INSIGHT

A Country, but not a State? The Apparent Paradox of International Statehood in Case C-632/20 P, *Spain v Commission (Kosovo)*

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Abstract: In the case of *Spain v Commission* the General Court and the Court of Justice of the European Union had to determine whether Kosovo fell into the scope of the definition "third countries" for the purposes of art. 35 of Regulation (EU) 2018/1971 (the "BEREC Regulation"). Despite offering differing viewpoints, the two courts arrived at the same conclusions. Ultimately, the CJEU ruled that the term "country" is interchangeable with the term "State" and that Kosovo could be treated as a "third country" for the participation in the Body of European Regulators for Electronic Communications (BEREC). Nevertheless, the CJEU contended that the treatment of Kosovo as a country, and thus as a State, did not impact the position of Member States towards its recognition in international law. This *Insight* focuses on this apparent paradox and its implications for the construction of the concept of statehood in international law. It is argued that the CJEU appears to imply the potential for multiple definitions of statehood, contingent upon their relevance in different contexts. This perspective faces the risk of contributing to the gradual dilution of this formerly granitic concept.

Keywords: Kosovo – recognition – third country – third State – statehood – international legal personality.

I. Introduction

On January 17, 2023, the Court of Justice of the European Union ("CJEU") issued its judgment in the Case C-632/20 P, *Spain v Commission*.[1] The ruling annulled the prior decision made by the General Court ("GC") in September 2020 in the same case.[2] The crux of the dispute in these proceedings centred around the participation of the Kosovo's National Regulatory Authority (NRA) in the Body of European Regulators for Electronic Communications (BEREC), a EU agency active in the context of European cooperation in the field of electronic communications. Spain sought the annulment of the European Commission's decision admitting Kosovo to participate in BEREC. The core of Spain's complaint was that the

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[1] Case C-632/20 P *Spain v Commission* ECLI:EU:C:2023:28.

[2] Case T-370/19 *Spain v Commission* ECLI:EU:T:2020:440.

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Commission violated the requirements of art. 35(2) of the Regulation (EU) 2018/1971 ("BEREC Regulation"),[3] which provide that the admission to the Board of Regulators of BEREC "shall be open to [...] regulatory authorities of third countries".

Spain contended before the General Court that the Commission was not entitled to treat Kosovo as a "third country", since Kosovo is not legally a "State" in the sense of international law, and that the notion of "third countries" and "third States" were equivalent.[4] According to Spain, the cooperation in the field of BEREC "presupposes the participation of an authority linked to an organization in the nature of a State, with the result that only a State can have an NRA".[5]

The General Court and the Court of Justice were consequently tasked with deliberating upon the interpretation of the term "third country" and Kosovo's eligibility within the context of the BEREC regulation. Remarkably, the two courts arrived at divergent conclusions regarding the initial query, although they ultimately concurred in their acknowledgment that Kosovo could indeed participate in BEREC.

The General Court distinguished the concept of "country" from that of "State". This enabled the General Court to assert that Kosovo's participation in BEREC was feasible without necessitating its formal or implicit recognition as an independent sovereign entity in the sense of international law. Conversely, the Court of Justice took an opposing stance by dismissing this distinction. Aligning with Spain's perspective, it maintained that the two concepts were synonymous and could be interchanged. This *Insight* focuses on the implications of these two different approaches for the status of Kosovo and the construction of statehood for the purposes of international law.

II. The recognition and the engagement of the EU with Kosovo

At the outset, it might be useful to briefly give an overview of the relationship between EU and Kosovo. The issue of Kosovo's recognition as a State has remained contentious among EU Member States. While most of them, together with some other 100 UN States, have accepted Kosovo's self-declared independence on February 17, 2008, a subset of five Member States (Spain, Greece, Romania, Slovakia and Cyprus) continue to withhold recognition.

In the meantime, the EU has strengthened its cooperation with Kosovo in various fields. Following Kosovo's declaration of independence, the EU launched its European Union Rule of Law Mission in Kosovo (EULEX), operating in the framework of the UNSC

[3] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) 1211/2009.

[4] *Spain v Commission* cit. para. 21.

[5] Ibid. para. 22.

Resolution 1244/1999, to support the Kosovo authorities in establishing sustainable and independent rule of law institutions.[6]

Despite not having formally acknowledged its recognition, the EU has continued developing a "policy of engagement"[7] towards Kosovo. In 2016, a Stabilisation and Association Agreement ("SAA") was concluded in order to establish a legal framework for cooperation and promote European standards in the country.[8] In order to avoid problems linked with the status of Kosovo, the agreement was not concluded as "mixed", as it is usually the case with association agreements, but as "EU-only".[9] Moreover, in order to avoid any misstep, recital 17 of the Kosovo SAA states that the agreement "is without prejudice to positions on status, and is in line with [United Nations Security Council resolution 1244 (1999)] and the [International Court of Justice] Opinion on the Kosovo declaration of independence". This point is further reinforced by art. 2, which states that the terms of the agreement do not "constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States".

The engagement of the EU with Kosovo continued in sectoral policy areas, such as the one involving electronic communication and the establishment of BEREC. Originally, in Regulation (EC) 1211/2009[10] the participation of NRAs in BEREC was restricted to European Economic Area (EEA) States and to States that were candidates for accession.[11] In its 2018 working document titled "Measures in Support of a Digital Agenda for the Western Balkans", the European Commission explicitly advocated for the integration of the Western Balkans into established regulatory bodies like BEREC.[12] The BEREC Regulation was thus repealed by Regulation (EU) 2018/971, which now allows for participation of NRAs from third countries where those countries have entered into agreements with the EU to that effect.[13]

In 2022, following the Russian invasion of Ukraine, Kosovo presented a formal bid to become a EU Member State,[14] for which it will be indispensable, both politically and juridically,[15] to solve the question of the Kosovo's recognition as a State.

[6] M Spernbauer, 'EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date' (2010) German Law Journal 769.

[7] C Challet and P Bachelier, 'Can Kosovo be considered as a "third country" in the meaning of EU law? Case note to Spain v. Commission' (2021) Maastricht Journal of European and Comparative Law 400.

[8] Stabilisation and Association Agreement of 12 February 2016 between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part.

[9] P Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' (2017) European Foreign Affairs Review 394.

[10] Regulation (EC) 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

[11] Art. 4 Regulation (EC) 1211/2009.

[12] Commission Staff Working Document of 22 June 2018 titled 'Measures in support of a Digital Agenda for the Western Balkans' 15-16.

[13] Art. 35 BEREC Regulation.

[14] 'Kosovo formally applies to join EU' (15 December 2022) Reuters www.reuters.com.

[15] Art. 49 TEU specifically refers to "European State".

III. The approach of the GC: a country, not a State?

In deciding whether Kosovo could qualify as a "third country" within the meaning of art. 35(2), the General Court followed a cautious approach. Mindful of the significant implications, the court aimed to differentiate between the terms "third country" and "third State" to prevent any inadvertent acknowledgment of Kosovo. While the latter designation was reserved for fully recognized sovereign entities, the former encompassed a broader concept, comprising territorial entities not acknowledged as States but still possessing the ability to engage in international agreements.

The judges pointed out that neither the BEREC Regulation nor any other EU legislation provided a specific definition for the term "third country".[16] To address this gap, the General Court turned to the wording of the Treaty on the Functioning of the European Union. They noted that the TFEU not only mentions "third countries" but also "third States", with a substantial number of its provisions concerning external relations exclusively utilizing the term "third countries".[17]

The court explained that this choice stemmed from a practical approach to encompass a wider array of international entities, extending beyond the realm of sovereign states. According to the General Court, the TFEU provisions serve the purpose of facilitating international agreements with entities that fall beyond the scope of "States", as long as these entities possess the capability to engage in treaty-making under international law: "the provisions of the TFEU relating to 'third countries' are clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'. Thus, the European Union may conclude international agreements with territorial entities, covered by the flexible concept of 'country', which have the capacity to conclude treaties under international law but which are not necessarily 'States' for the purposes of international law".[18] The court further emphasized that confining the EU's capacity to establish international agreements solely with States would lead to a "legal void in the EU's external relations".[19]

In support of these findings, the General Court referred to the practice of the EU entering into international agreements with entities other than States, together with the SAA concluded with Kosovo, which demonstrated Kosovo's capacity to engage in such agreements.[20] Furthermore, the General Court noted that the EU's engagement in international agreements with Kosovo was consistently accompanied by precautions to avoid any recognition of Kosovo as a sovereign State.[21]

[16] *Spain v Commission* cit. para. 28.
[17] Ibid. para. 29.
[18] Ibid. para. 30
[19] Ibid.
[20] Ibid. paras 31-32.
[21] Ibid. para. 33.

In differentiating the concept of "State" from that of "country", the court was able to affirm that Kosovo could join BEREC without necessarily solve the question of its recognition in general international law. This distinction, although criticized as "artificial",[22] proved beneficial in preventing potential confusion regarding the implicit recognition of Kosovo, which is qualified as a territorial entity capable of entering international agreement though not yet internationally recognized as a sovereign State.

Moreover, the distinction between "States" and the residual category of "countries", encompassing various non-State territorial entities, has the virtue of reflecting the current configuration of the international community. This contemporary landscape appears to encompass a diverse array of actors beyond the traditional notion of subjects, capable of engaging in significant international activities such as treaty-making, without always possessing the status of full-fledged subjects in the conventional sense.[23]

IV. The paradox created by the CJEU: a Country, but not a State?

On appeal brought by Spain, the Court of Justice rejected the distinction made by the General Court. According to the CJEU, a "country" means a "State", and Kosovo is eligible to be treated as a country for the purposes of the BEREC regulation.

Following the opinion of the AG Kokott, the CJEU criticized the General Court's decision for neglecting to analyse the different linguistic versions of the Treaties. In some of these, the terms "country" and "State" are used interchangeably[24]. Giving that the different language versions of the Treaties should be interpreted harmoniously, and that no version can take precedence over the others, the General Court erred in marking a distinction between the two concepts.[25]

The CJEU went on to determine whether Kosovo could fall into the scope of the definition of a country for the purposes of rt. 35 of the BEREC Regulation.[26] In this respect, the CJEU concluded that "for the purposes of ensuring the effectiveness of art. 35(2) of Regulation 2018/1971, a territorial entity situated outside the European Union which the European Union has not recognised as an independent State must be capable of being

[22] E Kassoti, 'Of Third "States", "Countries" and Other Demons - The CJEU's Judgment in Case C-632/20 P Spain v Commission (Kosovo)' (12 February 2023) EU Law Analysis eulawanalysis.blogspot.com.

[23] On the different relevance of the notion of "capacity" instead of "subjectivity" in modern international law see further A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 70-74; D P O'Connell, *International Law, vol. 1* (Stevens and Sons 1970) 81–82.

[24] For example, not all the language versions of the EU and FEU Treaties use the terms "third State" and "third country" together. In the Bulgarian, Estonian, Latvian, Lithuanian, Polish and Slovenian versions, only the equivalent of the term "third State" is used.

[25] *Spain v Commission* cit. paras 42-44.

[26] The CJEU can make a substitution of grounds of a decision of the General Court without annulling the decision if the grounds reveal an infringement of EU law, but the operative part of that decision is seen to be well founded on other legal grounds (see Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793, para. 50).

treated in the same way as a 'third country' within the meaning of that provision, while not infringing international law".[27]

After this point, one would expect that Kosovo would also qualify as "State", if the court accepted the proposition that "country" and "States" are equivalent terms. Instead, it is here that the CJEU appears to implicitly create a paradox. In fact, two paragraphs later, the court rushes to reassure Member States that: "[the] treatment of Kosovo as a third country does not affect the individual positions of the Member States as to whether Kosovo has the status of an independent State".[28] In other words, the court went on to clarify that the fact that Kosovo might be considered as a country within the BEREC Regulation does not mean that it is automatically recognized as a State in the sense of international law. AG Kokott was clearer in this respect, noting at the outset of her opinion that the recognition of Kosovo was not at issue in the present case, neither formally nor implicitly.[29]

However, the decision of the CJEU is unsatisfactory in this aspect. The paradox is evident if one frames the reasoning of the court in syllogistic terms. If the major premise ("a country is a State") and minor premise ("Kosovo should be treated as a country") are valid, the logical deduction should naturally be "Kosovo should be treated as a State".[30] Therefore, Kosovo could be considered as a State for the interpretation of EU secondary law, despite the ongoing uncertainty surrounding its status in international law. Alternatively, the combined interpretation of paras 50 and 52 in the judgment could imply that Kosovo should be regarded as a country but not as a State. However, this would apparently stand in contrast with the court's assertion that the terms "country" and "State" are equivalent and thus interchangeable.

Contrary to the submissions of AG Kokott, the fact that the recognition of Kosovo is at issue (at least implicitly) in this case could be inferred from the reference that the court made to "infringements of international law" in para. 50. The passage could be read as clarifying that territorial entities could be qualified as "country" only if their formation process complies with international law.[31] To this end, the court refers immediately in para. 51 to the 2010 Advisory Opinion[32] of the ICJ in order to emphasize that "the adoption of the

[27] *Spain v Commission* cit. para. 50.

[28] Ibid. para. 52.

[29] Case C-632/20 P *Spain v Commission* ECLI:EU:C:2022:473, opinion of AG Kokott, para. 38. AG Kokott grounded her conclusion on the fact that the Decision of the Commission replicated in a footnote that the designation of Kosovo was "without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence".

[30] One of the first comments on this judgment, a blogpost by Kushtrim Istrefi, is built around the idea of this syllogism, even though the author is careful not to draw any conclusion. K Istrefi, 'Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union' (20 January 2023) EJIL: Talk! www.ejiltalk.org.

[31] This conclusion is shared by commentators of this judgment. See K Istrefi, 'Kosovo is a Country, and a Country Means a State' cit.; E Kassoti, 'Of Third "States", "Countries" and Other Demons' cit.

[32] ICJ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [22 July 2010].

Kosovo declaration of independence of 17 February 2008 did not violate general international law, United Nations Security Council resolution 1244 (1999) or the applicable constitutional framework".[33]

Conversely, if the process of formation of the territorial entity had infringed peremptory norms of international law (i.e. *jus cogens*), the EU could incur in the duty of non-recognition provided for by art. 41(2) of the ILC Articles on State Responsibility. Kassoti noted that there would have been no need for the court to reference "infringements of international law" if it believed that the case did not directly involve formal or implicit recognition of Kosovo.[34] Instead, paras 50-51 seem to link the qualification of Kosovo as a "country" within the BEREC Regulation to the broader framework of international law and the law of State responsibility.[35]

This conclusion highlights the ruling's internal contradiction: Kosovo's determination as a "country" should adhere to international law, yet the court asserts that this recognition doesn't influence Kosovo's status within the same international legal order.

Such contradictions are evident in the history of EU relations with Kosovo. For instance, regarding the implementation of the Kosovo SAA, which the BEREC cooperation could be seen as a consequence of, some authors have noted that "although in formal terms the EU and the Kosovo SAA still do not recognize Kosovo as a state, in practice the implementation of the SAA tends to prove otherwise".[36] Similarly, in this judgment, the formal non-recognition of Kosovo does not appear to match the practical recognition implied by Kosovo's qualification as a "country".

V. A *SUI GENERIS* SOLUTION?

One possible resolution to the apparent paradox of a "country but not a State", as seemingly created by the CJEU, involves interpreting the definition of "country" under art. 35(2) solely within the confines of the application of EU law. By adopting this perspective, it becomes more comprehensible that Kosovo could assume the designation of a "country" within the scope of the BEREC regulation, without being considered a "State" according to the broader international legal framework. Some passages of the judgment appear to lend support to this interpretation. Notably, the CJEU uses careful language when asserting that Kosovo falls within the ambit of art. 35. In para. 53, the court asserts that Kosovo "may be treated in the

[33] *Spain v Commission* cit. para. 51.

[34] E Kassoti, 'Of Third "States", "Countries" and Other Demons' cit.

[35] The CJEU has constantly exhibited a notable sensitivity towards upholding *jus cogens* principles. In this context, see for instance E Cannizzaro, 'In defence of Front Polisario: The ECJ as a global jus cogens maker' (2018) CMLRev 569.

[36] C Challet and P Bachelier, 'Can Kosovo be considered as a "third country" in the meaning of EU law?' cit. 404.

same way as a 'third country"'. This implies that Kosovo, even though not a State, *may be treated as one* for the specific purposes of the cooperation in the field of BEREC.[37]

Nonetheless, the fact that the CJEU was willing to rely on specific definition of "country" for the purposes of EU law is not entirely persuasive. First of all, it is noteworthy that crafting a *sui generis* solution was a central element in the General Court's ruling, which the CJEU ultimately rejected. During the appeal, Spain argued that the distinction formulated by the GC, would establish an "autonomous category of EU law, with a meaning that diverges from the definition prevailing in international law".[38] The CJEU aligned with Spain's perspective on this matter. Moreover, commentators praised this judgment for having interpreted the concept of country in harmony with international law.[39] It is therefore difficult to support with certainty the contention that the court was relying on a specific definition just for the purposes of EU law.

Secondly, the CJEU seemingly opted against utilizing some of the interpretive approaches proposed by the Advocate General, which were focused on EU law and primarily revolved around the interpretation of the BEREC regulation. Embracing these approaches might have provided firmer ground for the proposition that Kosovo could be categorized as a country specifically within the context of EU secondary law.

Notably, even though the AG Kokott conducted a lengthy and detailed analysis on the wording, the regulatory context, the origins, and the purpose of art. 35 within the context of the BEREC Regulation,[40] the CJEU omitted such information when assessing whether Kosovo could fall into the scope of that provision. Instead, it preferred to refer, with few concise words, to the general need to ensure its effectiveness. However, the reasoning of the court in this respect is quite laconic, as it is not immediately clear how the principle of effectiveness guided and led the court to its conclusion.

Additionally, and differently from the General Court's decision and AG's opinion,[41] the CJEU decided not to mention the treaty-making practice of the EU with territorial entities that have not been recognized as sovereign States, such as the Palestine Liberation Organization,

[37] This solution would nevertheless leave open some issues. For example, it would not be clear if the qualification of Kosovo as a country/State for the purposes of EU secondary would impact the qualification of Kosovo as such for the purposes of primary law. Differently from other territorial entities that engaged in external relations with the EU, Kosovo has notably taken formal steps to seek EU membership by submitting a formal application. Here, art. 49 TEU stipulates that only "European States" are eligible to apply for Union membership. The EU would therefore need to address whether the acknowledgment of Kosovo as a state for the purposes of EU secondary law necessarily translates into its qualification as a State within the context of primary law. This solution could thus inadvertently create potential complications by inviting artificial distinctions.

[38] *Spain v Commission* cit. para. 35.

[39] K Istrefi, 'Kosovo is a Country, and a Country Means a State' cit.

[40] *Spain v Commission*, opinion of AG Kokott cit. paras 50-80.

[41] Ibid. paras 84-85.

Hong Kong and Macao. Such practice could have supported the idea that the definition of "country" was operational and functional for the sole purposes of the EU external relations.

Conversely, one could highlight the references made by the court to general international law[42] as a key element bolstering the consideration that the court was willing to build an interpretation of the term in harmony with international law. For these reasons, it is at least doubtful that the court wanted to confine its finding within the boundaries of EU law and rely on an autonomous operative definition of the term "country" for the specific inclusion of Kosovo within the scope of application of EU secondary law.

VI. Conclusion: diluting international statehood?

How, then, can we untangle this puzzle, whereby Kosovo is said to be a country, a country is said to be a State, but Kosovo is not said to be (yet?) a State? In essence, how can we reconcile the assertion that Kosovo possesses a certain level of international statehood as a country for the purposes of EU secondary law, while not possessing full-fledged sovereign statehood under general international law?

If it is conceivable that the court was hesitant to deviate from the meaning of State in international law, and thus elaborate its own autonomous definition, an argument could be made that the CJEU implicitly relied on a distinction between different "types" of international statehood: one tied to a territorial entity's capacity to integrate into the international legal community of States (a State in the strict sense), and another linked to the entity's ability to engage in international agreements with other States or international institutions (a "State" with hyphens).[43] Certain international rules presuppose the former, while others presuppose the latter.

In this dichotomy, the BEREC regulation could be said to belong to the second type. The reference to the effectiveness of BEREC regulation should thus be understood as meaning that art. 35(2) could effectively operate also in relation to territorial entities that are not State which nonetheless have the same capability of a State to contribute to the cooperation with the EU in the specific sector covered by the Regulation.

According to this interpretation, here the CJEU is explicitly recognising that Kosovo is a country, and implicitly that Kosovo is a "State" (with hyphens), in the sense that it enjoys that particular international statehood necessary to enter international agreements and engage in cooperation with international institutions. Notably, the CJEU recognizes in para. 55 that the EU has already treated Kosovo as a "State" for treaty-making purposes,

[42] *Spain v Commission*, paras 50, 51, 53.

[43] Some authors refer to the possible existence of a "private" conception of international Statehood as opposed to a "public" conception. The former would be tied with the participation of the entity to the "private circles" of specific multilateral agreements opened to that possibility. The latter would be linked to the idea of sovereignty and the participation to the public community of States. See in this regard E Cimiotta, 'È uno Stato o no? La determinazione della giurisdizione territoriale della Corte penale internazionale sulla situazione in Palestina' (2021) RivDirInt 728.

emphasizing that "the European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements".

The differentiation between various operational definitions of international statehood would thus represent a feasible idea to resolve the apparent paradox stemming from the CJEU's ruling. This differentiation avoids splitting countries from States and identifying an autonomous notion of State for the purposes of EU law. Furthermore it allows the court to leave the recognition of Kosovo as a State, in the general international law sense, to Member States.

Implicitly relying on this differentiation, however, could lead the CJEU to contribute to the seemingly ongoing process of "dilution" of the traditional conception of statehood in international law. Under this process, the once-solid notion of a State could transform into multiple definitions and meanings contingent on specific contexts in which it is necessary to define the status of a territorial entity. This trend may be intertwined with the broader phenomenon of the "fragmentation" of international law.[44]

The inclination to rely on diverse conceptions of statehood in distinct contexts has already been noticed in other realms of international law.[45] An instance worth noting is the decision by the Pre-Trial Chamber of the International Criminal Court of February 5, 2021, where Palestine was considered a "State" (with hyphens) within the limits of the ICC Statute, irrespective of its recognized existence as a sovereign State in the sense of general international law.[46] The logic behind this decision appears akin to that of the CJEU's ruling in case C-632/20 P, that admits Kosovo to participate in a EU agency without definitively resolving the issue of its status.[47] Hence, this case stands as another illustration of this trend, until a unified stance on the recognition of Kosovo is reached within the EU and among its Member States.

[44] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682.

[45] For example, in the context of the law of the sea, part of the scholarship contends for a more expansive interpretation of international statehood, considering the potential implications that insular States might encounter due to climate change. See e.g. D Lapas, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2022) ACDI 1; V Engström, M Rouleau-Dick, 'The state is dead – long live the state! Statehood in an age of catastrophe' (1 May 2020) Völkerrechtsblog voelkerrechtsblog.org.

[46] International Criminal Court, Pre-Trial Chamber, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021, ICC-01/18-143, in particular paras 102-103. For a comment see E Cimiotta, 'È uno Stato o no? La determinazione della giurisdizione territoriale della Corte penale internazionale sulla situazione in Palestina' cit.; A Bayefsky, '"Situation in Palestine" (Int'l Crim. Ct. Pre-Trial Chamber)' (2021) ILM 1038.

[47] Curiously, akin to the CJEU, the Pre-Trial Chamber refers to the principle of effectiveness in order to support the finding that Palestine should be treated as a State for the purposes of the ICC Statute, despite its contested recognition as such in general international law: "[b]ased on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it" (Pre-Trial Chamber, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", cit. para. 102).