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Court

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Date: **16 March 2020**

PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

IN THE CASE OF
THE PROSECUTOR v.

Public Document

ANNEX TO OBSERVATIONS (AUTHORITIES)

Source: **Addameer Prisoner Support and Human Rights Association**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Applicants

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The competent authorities of the State of Israel

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Philipp Ambach

Other

1.	"Final Clauses" in Triffterer and Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (2016) (Front page, p2318)	5-6
2.	Aust, *Modern Treaty Law and Practice* (3rd ed, 2013) (Title page, p102)	7-8
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14.	Clapham, Gaeta, and Sassòli, *The 1949 Geneva Conventions. A Commentary*, (2015)	44-45

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15.	Triffterer / Ambos, *The Rome Statute of the International Criminal Court*, (2016) (Front page, p415)	46-47
16.	*Abu Awad v The Military Commander* [1979] HCJ 97/79 (English Summary)	48-51

Steven Powles QC
Sahar Francis
Legal Representatives of Victims

Dated this 16th day of March 2020

At London, United Kingdom

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs in Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

1 This is a standard-form final clause that requires little discussion. In accordance with normal modern practice for multilateral treaties, the Statute was open for signature by all States. Initially, it was available for signature in Rome and then at United Nations Headquarters, where it remained open for signature until 31 December 2000.

The reference to 'all States' has raised some issues. In addition to the 193 Members of the United Nations and the Holy See and Palestine, the two entities that have Observer Status with the organization, the other entities generally regarded by the international community as States are both small island countries in the Pacific: Cook Islands and Niue, formerly non-self-governing territories of New Zealand. The latter are parties to a number of multilateral treaties and members of Specialized Agencies. Cook Islands acceded to the Rome Statute in 2008. The total potential number of parties to the Rome Statute thus currently stands at 197, given the present political status of the World. Kosovo is a further potential member once its 'statehood' position becomes less controversial. In April 2012, the Prosecutor declined to proceed further on the basis of a declaration lodged by the Government of Palestine in January 2009 under article 12 (3), accepting the exercise of jurisdiction for 'acts committed on the territory of Palestine since 1 July 2002'. His reasoning was that in interpreting and applying article 12 it was for the relevant bodies at the United Nations, or for the Assembly of States Parties to make the call whether Palestine is a State for the purposes of that article[1]. The General Assembly's subsequent action later in 2012 in according non-Member State observer status to Palestine would appear to provide a definitive affirmative answer to whether Palestine could accede to the Statute or make an effective article 12 (3) declaration.[2]

For those 139 States signing the Statute by the end of 2000, the definitive act to become a party is lodging an instrument of ratification. States that did not find it possible to sign within the relevant time period may always 'accede' to the Statute. Timor-Leste, for example, which had not achieved its independence at the relevant time, was among those acceding to the Statute. Some States, for domestic or historical reasons, seem to prefer the terms 'acceptance' or 'approval' rather than 'ratify' and some also use one or other of those terms in preference to 'accede'. The important point is that, regardless of the precise operative verb used, a State must clearly express in writing its intention to be bound. In October 2006, Montenegro informed the Secretary-General that it had succeeded to the 2001 ratification by Serbia and Montenegro and it has since been regarded as a party to the Statute.

[1] Office of the Prosecutor, Situation in Palestine, 3 April 2012.

[2] *Cf.* Ambos, EJIL*Talk* 6 May 2014, http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/.

MODERN TREATY LAW AND PRACTICE

THIRD EDITION

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> shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

If, however, the treaty provides that a state may accede only after a certain date or event (e.g., entry into force of the treaty), but an instrument of accession is received before then, the depositary will inform the state that the instrument will be held until that date has arrived or the event has occurred. Until then, the instrument will *not* be counted for the purposes of calculating whether the conditions for entry into force have been met.

Now there is usually no requirement for the exercise of a right to accede to be delayed until the deadline for signature has passed.

Preconditions for accession

As with the right to sign, the right to accede may be restricted to a specified category or categories of states, and may be made subject to conditions or the consent of other states. The conditions may be matters of fact, for example, that the state is already a party to a specific treaty. Article 22 of the Antarctic Treaty Environmental Protocol 1991[53] provides that, after the deadline for signature, the Protocol is open for accession by any state that is a party to the Antarctic Treaty. The conditions may include a requirement that the parties are to determine collectively that they are satisfied that the applicant state has met certain conditions. Article XXIX of the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR) provides that the Convention:

> shall be open for accession by any State interested in research or harvesting activities in relation to the marine living resources to which [the] Convention applies.[54]

The parties have interpreted this as requiring them to reach a collective determination as to whether the applicant state is truly interested in such activities. In practice, the CCAMLR Secretariat circulates a note about the applicant state, and if no party objects the application is deemed to be accepted.

The CoE National Minorities Protection Framework Convention 1995 provides that after its entry into force:

> the Committee of Ministers of the Council of Europe may *invite* to accede to the Convention . . . any non-member State of the Council of Europe.[55]

[53] ILM (1991) 1460; UKTS (1996) 6, see at: www.ats.aq.
[54] For the Convention, see 402 UNTS 71 (No. 22301); ILM (1980) 837; UKTS (1982) 48; TIAS 10240.
[55] ILM (1995) 353; UKTS (1998) 42; ETS 157: see Art. 29(1) (emphasis added). See also Art. 33 of the CoE Criminal Law Corruption Convention (ILM (1999) 505; ETS 173).

Even when the accession clause provides for invitations to accede, it is sometimes necessary to conclude a treaty (usually called a protocol) to formalise the accession and make any consequential modifications to the principal treaty. This will often be needed if the treaty concerns a collaborative project.[56]

Sometimes the accession clause of a multilateral treaty may be excessively complicated.[57] This may be due to political problems.

There are instances of the parties to a bilateral treaty consenting to a *third* state acceding to it, so making it multilateral. The France–Germany Very High Flux Reactor Convention 1967[58] provides, in its final clauses, that:

> The present Convention shall be open to accession by third States. Any accession shall require the consent of the signatory [note the term] Governments. The conditions of accession shall be the subject of an agreement between the signatory Governments and the Government of the acceding State.

There is a tendency for recent European treaties on *defence* matters to be concluded by a limited number of states, and only once all of them have signed and ratified the treaty, and it has entered into force, are other states allowed to apply to the parties for their approval to accede.[59]

When a treaty has been amended or supplemented by later treaties, and it is necessary or desirable that an acceding state should be bound also by those treaties, when inviting a state to accede the parties will require as a condition for accession that the state consents to be bound by the later treaties as well. This can be done by a declaration in the instrument of accession that accession to the principal treaty constitutes accession to the other (listed) treaties also. But it is even better if the accession clause in the principal treaty includes such a condition.

Accession 'subject to ratification' does not amount to accession, but is equivalent to signature subject to ratification. It is now rarely found, and is probably due to a misunderstanding of the nature of accession.

The rules on deposit of instruments of ratification (or acceptance or approval) apply also to instruments of accession; and, unless the treaty provides otherwise, accession has the same effect as ratification.

(Unless otherwise indicated, and for simplicity, *in this book the terms 'ratification' and 'consent to be bound' are used to cover also approval, acceptance or accession.*)

[56] The 1996 Protocol to the *Estonia* Agreement 1995 between Estonia, Finland and Sweden in effect amended that Agreement to allow other states to accede to it (1947 UNTS 404 (No. 32189); UKTS (1999) 74).
[57] See Art. XXIII of the Food Aid Convention 1999 (2073 UNTS 138 (No. 32022)).
[58] 821 UNTS 345 (No. 11764); UKTS (1976) 31.
[59] See, e.g., Arts 55 and 56 of the Measures to Facilitate the Restructuring and Operation of the European Defence Industry Framework Agreement (2184 UNTS 5 (No. 38494); UKTS (2001) 33). The France–United Kingdom European Air Group Agreement 1998 (2067 UNTS 264 (No. 35802); UKTS (1999) 10) provides for other European states to accede to it by means of ad hoc protocols: see Art. 35.

Part I The Conclusion of Treaties, Ch.VIII Accession: Acceptance

Lord McNair Q.C., LL.D., F.B.A.

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(p. 148) Chapter VIII Accession: Acceptance

International Law Commission, Lauterpacht, 1st Report, Articles 34 & 35, 2nd Report, Article 7; Fitzmaurice, 1st Report, Articles 34 and 35.

Oppenheim, i, §§ 532, 533.
Basdevant, pp. 594, 595, 612, 613.
Satow, §§ 653–65.
Hackworth, § 474.
Harvard Research, Article 12.
Rousseau, §§ 152–9.
Hudson, *International Legislation*, vol. i, pp. xlvii–xlviii.
United Nations *Handbook of Final Clauses* (St/Leg/1: 28 August 1951).

Mervyn Jones, Full Powers and Ratification (1946), pp. 61, 62, 124–31.
Notes on Practice of United Nations Secretariat, A/CN. 4/121, 23 June 1959.

Accession

1. *Terminology*. The three words most commonly used to denote this process are ‘accession’, ‘adherence’, ‘adhesion’. The word mostly used in the Commonwealth of Nations is ‘accession’; the word preferred in the United States of America is ‘adherence’, which also occurs in certain Conventions negotiated under the auspices of the United Nations; in French, both ‘*accession*’ and ‘*adhésion*’ are used and now seem to mean the same thing. [1]

(p. 149) It is necessary to distinguish from accession the practice whereby it is sometimes provided in a treaty that a party to it having Colonies, Protectorates, or Trust Territories (or even when it contains within itself territorial units such as Northern Ireland) may subsequently notify the other party or parties or a headquarters Government or the Secretary-General of the United Nations of the

'application' or 'extension' of the treaty or parts of it to some particular territorial unit. [1]

It is also necessary to distinguish between accession and the grant by treaty of rights to a third State. It is true that the third State must in some way accept this right (while it is still open to the third State to do so) before it can enforce it; but it would be wrong to regard this acceptance as an accession to the treaty. It is convenient to defer the question of rights created by treaty in favour of a third party until Chapter XVI .

2. *Two kinds of accession*. Normally and historically, accession is a secondary process: the act whereby a State accepts [2] the offer or the opportunity of becoming a party to a treaty already signed by some other States, though not necessarily yet in force. Or recent years, it has also become a primary process: the act whereby a State becomes a party to an instrument intended to become a treaty, the text of which has been drafted under the auspices of an international organization [3] such as the League of Nations, the United Nations, or one of the latter's Specialized Agencies, and which has been thrown open for accession. This type of accession will be dealt with later. [4]

Before going further it is useful to point out that the law permits to the parties responsible for the negotiation of a treaty an almost complete discretion in the provision that they make (p. 150) as to the manner in which States may become parties to it; [1] the result is that the practice concerning accessions is characterized by great variety and flexibility. [2]

3. *Accession as a secondary process*. If we are to deal with these two kinds of accession in their historical order, we must begin with accession as the secondary process of becoming a party to a treaty already signed.

Time for accession. For a long time past it has been the practice to provide for accession to a treaty after it has entered into force by reason of the completion of the number of signatures, or signatures and ratifications, stipulated by the treaty as necessary to produce that result. Now, however, the parties to a treaty constantly provide that it shall be open to accession at once, even before it has entered into force. Moreover, in some cases a treaty provides that accessions shall rank equally with ratified signatures in making up the number of firm acceptances required to bring the treaty into force; for instance, the Convention of 1929 for the Suppression of Counterfeiting Currency [3] by Article 25 provided that it should not come into force until the deposit with the Secretary-General of the League of Nations of five ratifications *or accessions* and the expiry of ninety days thereafter.

Some treaties provide that they shall be open for signature for a certain period, [4] and that after the expiry of that period they shall become open for accession; or again that accession may take place as soon as the treaty enters into force. Some treaties fix a final date such as three or six months after which no accession may be made. While this practice may accelerate accessions, it may reduce their number, and there are some treaties which place no limit of time whatsoever upon accessions; for instance, the Declaration of Paris of 1856 relating to Maritime War, to which Spain and Mexico acceded as late as 1908, [5] and the Kellogg-Briand Pact of 1928, of which Article 3 is as follows:

> (p. 151) This treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world.

4. *States which may accede*. No State, uninvited, has a right by means of accession to make itself a party to a treaty between two or more other States. [1] Accession can only take place when the original parties to the treaty consent, either generally by means of a provision in the treaty or *ad hoc*, [2] and only upon the conditions laid down by them for accession. [3] Complete liberty exists for the States who are responsible for the final text of the treaty in the choice, if any, of the parties who shall have the opportunity of acceding to it. They may throw it open to every State or only to certain States. The choice of States may be made once and for all by naming or describing in the text of the treaty the States to whom accession is offered. Alternatively, the treaty may make accession conditional upon the later invitation or consent of all the contracting parties, [4] or of one or more named parties, or of some public organ such as the Security Council of the United Nations.

(p. 152) An analysis, of a large number of treaties, contained in the comment upon Article 12 of the Harvard Research Draft Convention [1] illustrates the great variety of practice in the choice of States to whom accession may be made available; for instance, 'States which have not taken part in the war of 1914–1918', or 'States not Members of the League to which the Council of the League may decide officially to communicate the present Convention'.

5. *Form of accession*. The word 'accession' is applied not only to the process of accession, but to the instrument whereby that process is effected. The law prescribes no particular form, though the treaty may do so. Like a treaty, an accession is a formal instrument, and it is inconceivable that an oral communication would suffice. [2] No precise form is required for an accession. All that is required is a notification to the original contracting parties or to such other authority as may be indicated in the treaty, for instance, a headquarters Government or the Secretary-General of the United Nations. Instances are to be found of accessions being embodied in a special treaty, a Protocol, a Declaration, a Note or an Exchange of Notes, or an Act; the commonest form is now a unilateral notification.

An accession does not require ratification, unless it is made subject to ratification. [3] Thirty years ago some States adopted the practice of acceding to multipartite treaties 'subject to ratification'. The matter was considered in 1927 by the League Assembly when it adopted, [4] upon a Report of its First Committee, [5] a resolution to the effect that:

> The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage.
>
> Nevertheless, if a State gives its accession, it should know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a final obligation. If it desires to prevent this consequence, it must expressly declare at the time of accession that the accession is given subject to ratification.

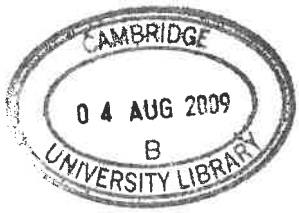
(p. 153) This statement, *mutatis mutandis*, reflects current practice and opinion.

According to the practice of the United Kingdom, an accession does not require ratification and is regarded constitutionally as equivalent to, or as comprising, ratification. It is not the usual practice to pass an instrument of accession under the Great Seal. A notification signed by the Secretary of State for Foreign Affairs or some other duly authorized person is considered adequate.

Commentary on the 1969 Vienna Convention on the Law of Treaties

By

Mark E. Villiger



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on participation in a treaty, while incorporating some of the legal aspects of participation in a re-drafted Article 13 on consent to be bound expressed by accession.[12] This provision led to Article 12 of the ILC Draft 1966.[13]

4 In Vienna in 1969 the ILC Draft 1966 (N. 3), reviewed by the Drafting Committee,[14] was adopted by 73 votes to 14, with eight abstentions[15] amid a call to adopt a declaration on the principle of universality (see *Article 15—Declaration*, N. 2).[16]

B. Interpretation of Article 15

1. Scope

5 Article 15 deals with accession as one of various means of expressing consent to be bound by a treaty (see also *Articles 2, subpara. 1[b]* and *11, q.v.*). Through accession a State which was not a negotiating State (*i.e.*, a non-signatory State) may become a party to a treaty already negotiated and signed by other States; or a negotiating State may become a party if it was unable to sign the treaty.[17] Once a State establishes its consent to be bound by a treaty by accession, it is bound by the treaty, *i.e.*, there is no need for ratification, acceptance or approval. Article 15 mentions three different circumstances in which a State may express its consent to be bound by a treaty by accession,[18] namely, when **the treaty** so **provides** by means of an accession clause (*para. [a]*, N. 7); when **it is otherwise established that the negotiating States were**

(*iv*) a proposal to reaffirm Article 8, para. 1 as drawn up in 1962, rejected by ten votes to mome. with one abstention; YBILC 1965 I 139 f, paras. 45, 47, 53, and 59. The debate is at YBILC 1965 I 113 ff.

12 YBILC 1966 I/2 271, para. 50.

13 *Ibid.* 271, para. 53, and 326, para. 88; adopted by 14 votes to none, with one abstention. Article 12 of the ILC Draft 1966 is reproduced at YBILC 1966 II 199 f.

14 Deleting the words "or an amendment to the treaty" in para. (a), because an amendment was an integral part of the instrument, Yasseen, Chairman of the Drafting Committee, OR 1969 CoW 345, para. 16. An amendment submitted by then *Czechoslovakia* provided that any State had the right to become a party to a multilateral treaty "which affects its legitimate interests", OR Documents 128, para. 142; debated at OR 1968 CoW 95 f, paras. 28 ff; eventually withdrawn, OR Documents 239, para. 47.

15 OR 1969 Plenary 27, para. 9.

16 Statement in Vienna by the *Spanish* delegation, *ibid.* para. 8.

17 ILC Report 1966, YBILC 1966 II 199, para. 1; Aust, Modern Treaty Law 88. See Bartos in the ILC, YBILC 1965 I 78, para. 82 ("[a]fter the final date for signature, only accession was possible. That was an ingenious device... in order to establish a distinction between signature and succession, but the distinction introduced no change of substance"); and the Harvard Draft, AJIL 29 (1935) Supplement 816.

18 ILC Report 1966, *ibid.* para. 4.

so **agreed** (*para. [b]*, N. 8–10); and when **all the parties have subsequently agreed** to admit its accession (*para. [c]*, N. 11). Most modern multilateral treaties contain accession clauses. The rules laid down in paras. (b) and (c) are intended to be residuary and apply only in the absence of specific provisions in the treaty itself.[19]

> There is no presumption in Article 15 that where a treaty is silent on the subject of accession, that treaty is open to the participation of all States.[20] It is in the hands of the **negotiating States** (*paras. [a]* and *[b]*) or the **parties** to the treaty (*para. [c]*) to agree on whether a State not entitled to become a party to a treaty under its terms is subsequently invited to become a party.[21] It follows that Article 15 expressly determines which States have a voice in decisions regarding participation in a treaty and under what circumstances (see in respect of the Convention *Article 15—Declaration, q.v.*).[22]
>
> The words **that State** in paras. (a)–(c) emphasise that accession is not open to "all States" or "any State", but only to the particular State or States eligible or invited to accede.
>
> Any difficulties arising from accession—in particular which States may accede—are circumvented if the treaty at issue has become binding on all States *qua* customary law (*Issues of Customary International Law, q.v.*).

6 Under Article 15 accession does not depend on the treaty having entered into force. This may be stated expressly by allowing accession to take place before the time set for the treaty's entry into force—either at once, or after the expiry of a stipulated period, or implicitly by making the entry into force conditional on the deposit of, *inter alia*, instruments of accession (*Article 16,* N. 6).[23] The rules on the deposit of instruments of accession are the same as on the deposit of instruments of ratification, acceptance or approval (*Articles 76* and *77, q.v.*). Consent to be bound is effective from the date of deposit. Unless the treaty provides otherwise, accession has the same effect as ratification (*Article 14, q.v.*).[24]

2. Accession Envisaged by the Treaty (Para. [a])

7 Para. (a) provides that the consent of a State to be bound by a treaty is expressed by accession **when the treaty provides that such consent may be expressed by that State by means of accession**, *i.e.*, when the treaty contains an accession clause. States negotiating a treaty are free to provide that it be

19 See Waldock Report IV, YBILC 1965 II 30, para. 7.

20 See the statement by Rosenne in the ILC, YBILC 1962 I 135, para. 33 ("[a] great deal could be inferred from the silence of a treaty... the mere presence or absence of a certain clause in a treaty was not the only relevant factor").

21 ILC Report 1966, YBILC 1966 II 199, paras. 1 and 4.

22 Waldock, YBILC 1962 I 119, para. 7.

23 ILC Report 1966, YBILC 1966 II 199, para. 2; Aust, Modern Treaty Law 110 f. See also *Article 83*.

24 Aust, *ibid.* 113.

open to accession, to whom and under what conditions. The accession clause may provide that the treaty be extended to all non-signatory States without distinction, in which case the treaty is said to be "open"; or it may provide that only certain States or categories of States may accede to it; or that non-signatory States may accede by invitation of the contracting parties only. The privilege of non-signatory States to accede to a treaty is entirely subject to the control of the parties to the treaty.[25]

3. Accession Otherwise Established (Para. [b])

8 In the absence of, in addition to or even contrary to, the provisions of an accession clause (N. 7), consent to be bound by a treaty may be expressed according to para. (b) **when it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession.**

9 Para. (b) refers to an **agreement** not in the treaty itself but **otherwise**, *i.e.*, reached outside the treaty in writing, orally or tacitly by implied conduct. Whatever form is chosen, it must be unequivocal.[26] In particular, the agreement must be **established**, which introduces an objective element (*Article 12*. N. 10). Thus, when a State claims to have reached an agreement by means other than the treaty itself, it will be called upon to demonstrate that another State or other States agreed that accession should have the effect of expressing consent to be bound by the treaty.

10 Para. (b) is broader in scope than para. (c) (N. 11). It refers to the (rather than all) negotiating States. Negotiating States are those States which took part in the drawing up and adoption of the treaty (*Article 2, subpara. 1 [e]*, N. 40–42), though they may not necessarily become parties to the treaty. Conversely, para. (c) requires unanimous agreement by all the parties

[25] Gore-Booth/Pakenham N. 32.27. See also Ago in the ILC, YBILC 1962 I 124, para. 70 ("[a]n accession clause ... constituted ... an offer to the States which had not negotiated the treaty"); the Harvard Draft, AJIL 29 (1935) Supplement 828 ff (no *right* to accede). McNair, Law of Treaties 151 ("[c]omplete liberty exists for the States who are responsible for the final text of the treaty in the choice, if any, of the parties who shall have the opportunity of acceding to it. They may throw it open to every State or only to certain States. The choice of States may be made once and for all by naming or describing in the text of the treaty the States to whom accession is offered ... [or] ... may make accession conditional upon the later invitation or consent of all the contracting parties, or of one or more named parties").

[26] ILC Report 1966, YBILC 1966 II 196, para. 3 ("simply a question of demonstrating the intention from the evidence"); see Bolintineanu, AJIL 68 (1974) 683 ("[w]hat is essential in determining ... consent to be bound by a treaty ... are not the circumstances of its conclusion but the existence of an agreement to this effect between the negotiating states, irrespective of whether it has been embodied in the text of the treaty").

(N. 11). Hence, para. (b) does not require unanimous consent in the case of multilateral treaties: it suffices if a certain number of negotiating States agree that accession shall be permitted.[27]

> The aim of para. (b) is to avoid the situation where negotiating States with no intention of subsequently ratifying the treaty or acceding to it "confine themselves to the negative function of preventing the accession of other States".[28]

4. Accession Subsequently Agreed Upon by the Parties (Para. [c])

Para. (c) provides that, once a treaty has entered into force, a State may express its consent to be bound by accession **when all the parties have subsequently agreed that such consent may be expressed by that State by means of accession**. This is a strict condition: accession to a treaty must be granted by **all** the parties (as opposed to "*the* negotiating States" (*italics added*) in *para. [b]*, N. 10), *i.e.*, the existing parties must unanimously agree to the participation of non-signatory States in the treaty.[29] **Parties** are those States which have consented to be bound and for which the treaty is already in force (*Article 2, subpara. 1 [g]*, N. 48). In practice, the collective determination required by para. (c) means that the depositary will notify all the parties of the application by a non-signatory State for accession to the treaty; if no party objects, the accession is deemed accepted.[30] As in para. (b), the **agreement** between all the parties will be reached outside the treaty in writing, orally or tacitly by implied conduct. 11

> The difference between paras. (b) (N. 10) and (c) appears justified. A negotiating State (as in para. [b])) may yet opt out of an agreement if it no longer wishes to be a party, whereas a State bound by the treaty cannot—hence the stricter provision in para. (c). For as long as all the parties agree that consent to be bound may be expressed by accession, negotiating States have less cause to hesitate before becoming parties to a treaty for fear that treaty partners be imposed upon them.[31]

[27] See Lauterpacht, Report I, YBILC 1953 II 119, para. 6 ("[i]nsofar as the original instrument makes accession dependent upon some subsequent action or condition, there is room ... for relaxing in cases of doubt the requirement for unanimous consent").

[28] See the statement in the ILC Lachs, YBILC 1962 I 125, para. 81; also Waldock, *ibid.* 132, para. 78 ("negotiating States ... had an important interest in the question of future participants. If the decision were left to the parties alone, and they acted in a manner contrary to the views of the states which had participated in the negotiations, some of the latter might find themselves unwilling to proceed to ratify the treaty"); and Ago, *ibid.* 124, paras. 73 f.

[29] Statements in the ILC by Waldock, *ibid.* 281, para. 91; and Tsuruoka, YBILC 1965 I 119, para. 12 ("[i]nconceivable that an independent State should be required to accept, without its consent, treaty partners imposed on it by other States").

[30] Aust, Modern Treaty Law 111 f.

[31] Tsuruoka in the ILC, YBILC 1965 I 119, paras. 16 f.

Chapter 2

THE CRITERIA FOR STATEHOOD: STATEHOOD AS EFFECTIVENESS

2.1 Introduction

If the effect of positivist doctrine in international law was to place the emphasis in matters of statehood on the question of recognition, the effect of modern doctrine and practice has been to return the attention to issues of statehood and status independent of recognition. Nevertheless there has long been no generally accepted and satisfactory legal definition of statehood.

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to as the *Lotus* presumption— its classic formulation being the judgment of the Permanent Court in *The Lotus*.[25]

These five principles, it is suggested, constitute in legal terms the core of the concept of statehood, the essence of the special position of States in general international law. As a matter of interpretation the term 'State' in any treaty or other instrument prima facie refers to States having these attributes; but again

[25] PCIJ ser A no 10 (1927) 18. The cogency of the *Lotus* presumption in modern law has been doubted: see, e.g., Brownlie, *Principles* (6th edn), 299–1. It was referred to with approval by the Permanent Court in the *Free Zones Case*, PCIJ ser A no 24, 11–12 (1930), but it was not applied by the Court in cases involving the constitution of international organizations when a rather extensive interpretation was adopted: see *Competence of the ILO with respect to Agricultural Labour*, PCIJ ser B nos 2–3 (1922) 23–6; *Competence of the ILO to regulate, incidentally, the work of the Employer*, PCIJ ser B no 13 (1926) 21–3; *Jurisdiction of the European Commission of the Danube*, PCIJ ser B no 14 (1927) 36, 63–4; contrast Judge Negulesco (diss), ibid, 104–5. In the *Territorial Jurisdiction of the Oder Commission*, PCIJ ser A no 23 (1929) 26, the Court refused to accept the contention 'that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation; in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.' Like most of the secondary rules of interpretation the *Lotus* presumption found no place in the Vienna Convention on the Law of Treaties 1969, Arts 31–3. It was not applied by the majority in the *Admissions Case*, ICJ Rep 1948 p 63; the dissentients (Judges Basdevant, Winiarski, McNair, Read) referred to it as 'a rule of interpretation frequently applied by the Permanent Court' (ibid, 86). It was applied in the *Asylum Case*, ICJ Rep 1950 p 266, 275. Apart from the separate opinion of Judge Guillaume in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 291 (paras 9, 10) asserting that States remain free to act absent a prohibition, its reception in recent decisions has been ambiguous. Consider, e.g., *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Request for the Indication of Provisional Measures), ICJ Rep 2000 p 182, 233, Declaration of Judge Van Den Wyngaert, (para 10), and various statements in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 p 226, 239 (para 21). In that case President Bedjaoui indicated that the *Lotus* presumption has 'very limited application in the particular context of the question which is the subject of this Advisory Opinion': ibid p 226, 270–1 (paras 12, 15); cf Judge Shahabudeen, ibid, 376, 395. In his dissent, Judge Weeramantry discussed the presumption at length, suggesting '*inter alia*' that the *Lotus* presumption might be inverted given that the use of nuclear weapons would drastically restrict the freedom of the States against which they were used. Cf Judge Dillard's comment in *Fisheries Jurisdiction (United Kingdom v Iceland)*, ICJ Rep 1974 p 3, 59: '[I]f the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification. This the Court must determine in light of the applicable law and it does not advance the enquiry to attempt to indulge in a presumption or to lean on a burden of proof. It can be argued, for instance, that Iceland was the "actor" who sought to change the established law and the burden of proving legal justification rests on her. Conversely it can be argued that the Applicant was in the role of plaintiff and should therefore have the burden of establishing the illegality of Iceland's actions. In either event the Court must determine the rights of the Parties. Freedom of State action and burdens of proof suggest analogies to the criminal and civil procedures of some States. Applied to the present case the analogy is misplaced.' See also Lauterpacht (1949) 26 *BY* 48; Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 247–63.

Chapter 3

INTERNATIONAL LAW CONDITIONS FOR THE CREATION OF STATES

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3.1 Legality and statehood

It has been seen that the classical criteria for statehood (the so-called 'Montevideo criteria') were essentially based on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from the equation of effectiveness with statehood. Even if effectiveness was conceded to be a legal requirement—and not simply a self-evident fact—it was generally denied that there exist (or even that there could exist) criteria for statehood not based on effectiveness. For example according to Charpentier 'les tentatives de développement de règles de légalité objective détachées de l'effectivité jointes à l'absence de sanctions capables de les faire respecter entraînent fatalement un *confit entre le droit et le fait* dans lequel celui-là risque de l'emporter, constituant ainsi à lui seul un critère de validation de l'extension illégale des compétences.'[1]

In the first place it is necessary to distinguish two possible positions: that there cannot a priori be any criteria for statehood independent of effectiveness, and that no such criteria yet exist as a matter of international law. If the former position is correct there can be no inquiry into the effect of particular rules on statehood. But, clearly, effective entities have existed that have been widely or even universally held not to be States—for example, Rhodesia, Taiwan and the Turkish Republic of Northern Cyprus. Conversely, non-effective entities have been regarded as continuing to be States: for example, the various entities unlawfully annexed in the period 1936 to 1940 (Ethiopia, Austria, Czechoslovakia, Poland, the Baltic States), Guinea-Bissau before Portuguese recognition or Kuwait in the period 1990 to 1991. The proposition that statehood must necessarily be equated with effectiveness is not supported by this practice. Nonetheless, various arguments have been made in support of that view.

[1] Charpentier, *Reconnaissance*, 127–8 (emphasis in original). Cf Mouskhély (1962) 66 *RGDIP* 469, 475, referring to 'les tentatives de réglementation juridique de la naissance des États'; Verhoeven, *Reconnaissance*, 548–9, 589–91.