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THE ROLE OF THE CLASSICAL CRITERIA FOR ESTABLISHING AND RECOGNIZING OF NEW STATES BY THE INTERNATIONAL COMMUNITY

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Abstract:

The state as a legal person of international law should possess the following qualifications, which count as traditional criteria of statehood and its recognition: (a) Permanent Population; (b) Defined Territory; (c) Government (d) Sovereignty or Independence.

However, the above qualifications are not enough for recognition of the new state, at the same time; the additional or new criteria also have to be existing, particular when nations emerged as independent entities after colonial rule from the beginning of the 1960s.

This paper aims to explain the classical criteria of statehood and its recognition. Moreover, discuss all international additional or new criteria for the recognition of new states that have been established and practiced at the regional level by the European Community, and highlight the role of all objective and procedural criteria for membership of new members from states in the United Nations.

The result of this paper it could be said that both the traditional and new criteria as well are important for the creation and recognition of new states.

Keywords: Classical Criteria, Additional Criteria, Badinter Commission, Advisory Opinion, State Membership

1. Introduction:

To be considered an independent and recognized State, an entity must meet certain criteria. For this purpose Article (1) of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law. It notes that the State should possess the following qualifications as an international person: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other.

The first three criteria listed in Article (1) are generally accepted under customary international law, whereas in this respect there is some doubt as to the fourth. At the same time, writers argue that the Montevideo definition is missing elements essential to statehood. Crawford argues that the critical criterion for statehood is independence (Grant, 1999, p. 437).

Under belligerent occupation (e.g., Manchukuo) the formation of the putative state casts doubt on independence. A putative state which experiences "substantial external control" may also lack the essential statehood attribute (Grant, 1999, p. 437).

In this time of globalization, despite the above mentioned classical criteria, also new or additional criteria are important for the creation and recognition of the new states. On the international level, the United Nations passed some criteria for accepting new entity as a membership of the organization. Furthermore, on the regional level, the European Community as well in 1991 passed some important additional criteria for the recognition of the new states particular these new states that emerged as a result of the dissolution of the Former Socialist Republic of Yugoslavia and Russia.

For this purpose, the authors try to answer the main research question, which is **(Are the Classical Criteria enough for the Creation and Recognition of the New States?).**

This academic paper will examine the traditional criteria in relation to the statehood and recognition of new states, which they are (the people, the region, the government, and sovereignty or independence). Moreover, the new or additional criteria that consist of the European Community and United Nations Criteria will be explained and discussed briefly.

2. Classical Criteria for the Creation and Recognition of New States:

2.1. Permanent Population

The first qualification which a state should possess is the existence of a permanent population. Without the population, a State cannot exist. The 'permanent population' requirement refers to a stable community. As regards numbers ‘no minimum limit is apparently prescribed (Crawford, 1979, p. 36). When Nauru became independent its estimated population was 6,500 people (Kaczorowska, 2005, p. 53).

Thus, the existence of states with very small populations is generally accepted, although the diminutive size of a population may cast doubt on the ability of a State to meet certain membership requirements of international organizations (Duursma, 1996, pp. 135 – 136). Obviously, this did not serve as a bar to membership of the United Nations. Micro-States like Liechtenstein, Micronesia, the Marshall Islands, San Marino, Monaco, Andorra and Palau have all become fully a member of the UN (Duursma, 1996, p. 138).

It must be noted that a permanent population is not necessarily the same as a people. Within a State, a people may refer to an ethnic subgroup. In that case, a permanent population could consist of several distinct peoples (Raic, 2002, p. 117).

The people must have the intention to inhabit a specific territory on a permanent basis. Mere occupation of a territory will not suffice legally to meet that criterion. The presence of traditionally nomadic inhabitants will not necessarily affect the permanence requirement (Aust, 2005, pp. 15 - 16).

This point was reflected in the International Court Justice's Advisory Opinion on the Western Sahara (1975) where – while it was a territory sparsely populated mostly by people of a nomadic nature – The Court was still of the opinion that it had a permanent population, with the right to self-determination. Nevertheless, it seems logical that to fulfill this criterion, there remains a requirement for some permanence, if not in living arrangements then at least such as to suggest the viability of the community over time (Boas, 2012, p. 163).

Homogeneity among the population is not required by international law. The notion of a nation state is only of historic interest. The population does not need to be composed of nationals. Determination of nationality is one of the attributes of a State but not an element of its definition. Nationality is therefore dependent on statehood, and not the other way around (Kaczorowska, 2005, p. 53).

2.2. Defined Territory

In order to satisfy the second classical criterion, control must be exercised over a definite portion of territory. This criterion is a critical precondition for statehood (Currie, 2008, p. 22). Exclusive territorial control remains a fundamental prerequisite for any State's competence and authority to administer and exercise its State functions both in fact and in law. As Cassese (2005,p. 74) puts it, states have paramount in international law by virtue of their stable and permanent control over territory**.**

Nor is there a rule prescribing that a State should have fixed boundaries. A substantial boundary or territorial dispute with a new State is not enough to bring statehood into question (Kreijen, 2004, pp. 19 - 20). Generally, boundary disputes have neither prevented the creation nor the continued existence of States. As Brownlie (1998, p. 27) puts it, "what matters is the effective establishment of a political community and not the existence of fully defined frontiers".

In order to say a state exists ... it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the state actually exercises independent public authority over that territory (Arbitral Tribunal in Deutsche Continental Gas-Gesellschaft v Polish State (1929) 5 AD 15).

Albania was recognized by many countries prior to the First World War and became a member of the League of Nations, although its borders were in dispute (ICJ in North Sea Continental Shelf case [1969] ICJ Rep at pp. 3, 32). More recently, Israel has been accepted by the majority of nations as well as the United Nations as a valid state despite the fact that its frontiers have not been finally settled and despite its involvement in hostilities with its Arab neighbours over its existence and territorial delineation (Kreijen, 2004,p. 19).

Similarly, Kuwaiti sovereignty was restored and recognized before its borders were finally demarcated by the UN in 1992 in accordance with its 1963 agreement with Iraq (Wallace and Martin-Ortgea, 2009, p. 56). What matters is the presence of a stable community within a certain area, even though its frontiers may be uncertain. Indeed, it is possible for the territory of the state to be split into distinct parts, for example Pakistan prior to the Bangladesh secession of 1971 (Shaw, International Law, 2008, p. 180).

However, it is possible to cite a few situations where statehood was refused on the basis of unsettled frontiers, the classic example being that of Lithuania, which was refused membership of the League of Nations until border disputes with neighbouring states were settled (Hillier, 1998, p. 184).

Furthermore, there is no rule prescribing a minimum size of the territory of the State. Tuvalu (seven square kilometres), (Monaco less than two kilometres) and Nauru (21 square kilometres) are all States. As Crawford observes, the size of the territory is not what matters, provided that there is an independent authority that exercises actual authority over the territory (Raic, 2002, p. 60). Thus, the existence of mini States is generally accepted.

2.3. Government

The third classical criterion requires a state entity to have a central government functioning as a political entity within land law and ineffective territorial control (Aust, 2005, p. 15 – 16).

The existence of effective government, with centralized administrative and executive organs, is the best evidence of a stable political community (Brownlie, 1998, p. 71). The requirement of government reveals internal and external aspects. A State must have a government, i.e., a political organization which regulates the conduct of its citizens by means of rules which are recognized and upheld internally (Kreijen, 2004, p. 20).

There is a strong case for regarding the possession of effective government as the single most importance criterion of statehood since, arguably, all the other requirements depend upon it. A juristic commission was appointed in 1920 to investigate a dispute between Finland and the Soviet Union. The League of Nations Commission of Jurists in the Aaland Islands dispute (1920) confirmed that: "Finland did not become a definitely constituted State until a stable political organization had been created and until the public authorities had become strong

enough to assert themselves throughout the territories of the State without the assistance of foreign troops".

However, it was far from straightforward to apply the requirement of an effective Government. Recent practice with regard to the new states of Croatia and Bosnia and Herzegovina emerging out of the former Yugoslavia suggests the modification of the criterion of effective exercise of control by a government throughout its territory (Weller, 1992, p. 569). Both Croatia and Bosnia and Herzegovina were recognized as independent states by European Community member states and admitted to membership of the United Nations (which is limited to states by article 4 of the UN Charter) (Gowlland-Debbas, 1990, p. 135). At a time when both states were faced with a situation where non-governmental forces controlled substantial areas of the territories in question in civil war conditions. On 1 July 1960, the Republic of the Congo was granted independence by the former colonial power, Belgium, and admitted to membership of the UN. At the time, law and order had completely broken down and the government controlled very little of the territory, most of which was subject to the control of the Katangan secessionists (Raic, 2002, pp. 64 - 65).

Although there is a tendency to subject the establishment and functioning of governments increasingly to certain norms (Franck, 1992, p. 91), statehood in principle is not concerned with the legality or legitimacy of government. A government could have come to power through democratic elections or a bloody coup d'état. It may be a monarchy, constitutional democracy, or a military dictatorship. Basically, "the rule is crude and only demands that a government must have established itself in fact" (Malanczuk, 1997, p. 79; Schachter, 1997, pp. 7 -23). The tenacity of effectiveness is clearly reflected in this 'rule'. It seems that to be relevant in the eyes of international law government must be effective.

The following conclusions suggest themselves. First, In order to be a State, an entity must have a government or a government system in general control of its territory, to the exclusion of other entities not claiming through or under it. Secondly, international law does not lay down specific requirements as to the nature and extent of this control except, it appears that it includes some degree of law and order upholding. Third, in applying the general principles to specific cases, the following must be considered: (i) whether the statehood of the entity is opposed under title of international law; if so, the requirement of effectiveness is likely to be more stringently applied; (ii) whether the government claiming authority in the putative state, if it does not effectively control it, has obtained authority by consent of the previous sovereign and exercises a certain degree of control; (iii) in the latter case at least, the requirement of statehood may be liberally construed; (iv) finally, there is a distinction between, on the one hand, the creation of a new state and, on the other, the subsistence or extinction of an established state. There is normally no presumption in favour of the status of the former, and the criterion of effective government therefore tends to be applied more strictly (Crawford, 1979, p. 45).

2.4. The Capacity to Enter into Relations: Independence and Sovereignty

This requirement mentioned by the Montevideo Convention has been challenged by many authors as being a consequence of statehood not a prerequisite. Indeed, the capacity of an entity to enter into relations with other states derives from the control the government exercises over a given territory, which in turn is based on the actual independence of that state. That is why most writers seem to be agreed that this criterion could be better expressed as "independence" or "sovereignty" in the sense of having full control over domestic and foreign affairs. The essence of the capacity to enter into relations with other states is independence. As Lauterpacht said:

"the first condition of statehood is that there must exist a government actually independent of that of any other state ... If a community, after having detached itself from the parent state, were to become, legally or actually, a satellite of another state, it would not be fulfilling the primary conditions of independence and would not accordingly be entitled to recognition as a stat" (Lauterpacht, 1975, p. 487).

This criterion also clearly mentioned in the case of (Island of Palmas Arbitration: The Netherlands v US (1928) 2 RIAA 829) that "Sovereignty … signifies independence. Independence is the right to exercise… to the exclusion of any other state, the functions of a state".

Sovereignty is described as the state's supreme power over its territory and inhabitants, irrespective of any outside authority. The supreme power exists only within and not outside the independent state. However, a state may be limited in the exercise of its sovereignty, for example as a result of economic dependence, or because it has surrendered by treaty some of its competences to another state. Limitations of its competences do not limit a state's sovereignty. They just restrict the exercise of sovereignty (Korowicz, 1961, p. 108).

It is arguable that a degree of actual as well as formal independence may also be necessary. Formal independence refers to the situation in which a state has control over all of its functions or competences, whereas actual independence is described as the minimum degree of real government power at the disposal of the putative state authorities, necessary to qualify it as independent (Crawford, 1979, pp. 56-57).

The relation between an entity's formal and actual independence will indicate the extent to which such entity meets the statehood criteria.

This matter was raised in relation to South Africa granting its Bantustans independence. In the case of the Transkei, for example, a considerable proportion, perhaps 90 percent, of its budget at one time was contributed by South Africa, while. Both the African Unity Organization, and the United Nations, called on all states not to recognize the new entities.

These entities were, apart from South Africa, totally unrecognized (Van der Vyve, 1991, p. 39).

However, many countries are as dependent on aid from other states and economic success would not have changed the international community's attitude. Since South Africa as a sovereign state was able to alienate parts of its own territory under international law, these entities would appear in the light of the formal criteria of statehood to have been formally independent. However, it is suggested that the answer as to their status lay elsewhere than in an elucidation of this category of the criteria of statehood. It lay rather in understanding that actions taken in order to pursue an illegal policy, such as apartheid, cannot be sustained (Shaw, Title to Territory in Africa: International Legal Issues, 1986, pp. 161-612).

Some authors argue that an additional criterion should be added to those mentioned above: that is the legality of origin of a state. A putative state which is created in violation of international law, and which exists because of such violation, should be denied recognition. A putative state will be illegal if it has been created in violation of any of the following three norms of international law: the prohibition of aggression and of the acquisition of territory by force; the right to self- determination; and the prohibition of racial discrimination and apartheid (Kaczorowska, 2005, p. 53).

The principle of independence or sovereignty underlies international law. It is expressed to be a principle of the UN in Article 2(4) of the UN Charter and was confirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Between States (1970) adopted by the UN General, which provides: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State".

This is illustrated by the case of Manchukuo, a puppet state created by Japan subsequent to its 1931 invasion of Manchuria. The League of Nations adopted the recommendations of the Commission and decided not to recognize Manchukuo. The League of Nations Assembly stated that "the sovereignty over Manchuria belongs to China"(Resolution of 24 Feb. 1932, League of Nations, No. 112, p. 75). Several resolutions of both the Council and the Assembly of the League with respect to this matter, however, indicate that the principal consideration with respect to the rejection of the statehood of Manchukuo by the international community was grounded in its illegal creation rather than the manifest lack of actual independence (Raic, 2002, p. 79).

In the end, it could be said that the above-mentioned criteria basically are for the creation of new states, but at the same time without each of them, the international community cannot accept new states and recognize them.

3. New Criteria for the Recognition of New States

In the beginning, the European Community Criteria will be discussed and then the United Nations Criteria will be explained as additional criteria.

3.1. The European Community Criteria

More than a dozen new states have emerged in Europe since the end of the Cold War as a result of the disillusion of the Former Socialist Republic of the Soviet Union and Yugoslavia.

After the war began following Slovenia's and Croatia's declarations of independence on 25 June 1991, the European Community counties responded to solve the Yugoslavia crises, then they decided to recognize the republics of Yugoslavia seeking statehood.

For this purpose, according to the 'Carrington Plan', the opinions of the 'Badinter Commission' and the Council of Ministers meeting in Brussels on 16 December 1991 (Rich, 1993, p. 16), the European Community have adopted the following guidelines and criteria on the formal recognition of new states in Eastern Europe and the Soviet Union that obligate the new states to:

A. Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights aggression (Turk, 1993, p. 72).
B. Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the Commission on Security and Cooperation in Europe (CSCE) (Murphy, 1999, p. 553).
C. Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement (Rich, 1993, p. 43).
D. Acceptance of all relevant commitments with regard to disarmament and nuclear nonproliferation as well as to security and regional stability (Advisory Opinion, ICJ Reports 1996, P 241, Para 27).
E. Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes (Turk, 1993, p. 72).
F. Implementing popular referendum (Radan, 2012, p. 10) and existing Constitutional Guarantees, especially guarantees for the minority rights, respecting rule of law, democracy and human rights (Mazur, 2014, p. 35).

In addition to the above criteria, those new States have to constitute themselves on a democratic basis, accepted the appropriate international obligations, and committed themselves in good faith to a peaceful process and negotiations. In the end, the European

Community declared that they will not recognize entities which are the result of aggression (Turk, 1993, p. 72).

As a result, after existing and implementing all traditional and European Community Criteria by (Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Serbia, and Montenegro), the international community particularly the European Community recognized them as independent states.

3.2. The United Nations Criteria

In an advisory opinion of the International Court of Justice on conditions of a state's admission to membership in the United Nations, it was pointed out that additional considerations, above and beyond that of statehood, apply when membership of the United Nations is at stake. According to the article 4(1) of the UN Charter, the International Court of Justice declared that a new member entity must (a) be a State; (b) be peace-loving; (c) accept the obligations of the Charter; (d) be able to carry out those obligations; and (e) be willing to do so (Van der Vyve, 1991, p. 26).

Additionally, decision-making bodies may "reasonably and in good faith" take into account other considerations "to connect with" the membership requirements set out in Article 4(1) (Van der Vyve, 1991, p. 26).

For the membership of the UN, the new entity needs to try to solve its international disputes by peaceful means and implement all obligations of the UN Charter. The ability and desire to respect the right to self-determination of peoples, the democracy, and non-discrimination by the new entity are necessary.

The United Nations refused to recognize Katanga (1960) and the Turkish (Northern) Republic of Cyprus (1965) as the new countries because they relied on the use of force and foreign military assistance for independence (van der Vyve, 1991, p. 28).
Also, the Security Council and the General Assembly have called on all governments to reject any form of recognition of Southern Rhodesia (1965) and black states (Bantustans) in South Africa (1976) as new states because they relied on independence for racial discrimination and violated the principle of the right to self-determination (Devine and F, 1971, p. 412)

The second paragraph of Article (4) of the UN Charter confirmed the procedural criteria and it mentioned that "the admission of any such state to membership in the United Nations will be affected by a decision of the General Assembly upon the recommendation of the Security Council".

This is meant that both General Assembly and the Security Council have a very essential role to accept new entities as a new member of the United Nations Organization, without each of them the new entity will not be accepted.

4. Conclusion:

It is clear that there are four essential classical criteria for the establishment of the new states and recognizing them by the international community. For this purpose Article (1) of the Montevideo Convention on Rights and Duties of States in 1933 declares that the state should possess the following qualifications as an international person: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

The authors believe that the first three criteria listed in Article (1) of the Montevideo Convention are generally accepted under international law, while in this respect there is some doubt as to the fourth. At the same time, writers argue that the Montevideo definition is missing elements essential to statehood, which is independence.

While the classical criteria necessary for creating and recognizing new states, but European Community and United Nations criteria also essential and have to be available for establishment and recognition new entities as independent states by the international community.

After applying the European standards for the recognition of new states by the former republics of Yugoslavia, (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Serbia and Montenegro) declared their independence, thus they were recognized by the international community.

However, The European Commission guidelines are "subject to normal criteria of international practice", and their application in fact casts doubts on the importance of traditional criteria of statehood. There was widespread recognition of a country that did not control a third of its territory. For example, in Croatia, recognition was granted against Croatia on the advice of the jury. No country was admitted to the United Nations while it was clear that its government did not have effective control of any areas including the capital, for example in Bosnia and Herzegovina. At the same time, the absence of foreign forces from the Former Yugoslav Republic of Macedonia did not lead countries to accept these territories as a suitable subject for recognition. Although it meets all the criteria and all conditions, it simply refuses to change its name. The “political realities” in this case seem to have more to do with the European Commission’s internal politics than with the merits of the Macedonian issue.

Furthermore, when new entities not provide classical criteria and not implement the international criteria or they declared state independence by violating international law, the international community cannot accept and recognize them as a state.

As a result, it could be said that only existing classical criteria not enough for establishing and recognizing new states, but fulfilling all European and United Nations criteria essential as well.

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