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FOUNDATION OF STATES

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Abstract

The organisation of international society in state entities, appearing as subjects of international law, represented an essential element in the overall evolution and development of it, the state-policy making leading to the incorporation, maintenance and development of international community. The state may be considered the main creator, beneficiary and defender of public international law.

Key words: *foundation of state, South Sudan, subject of public international law.*

Introduction

The states have been the first subjects of public international law and for a long time the only one. They are typical, fundamental subjects of international law, forming the political and legal entities which meet to the largest extent the capacity of having legal reports governed by international law and benefit from the unlimited right to participate to the elaboration of the norms of international law.

They are also subjects of universal international law, the only ones entitled to undertake all rights and obligations with international character.

In the international relations, the states participate as suzerainty holder. Suzerainty is an essential and necessary characteristic of every state, an intrinsic, inherent attribute of it, being the political and legal basis of the capacity of state as subject of international law.

I. Definition of the incorporating elements of the state

As for the definition of the state, based on the general theory of law, "the state is the political organisation which, holding the monopole of coercion force, of elaboration and application of law, exercises over a human community on a certain territory the suzerain power from the given society".

Based on public international law, the state is a community of individuals independently organised, settled on a determined territory, permanently, enjoying the right to decide in a suzerain manner, if not over all its interests, at least partly.

The state is a direct and immediate subject of international law, with full capacity of undertaking all rights and obligations with international character. The states have been the first subjects of public international law and for a long time the only subjects.

The states have international legal personality, regardless their territorial length, the size of population, the economic and military force or the degree of development, since they do not have the capacity of international law subjects in terms of such characteristics, but it results from their suzerainty.

For an entity to have international legal personality as state, it has to meet certain conditions. According to the convention related to the rights and obligations of state[1] in the

[1] For the Convention text, see: http://avalon.law.yale.edu/20thcentury/intam03.asp.

year 1933, in order to be acknowledged as international individual, the state shall meet the following characteristics:

- to have a permanent population;
- to have a delimited territory;
- to have a government;
- to have the capacity of entertaining relations with other states (to conclude treaties).

The population consists in the totality of natural individuals living on the territory of a state and submitted to its jurisdiction. The population of a state includes several categories of individuals, each of them having a different status: its own citizens, foreigners (citizens of other state), as well as stateless and dual nationals living (having the domicile or residence) on the territory of this state. Regardless the category of such individuals and the state specific to each of them, the basic characteristic is that they are living and submitted to the territorial jurisdiction of this state.

The state territory is the geographical space formed of terrestrial, aquatic and marine areas, of soil, subsoil and air space over which the state exercises the full and exclusive suzerainty.

The governmental authority is the condition that provides expression to the political organisation of the group. It represents only the public authority by which the population is organised inside and by which it relates with other entities with international personality. Regarded as limited law power (public authority), the government provides international identity to the entity it represents, provided there is no other authority on the same population and the same territory (exclusivity and effectiveness of power).

The last condition, *the capacity of entertaining relations with other states,* is valid to the extent that the states, in virtue of their international personality, must have the possibility to participate directly to the international legal reports, the activity of inter-governmental international organisations, to have access to the jurisdictional procedures and, last but not least, to have the capacity to determine diplomatic relations with other states.

II. Foundation of state

In the history, the manner of foundation of states has varied. In the slave and feudal order, the new states usually appeared as result of conquering territories, by successional partition or unification between the members of monarchic families.

During the breakdown of feudal order, with the incorporation and consolidation of some new social classes - bourgeoisie - new states appeared pursuant to the fight for national independence. Thus, during the process of incorporation of nations and fight for national independence in the XIX and XX century, unified states appeared, such as Italy, Germany and other independent states resulted from the breaking down of some empires (ottoman or Hapsburg). This is added the separation of some metropolis colonies and turning them in independent states, mainly pursuant to the Second World War, during the decolonization process.

As legal forms of incorporation of new international law subjects the following are known:

- merger of two or more states within a sole state, such as Tanzania, incorporated by the merger of Zanzibar and Tanganika states in 1964 or in case of Germany, when Federal Republic of Germany (RFG) was united with the Democratic Republic of Germany (RDG);
- dismemberment (division) of a state in two or more suzerain states. For instance, Czech, replaced by two independent states, Czech and Slovakia; dismemberment of URSS and disappearance of it as state, replaced with several independent states etc.;
- separation of one or several parts of a state and incorporating them as suzerain states. For instance, Croatia, Bosnia-Herzegovina, Macedonia and Slovenia, detached from Yugoslavia; subsequently, Yugoslavia disappeared, pursuant to the occurrence of new European states: Serbia and Montenegro in 2006. More recently, we have states such as Kosovo, detached from Serbia, or South Sudan, detached from Sudan.

As noticed, a new state, as subject of international law, involves the existence of a governmental, independent authority, holding the prerogatives of power within a certain territory and over a stable population. The institution of such authority has to be done by exercising the right to self-determination of people.

II.1. Acknowledgement of states

Concerning the appearance of new states, different problems appear, among which the problem of acknowledging them by the existent states, with which shall entertain relations.

Acknowledgement is a unilateral act by which a state observes the existence of some facts, acts or situations with consequences over its rights, obligations and interests.

The acknowledgement of a state is the act by which a state admits that a political entity meets the conditions specific to a state (considers the occurrence of this new subject) and expresses it will to consider it member of international community.

Pursuant to the analysis of the definition of acknowledgment of states, the following characteristics may be considered:

- acknowledgement is the unilateral act of state, resulting from its suzerainty. The states have consequently the right, but not the obligation, to acknowledge other states;
- the act of acknowledgement may have either the form of diplomatic notes or of a direct notification addressed to the state acknowledged or the form of some messages, congratulation telegrams or official declarations. Seldom, the acknowledgement may be done by multilateral international treaties or bilateral treaties, being however appreciated the volume and nature of the relations established between the parties;
- the acknowledgement may be performed only by a state (individual acknowledgement) or a group of states (collective acknowledgement);
- the acknowledgement is a state determining the occurrence of a new state, subject of international law. It does not provide such quality to the states, which they acquire as of their incorporation. The refusal of some states to acknowledge a new state does not affect its existence which maintains the quality of subject of international law, with all juridical and political consequences of such existence;
- acknowledgement has a declarative nature, it does not create the rights of the state, which it exercises based on its suzerainty, independently of its acknowledgement.

The acknowledgement has as practical effect establishing normal relations between states, representing, in fact, the leaving point of the manifestation of personality of the state acknowledged, in relation to other states. As of such moment, the state acknowledged may establish diplomatic relations with the state or with the states that acknowledged it, he is acknowledged the right to the immunity of jurisdiction and execution before the state courts acknowledging it, affecting its rights of using the assets held on the territory of other state, it may demarche judicial actions in the states acknowledging it, it may conclude bilateral treaties with it etc.

Depending the volume and length of the effects produced by acknowledgement, there is a distinction between *de jure* and *de facto* acknowledgement.

By *de jure* acknowledgement, one understands the full and final acknowledgement of a state. Such acknowledgement is irrevocable; the effects disappear only upon the termination of the capacity of law subject of the state acknowledged.

The *de facto* acknowledgement has a limited and provisional character, being possible to recall it anytime. Pursuant to *de facto* acknowledgement, relations are established between states with a narrower field than in case of *de jure* acknowledgement.

Between the *de jure* and *de facto* acknowledgement, there is no essence difference, and the limits between them are difficult to determine, the *de facto* acknowledgement representing, usually, a preparing phase *of de jure* acknowledgement.

In terms of the forms of expression and acknowledgement, this may be express or tacit.

The express acknowledgement is performed by a special act of the competent state body (a formal declaration or notification), addressed to the new state and which expresses, clearly, the intention to acknowledge it.

Tacit acknowledgement appears when, in the absence of a formal and express declaration, it may be deducted from concluding facts of the state, such as determiningdiplomatic relations, concluding a bilateral treaty ruling general issues, without reserves in terms of acknowledgement.

We outline that the participation to international conferences or the admission to an international organisation is not equivalent to a tacit acknowledgement by the states participating to the conference or members of the organisation if they didn't acknowledged otherwise the new state.

Besides the acknowledgement of new states, in the international relations it is raised the issue of acknowledgement of governments, movements of national liberation or insurgents within a civil war

II.2. South Sudan - the last state appeared on international scene

On July 9th 2011, the South Sudan became the newest country of the world by separating it from Sudan. Incorporated after over fifty years from the declaration of the own independence of Sudan that took place on January 1st 1956, the incorporation of South Sudan as nation concluded a period of painful transformation: from being a region contested in the country (South Sudan) to an independent state (South Sudan Republic). The south people contested the unity of Sudan during two civil wars, that extended, to the largest extent, in the second half of 20* century. The first civil war, that took place in the eve of independence - 1955 - until 1972, was restricted mostly to the South area. This first fight generated around 500.000 victims, 180.000 refugees and up to one million civil citizens travelling internally. The first war, having as scope the independence, ended only with a quasi-autonomy for South Sudan, upon the execution of the Agreement from Addis Abeba, incorporated in the Constitution of Sudan.

In 1983 the second Civil War burst between the Government of Sudan and the Army of People Liberation from Sudan, led by John Garang de Mabior. The war started upon the breach of the Agreement from Addis Abeba by the President Gaafar Nimeiry, who declared the entire Sudan as being an Islamic state, ceasing thus the existence of the Autonomous Region of South Sudan. The second war, with over 2 million victims, continued until 2005, when a new peace agreement was signed, on January *9X,* in Nairobi, with the following terms:

- the South will be autonomous for six year, then a referendum for independence will be organised;
- both parties in conflict will unite their armed forces in one formed of 39.000 soldiers, after six years, if the referendum is not favourable for succession;
- the income resulted from oil will be shared equally between the Government and the Army of People Liberation from Sudan, during the autonomy period of six years;
- the jobs will be shared in different proportions, so as the autonomous Sudan holds a certain percentage, although the majority will be held by Government;
- the Sharia Islamic law will be applied in North, and in South one will apply only to the extent decided by the Meeting selected.

Therefore, observing the Agreement from Nairobi, between January 9th-15th 2011, after six years of autonomy, one has organised the referendum for the independence of South Sudan. 98.8% of population supported the secession, which entailed formal independence on July 9th 2011, the capital of the new state being established at Juba.

The Egypt, Sudan, Germany and Kenya have been the first countries that acknowledged the independence of South Sudan. More than that, only few days after obtaining the independence, on July 14* 2011, the South Sudan became the 193r state member of the Organisation of United Nations and on July 28th it has been received in the African Unit becoming the 54th member state.

The independence largely claimed of South Sudan as a great victory for its population, affected by internal fights for almost half a century, however the North and South still depend one of the other: most of the oil reserves are in South, and the transportation pipes, the ports and refineries are in North. In addition, the area of Abyia, very rich in oil, has to decide by a referendum if it joins South Sudan currently being under the control of North Government and there is the risk that a new conflict bursts in the future between the two countries.

Conclusions

In conclusion, the state represents the frame of exercising the law of every people to decide its own fate, and its appearance is related to the evolution of human communities which, in order to operate, need a political organisation given by state.

Regardless the manner of their creation, the new states enjoy the quality of subject of international law as of its occurrence, with all state rights and obligations, the other states having the obligation to observe both their suzerainty and territorial integrity, and all right held by a state in the international relations.

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