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THE RELEVANCE OF THE EMERGENCE OF NEW STATES IN THE ERA OF THE UNITED NATIONS

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Abstract: The issue of the creation of new states is one of the most controversial issues in international law and international relations. The existing dilemmas are still very relevant when discussing this process that seems to elude any established international rules and is subject only to the facticity of laws. The paper looks back at the positions of the doctrine of international law but presents certain points of view regarding the application of international legal rules and principles usable in international practice. For the emergence of the main subjects of international law and international relations, this is very significant because it represents the starting point for further elaboration of the issue of the emergence and functioning of international organizations and other international institutional forms in which states play a decisive role. The creation of states is treated in the paper as a very complex process which, no matter how intriguing, should not escape international legal regulation, at least in terms of legal consequences. In this sense, the author tried to shed new light on the importance of general international law in regulating this process. In the context of the contemporary development of international relations, the application of international legal principles and goals of the universal organization of the United Nations can be useful in this regard since they provide certain guidelines for the recognition of new states in the context of admission to this international organization. Consequently, according to the author's opinion, there is a chance for a more extensive interpretation of the existing criteria of "statehood", which in the extreme case may affect the overcoming of the United Nations itself, whose universal role in preserving world peace and security should not be questioned.

Keywords: International law, emergence of new states, the United Nations.

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INTRODUCTION

The phenomenon of international law cannot be observed or understood, and therefore cannot be explained without understanding and explaining the phenomenon of the state. It should be noted that the norms of international law are created by the consent of the states participating in the design of its rules, as well as the fact that the dominant position in the teaching of international law is that states are basic subjects of international law. Again, although the phenomenon of international law can be said to be a phenomenon that began to occur in a certain historical and social context, when it comes to the state, things are a little different. Namely, the theory of the state and law can only state that certain forms of human organization that we recognize as a state throughout the millennia really existed in the distant, ancient, and even "pre-ancient" past. However, the theory itself raises the question of the identity of all these forms of states. Thus, Spektorski (2000, p. 21), writes the following: "Unlike geometric shapes and other simple and unchangeable things that know neither the past, nor the present, nor the future, the state is a multiple phenomenon that changes significantly over time. Thus, for example, the ancient or feudal state is so different from the state in the modern sense that the question even arises as to whether the same notion of the state can be applied to these fundamentally different phenomena". We come across similar thoughts with other prominent writers. Thus, Professor Košutić points out that political communities in Antiquity, the Middle Ages, the New Age, and Modernity have many specific things that qualitatively distinguish them. (Lukuć & Košutić, 2008, p. 13). That specificity, he says, is so significant "that it excludes the possibility of using the same name (names) for pre-modern and modern political communities" (*Ibidem*). Thus, it is further emphasized that the "state is understood differently depending on whether there are more similarities or differences between the so-called modern states (since the 16th century) and previous political communities (*polis, medieval states*)" (Vukadinović & Avramović, 2014, p. 31). In an interesting discussion, Georg Jellinek points out the following: "No matter how true it is that the state order has some legal remnants from earlier feudal times, it is certain that these remnants have fundamentally changed their essence even when the content of the legal rule has remained the same" (Jelinek, 1998, p. 90). This certainly means that the content of the notion of the state is something that has changed over time. This is especially due to the fact that, at one point, the state began to appear together with a new phenomenon, which, although a creation of the state, in many ways began to limit and define the

state itself. That phenomenon was international law. Just like international law has evolved and changed, so the meaning of the state in legal terms has changed over time. All this means that when we talk about the state in the modern sense, we must stick to the context in which it takes place. Of course, that context itself has changed over time. We consider the establishment of an organization like the United Nations to be an excellent moment in this centuries-old evolution of international law (Krivokapić, 2015, pp. 14-16). It is in this context that we look at the issue we are dealing with.

STATE AS A MEMBER OF THE ORGANIZED INTERNATIONAL COMMUNITY OF STATES

The evolution of international law, which has lasted through the centuries, has led to an evolution in the understanding of the state, which increasingly had to communicate with the legal order within which it was realized. The state, as we have already mentioned, thus received its new legal content. As we pointed out earlier, this is because the state has always reflected the law within which it took place. The fact that at some point in the development of international law, international rules binding on states without their consent began to appear, which over time weakened the idea of a legally unlimited state, as well as the emergence of an organized international community that managed to direct international relations and international communication, also meant the emergence of a new understanding of what the state is in the international legal sense. Certainly, the issue of the creation of new states has not yet reached the level of a universally accepted norm of international law. However, it cannot be said that, in that sense, certain changes did not happen, which means, if not the establishment of rules on individuals, i.e., individual recognition, it certainly established rules and procedures that, if successfully passed, mean that one entity has become an equal member of the international community with all the rights guaranteed to the states, despite the individual views and oppositions of individual states *vis-à-vis* that entity. Although it is indisputably true that the act of recognizing a new state is a political act, the essential question we ask here is whether international law knows the mechanisms that, despite the fact of recognition or non-recognition of an individual state by another state, and regardless of the political position of an individual state, can say whether it is about the state or not. Following the answer to this question, we will start by quoting a legally interesting document. Article 3 of the Montevideo Convention on the Rights and Duties of States says the following: "The political existence of the state is

independent of recognition by the other states. Even before recognition, the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently, to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The realization of the mentioned rights has no other restrictions, except if the realization of the rights of other countries according to international law is taken into account" (Montevideo Convention, 1933). So, even before the founding of the UN, it was stated that the act of individual non-recognition, as a political act, must also accept the political and, we believe also, international legal reality of the existence of the state regardless of that individual or many individual non-recognitions. International law, which is largely based on customary rules, certainly knows the mechanisms of the creation of its rules, which, when a sufficient number of states in the international community give them legitimacy, become general and binding in many ways. We do not want to reduce the issue of new state formation to a strictly legalistic and legal issue separate from politics and other complicated moments in this way. It is impossible to separate politics and the law. Every law, including international law, is an expression of the political will of those in power. In international law, we call this will the "will of the international community", which does not necessarily incorporate every individual will of states. We are attempting to find some, perhaps overly simplistic, answers to one complex phenomenon through the lens of the existing institutional and international legal structures, which is a challenge. It seems to us that the procedure of admission of a "state" to the UN, however, gives a certain international legal answer to the question we are asking here, so we will look at it below.

ADMISSION PROCEDURE TO THE UNITED NATIONS AS AN INTERNATIONAL LEGAL TEST OF STATEHOOD

The Charter of the United Nations stipulates that "membership in the United Nations is open to all peaceful states that accept the obligations contained in this Charter and, in the opinion of the Organization, are capable and willing to fulfill those obligations" (Article 4 of the UN Charter). The conditions given in the provision have created doubts over time and have been subject to different interpretations (Ganić, 2018). An authoritative interpretation of this article was given by the International Court of Justice in an advisory opinion on the conditions of admission of a state to membership in the United Nations (ICJ Reports, 1949, p. 62). This

advisory opinion was given at a time when there was a stoppage in the admission of new states to the UN and when attempts were made to admit some countries to membership, bypassing the provisions of the UN Charter and the Security Council. In an advisory opinion in which he addressed this issue, the International Court of Justice stated that the applicant for admission must go through the appropriate procedures in both the Security Council and the General Assembly. It was also pointed out that an applicant for UN membership must be: 1) a state; 2) that the state must be peaceful; 3) the state must accept the obligations contained in the Charter; 4) that it is capable of fulfilling those obligations; and 5) that it is willing to execute them (ICJ Reports, 1949, p. 62). It is interesting that one of the conditions required by the Court's interpretation is that the candidate (applicant) must be a state. The admission procedure takes into account whether it is a subject whose request for full membership in the international community has been more widely agreed upon, that is, whether it is an entity that is a state. This specifically includes the decision-making process in the Security Council and the United Nations General Assembly. As a rule, a wider international consensus is required for admission to the membership of the world organization, which is necessary when one wants to legitimize the existing reality on a general international level. We believe that this procedure reflects an international legal norm on the emergence of the state as a full-fledged subject in the international community. Because, as it is pointed out, "international law gives and ensures the legal validity of the request for sovereignty to that collective to which a sufficient number of states recognize sovereign status as an empirical fact" (Mecklem, 2007, pp. 586-587). The consent of all, in many ways, different permanent members of the Security Council on this issue, with the qualified majority required for the admission of a state to the UN, certainly represents sufficient proof of international legitimacy, which is verified by the procedure of admission to this universal international organization. Although we have relied here on an advisory opinion which is non-binding in its legal nature, there is no doubt that the International Court of Justice did not accidentally point out that one of the parameters to be assessed by the Security Council and the General Assembly is whether the entity aspiring to UN membership is a state or not. Although non-binding, the impact of advisory opinions on international law is enormous and, together with judgments, advisory opinions constitute the jurisprudence of the International Court of Justice, which the court views as an established rule of law (Ganić, 2010a; 2010b). The reasons why we believe that the international legal legitimacy of a state is marked by its

membership in the United Nations are numerous. Most of them are related to the fact that if a state or entity aspiring to be a state is left outside the UN system, it indicates the fact that there are serious disagreements among the members of the international community regarding its state-building request, which makes that entity isolated from the decision-making process at the international level. An additional reason is that this organization has almost universal membership today, and the UN Charter limits its signatories to its provisions in their possible appearances with non-member countries (Article 103 UN Charter). Entities that claim to be internationally recognized states but are not members of the UN are almost invisible in the international community and communication, and the only countries with which they communicate are the countries "patrons and inspirers" of their unilateral secessionist acts declaring independence (Crnovršanin, 2011a). Such is the case with the "Turkish Republic of Northern Cyprus", which is recognized only by Turkey (Crnovršanin, 2011b). The situation is similar in South Ossetia and Abkhazia, which, apart from Russia, is recognized by only a few other countries in the world (Samkharadze, 2016). We will not even comment on the latest recognition of the Ukrainian territories by Russia due to the topicality of the events and the impossibility of observing these issues from a sufficient time distance, which is a condition of scientific objectivity. The importance of membership in the UN is sufficiently indicated by the positions of the countries that are facing the secession of a part of their territory. Proof that the mechanism established by international law still works in this regard is evident in many cases. Thus, "Kosovo", despite numerous recognitions, even the recognitions of some of the most powerful countries in the world, still faces the practical impossibility of normal institutional functioning and communication with other countries in the international community. These countries and entities that aspire to be states, in their international appearances, are often forced to pursue their interests with the help of other states. This again leads to, as the International Court of Justice pointed out in one of its advisory opinions, "the alienation of sovereignty" (P.C.I.J. Publications, 1931). This is because, according to the position expressed by the ICJ in the advisory opinion concerning the Austrian-German customs union, the independence of a state as a subject of international law implies "the exclusive right to decide in all economic, political, financial, and other matters" (Đorđević et al., 1988, p. 145). We should not forget the extent to which the calls of the United Nations for non-recognition of some entities by the members of the United Nations have contributed to their marginalization at the international level. Such is the case, for example, with the collective non-recognition of the

already mentioned "Turkish Republic of Northern Cyprus", or the unilaterally declared independence of Rhodesia (Crnovršanin, 2011a, pp. 184-185). In any case, the UN mechanisms have an effect on this matter (Gajić, 2015, pp. 296-299). For this reason, we view this issue completely legally and moving within the normative reality of international law, which is certainly not able to eliminate what, due to lack of legal basis, is often called in science a *de facto* state, which for this reason in this paper we call "an entity that aspires to be a state". It is important to mention that in this review we do not deal with the principles that justify the state-building demands of today, such as the principle of self-determination of the people. In this review, we will be satisfied with the statement of the International Court of Justice that this is a principle that, in certain circumstances (see more in: Declaration on principles of International law: friendly relations and co-operation among states in accordance with the Charter of the United Nations), operates *erga omnes* (*ICJ Reports*, 1995, p. 102, Para. 2). The focus of this brief review is to recall the international procedures that we consider to be a test that entities that aspire to be states must pass in order to obtain an international legal basis.

CONCLUSIONS

In one of his textbooks, Le Fur (*Louis Le Fur*) made a bold statement in the 1930s when he said that "international law is the last stage of law that finally manages to bring the states under its own laws" (Le Fur, 1934, p 6). Although we believe that international law has greatly changed the way we understand the state and the legal concepts and principles related to it, such as the principle of state sovereignty (Ganić, 2013), and although we are ready to state that, at least when it comes to the normative reality of international public law, things are possible and explainable, we are far from being able to say that the issue we are dealing with in this paper has been clarified, and we are very aware of that. The relations of states to one another, and the relations of states to the international community as a whole, but also the relations of the international community to the state, still elude complete international legal regulation. However, it cannot be said that there are no rules in this area and that this is a sphere that should be outside the reach of international public law. On the contrary, international law must be continuously interested in this phenomenon. It is not only important because it deals with the basic subject of international law and the creator of the very rules of international law, but it also reveals to us the unprincipledness of some important states on this issue. Because it is

common in the international community for the same country to have completely different standards in different situations. This speaks of a strong political moment and the real and exclusive states' interests, which, when it comes to these issues, the states are guided by. This fact, on the other hand, cannot be ignored and reminds us that any legal construction on this issue can be radically endangered due to any sudden disturbance on the international scene. We are also aware of that.

Pointing out the complexity of the problem of the emergence of new states on the international scene, Christian Hillgruber begins his presentation by quoting the famous internationalist Hersch Lauterpacht, who, although revealing nothing new, further confirms one great truth when he says: "A small number of branches of international law that are of greater and more lasting importance for the Law of nations than the issue of state recognition (...). However, there is probably no other subject in the field of international relations in which law and politics are so closely intertwined" (Hillgruber, 1998, p. 491). However, we repeat, this does not mean that this matter should not be viewed from a legal perspective because reality tells us that in insisting on the rules of international law, which in these cases we recognize in the UN admission procedure, especially small states can protect or see the possibility of protecting their interests. Finally, the views we present in this review are not new. A few decades ago, Polish professor Lech Antonowicz was unequivocal when he said that a sovereign state in terms of international law exists when it has features that accompany international legal capacity, and above all, contractual capacity, right of legation, and the possibility of joining international organizations (Antonowicz, 1885, p. 21). We consider the impossibility of association in the UN organization a fact that tells us that we do not have a complete subject of international law, while the possibility of association tells us that we have a subject of international law. These are the coordinates within which this paper moves, and this brief review is just our attempt to contribute to the debate that is already underway, without saying anything spectacularly new, but only further recalling some legal arguments drawn from contemporary international law.

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