join HRTs for that purpose thus fed a performance of sovereignty that unfolded

[41] Recall that Decision no. 5/2017 did not, in fact, deal with CEDAW directly but with the entire HRL apparatus. This only goes to illustrate how CEDAW was present in the shadows when the ruling took shape, with the debate heating up and taking on a public profile (*AlwatanVoice* 2018; *Wattan* 2018).

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internationally and domestically. Building on the theory of performative sovereignty, we have explained how the PA performed three roles on the international stage: member state, occupied state, and hindered state. Moving between these three variations, the PA was able to navigate conflicting objectives, performing its sovereignty and putting Israel on trial at the same time.

To complement its international efforts, the PA asserted its performance—specifically, that of a member state—at home. By the very act of joining HRTs, it enacted its member state performance. But, in joining without reservations, it signaled a desire to secure a certain vision of itself as liberal and human rights oriented. However, we have also seen how those efforts, specifically in the case of CEDAW and women's rights, were met with opposition that exerted a cooling effect, as evident in the fact that CEDAW, for instance, remains an unpublished treaty. Notwithstanding, attempts to reject the HRL framework entirely failed to gain traction. The SCC, a prominent domestic actor, demarcated future resistance to HRTs within HRL's framework, accepting the PA's performance of sovereignty and its own role in it. Furthermore, as discernable in HRT bodies' correspondence, the SCC's decisions reinforced its legitimacy and, simultaneously, the PA's "member state" performance.

The PA attempts to pass as "member state" are, on its face, successful, but they push the envelope of sovereignty on two fronts. First, by navigating the delicate dance of its cultural clause without meeting the bar of a general reservation, the PA creates further conditions to shape what a member state is and the kind of normative plurality that the term can sustain. More importantly, though, is the partial divorce that the PA has succeeded in pursuing between its (lack of) affective control of Palestinian territories and between the international and legal performance of sovereignty, mediated by its occupied state and hindered state roles. While this article was written before October 7, 2023 and the (still) ongoing war, the gap between the PA lack of control and the widespread recognition of its sovereignty is striking (after October 2023 and by June 2024, nine states, four of them European, four African, and one from Asia, declared they recognized the SoP. In addition, the UN General Assembly expanded the SoP rights in the UN.) This gap uncovers the constraints of sovereignty as a concept and as an end. To put it differently, what could be seen as a critical work if looked upon from the perspective of HRTs is also a critique of the PA's approach if looked upon from the perspective of international relations, making the performativity of the PA limited in its ability to bring about de facto change no matter how innovative it is. Nonetheless, the actions of the PA are not devoid of de facto implications, provoking much concern among Israeli right and far-right politicians, perhaps sadly and ironically, more than the war does (*I24 News* 2024).

At the same time, one actor did not perform at all—the State of Israel. Understanding perhaps that any attempt to challenge the SoP in HRT bodies would possibly result in the assertion of the latter's sovereignty, Israel has thus far refrained from taking any part in the proceedings. Whether that might change following October 7 remains to be seen and is worth following.

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Every actor involved in the performance of the PA's sovereignty gains from it but, at the same time, is trapped by its iron cage. As we summarized earlier, the incentives and actions of the various actors in the international arena are structured to oblige them to accept the PA's performance as a state. As for the SCC, it gains significantly in establishing itself as a legitimate constitutional court and an important political player. However, in empowering itself with future discretion on what constitutes the religious, the cultural, and the national, it also exposes itself to demands for accountability. In every future case where a human right is brought to its doorstep, the SCC will have international eyes scrutinizing its every action and assessing each decision against an external yardstick. Moreover, using the SCC's decisions in the international arena bolsters its international and domestic legitimacy as HRT bodies acknowledge and discuss allegations by Palestinian NGOs on various issues but not on direct claims against the legitimacy of the actions of the SCC.

Beyond the direct implications for the case of Palestine, this article has also demonstrated how a "performative" theoretical and methodical approach to international relations and law can advance the field. First, the performance perspective provides insights into core concepts in the study of international law—in this inquiry, sovereignty. But, more than that, it provides new methodological tools to investigate international relations. Committee communications are not only evidentiary aids to state conduct or for prevailing arguments (which they are) or only empty gestures (which they sometimes are) but also legal instruments that result in granting rights and privileges. One promising avenue of research is situating the PA's efforts in the realm of HRTs discussed in this article within the PA's larger effort to internationalize the conflict. In 2011, the PA made a bid for membership in the UN with a clear and declared intention to "pursue claims against Israel at the United Nations, human rights treaty bodies, and the International Court of Justice" (Abbas 2011). A performative approach may offer much to an analysis of the PA's actions in other international organizations such as the International Criminal Court and the International Court of Justice and the reactions of other states to it (see, for example, International Court of Justice 2024; International Criminal Court 2024a, 2024b; Office of the United Nations High Commissioner for Human Rights 2024; *Reuters* 2024; *UN News* 2024).

Another promising avenue of research is an exploration of the applicability of our argument to other states. We suspect it holds for other liminal states and other instances of contested sovereignty (Taiwan, Kosovo, Western Sahara). Furthermore, we contend that the theory and method can be applied to non-contested states and territories. The sovereignty of non-contested member states is performative as much as that of liminal states, even if its success is often taken for granted. Global challenges such as climate change and multi-national corporations confront all states with the contingency of their sovereignty. In this context, for instance, the emergence of a global pushback against the international order by both Third World approaches to international law and right-wing populist regimes that poise self-determination against the liberal commitments of the member state ideal could possibly be analyzed through the prism of performative sovereignty.

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