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Birth and recognition of new States

1. INTRODUCTION

As an introduction, I would like to remind you that "new States" sometimes appear in international society. There are many reasons for this. It may be, firstly, as a consequence of the phenomenon of decolonisation. Secondly, it could be due to the break-up of a pre-existing State. This scenario would include both the dismemberment of part of a State and the splitting of another State, which would disappear from international relations. Finally, a "new State" may emerge through the unification of States resulting from the merger of two or more pre-existing States, which would cease to exist. This assumption does not cover the case of the unification of States resulting from the absorption of one State by another since, although the absorbed State (e.g. the German Democratic Republic) disappears, no "new State" appears, since the absorbing State (e.g. the Federal Republic of Germany) continues to exist.



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When a "new State" is born, other States may or may not recognise it as a "new State". We therefore argue that the birth and recognition of new States creates two problems in international relations. The first problem is whether the birth of a new State is a matter of fact or a matter of law. In this respect, it should be recalled that the Arbitration Commission of the Yugoslavia Peace Conference, in its Opinion No. 1 of 29 November 1991, held that "the existence or disappearance of a State is a question of fact". This Commission added that: "the State is defined as a community consisting of a territory and a population subject to an organised political power; it is characterised by sovereignty". We therefore conclude that a new State exists when these three elements are present, whether or not it is recognised by other States.

The second question that arises is whether the recognition of the new State is a political or a legal act. I should point out that the act of recognition is a political act: the other States are free to recognise the new State or not. In other words, they are not obliged to do so. Consequently, we must hold that the recognition of a new State will only have declarative effects of its existence. These effects will never be constitutive, i.e. the birth of a new State will not depend on its recognition by the other States.

2. MODALITIES OF STATE RECOGNITION

I must stress that recognition is an act by one or more States recognising the existence of a new State.

We can speak of two classifications of the modalities of the act of recognition. Firstly, depending on the number of States recognising the new State, we can speak of unilateral, bilateral or multilateral acts of recognition. Recognition of the new State is a unilateral act when it is recognised by a single State. It is bilateral when two States recognise the new State in the same act. For example, Article 1 of the Treaty of Good Neighbourliness, Friendship and Cooperation between the Kingdom of Spain, the French Republic and the Principality of Andorra (of 1 June 1993) provides that "the Kingdom of Spain and the French Republic recognise the Principality of Andorra as a sovereign State".

Multilateral recognition acts are also possible. The latter is possible in two cases. Firstly, when three or more States jointly recognise the new State and, secondly, when the Member States of an International Organisation collectively and unanimously recognise the new State. An example of this possibility can be found in the Communiqué of the twelve Member States of the European Community in the framework of European Political Cooperation (15 January 1992), in which they stated that: "The European Community and its

Member States have decided today to recognise Slovenia and Croatia".

Secondly, with regard to the form of the act of recognition, the recognition of the new State can take the form of an "express" or "tacit" act. An express act occurs when the recogniser carries out an act in which it specifically acknowledges the existence of the new State. Conversely, recognition will be "tacit" when the recogniser does not do so expressly but performs an act from which it necessarily follows that he has recognised the new State.

The latter possibility raises two practical problems. The first is to determine which acts necessarily imply tacit recognition. A number of acts are considered to fall within this possibility, such as: (1) congratulating the new State; (2) establishing diplomatic relations with the new State; (3) voting in favour of the admission of the new State to an international organisation; (4) establishing conditions or guarantees for the recognition of new States and subsequently finding that a new State has complied with them; and so on.

The second problem is to identify which acts never imply tacit recognition of the new State. These include: 1) abstaining in the vote on the admission of the new State to an international organisation, bearing in mind that voting against is an express act of non-recognition; 2) coinciding in the vote (for or against) in an organ of an

international organisation, of which the non-recognised State is also a member State (for example, Spain and Israel, despite not recognising each other, voted in the UN General Assembly for almost 30 years); 3) the mere publication of criteria or requirements on which recognition is conditioned; etc.

3. DISCRETIONARY NATURE OF RECOGNITION

Recognition of a new State is a "political" or "discretionary" act. This is because there is no international obligation to recognise an entity that meets all the requirements of a State. We therefore argue that States are free to recognise or not: they must decide independently whether and when to recognise the new State on the basis of political expediency.

The discretionary nature of the act of recognition of new States raises two practical problems. The first problem arises in situations of late recognition. It can be argued, however, that the late act of recognition does not prevent the "new" State from engaging with other States. This was the case, for example, when Spain took more than 60 years to recognise Peru after its independence. At present, it should be noted that Spain still does not recognise Kosovo, which unilaterally proclaimed its independence on 17 February 2008, despite the fact that the legality of its declaration of

independence was confirmed by the International Court of Justice in its Advisory Opinion of 22 July 2010.

The second problem is situations of premature recognition. I must state first of all that this possibility is a violation of the principle of non-intervention in internal affairs. As such, it gives rise to the international responsibility of the State that carries out the premature recognition.

4. EMERGENCE OF THE OBLIGATION NOT TO RECOGNISE

It should be noted that two scenarios are emerging in international relations in which the obligation not to recognise the new State is enshrined.

The first assumption is the obligation not to recognise when the right to self-determination of colonial peoples is infringed. It is worth recalling that the Security Council, in its Resolution 276 (1970), declared South Africa's occupation of Namibia illegal. Days later, the Security Council itself, in its Resolution 283 (1970), called on all States to refrain from any relations - diplomatic, consular or otherwise - with South Africa that would imply recognition of the authority of the South African government over the Territory of Namibia.

The second case of an obligation not to recognise occurs when, as a result of an illegal use of armed force in international relations, a new State

emerges or the territory of a pre-existing State expands.

The first assumption followed the military invasion of Northern Cyprus by Turkey in 1974. Subsequently, on 14 November 1983, the existence of the "Turkish Republic of Northern Cyprus" was proclaimed. Within days, the Security Council reacted by adopting Resolution 541 (1983) on 18 November 1983, in which it called on all States not to recognise any Cypriot State other than the Republic of Cyprus.

The enlargement of the territory of a pre-existing State due to the illegal use of armed force can involve either the full or partial annexation of another State's territory. An example of an enlargement of the territory of a pre-existing State due to the total annexation of the territory of another State occurred on 2 August 1990, when Iraq invaded Kuwait. The Security Council reacted swiftly, adopting Resolution 661(1990), in which it called on all States to refrain from recognising any regime established by the occupying power.

A more recent case of enlargement of the territory of a pre-existing State, resulting from an illegal use of armed force involving the partial annexation of the territory of another State, occurred on 9 September 2022, when Russia annexed four Ukrainian regions. In this case, it was the General Assembly which, in its Resolution A/ES-11/4 of 12 October 2022, called upon all

States, international organisations and specialised agencies of the United Nations not to recognise any change in the status of any or all of the Ukrainian regions of Donetsk, Kherson, Luhansk or Zaporizhzhia by the Russian Federation, and to refrain from any act or operation which might be interpreted as recognition of that changed status.

