Recognition of new States: An Analysis of selected Case Studies from a Third World Approach to International Law (TWAIL)

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ABSTRACT

Despite progressive developments over the past, some areas of international law still require further improvements. Recognition of a new State is such an area, generally a decision by a recognizing State based on policy and politics than law, for which international law hardly provides an unbiased legal framework. The absence of such a non-politicized criterion to recognize new States necessitates to craft an appropriate legal yardstick as this lacuna shows the unavailability of a relevant treaty or a customary international law principle, notwithstanding the prevalence of the seemingly outmoded 'Montevideo Convention on the Rights and Duties of a State of 1933', which provides a criterion of Statehood to be satisfied by an entity as a pre-requite to be recognized as a State. States known as 'third world countries', particularly face frequent secessionist attempts due to complex religious and ethnic diversities in their territories, which pose threats to their sovereignty, political independence, and territorial integrity, and mostly are former colonies of the Western powers that may continue to be affected by their geo-politics. This research is to analyze the State practices pertaining to the recognition of States from a third world perspective on international law (TWAIL) with reference to selected case studies, namely, Kosovo, South Sudan, Crimea, and Catalonia, since they present legal issues associated with recognition of States. Findings of the research demonstrate a lack of uniformity in the State practices, coupled with the dearth of formal legal sources for the recognition of new States, which has had a potential to affect the third world countries adversely by making them persistent victims of the powerful countries of the West. Conclusion of the research highlights the need to craft a proper legal criterion, followed with a suitable mechanism, to protect the rights and interests of third world countries.

Keywords: recognition of States, international law, Third World Approach to International Law, TWAIL, criteria for Statehood

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1. Introduction

While international law has grown in stature with its expanding ambit and the areas, which it governs, many areas of international law remain to be further clarified with proper definitions. Recognition of new States is one such issue where the international legal community has long struggled to find a viable solution to the question as to what is required of an entity to be recognized as a State and whether there is any obligation on the actors of international law to give such recognition. Hersch Lauterpacht[3] stated that, the question of State recognition is a matter much dedicated to policy rather than law about seventy years ago. While the Montevideo Convention of 1933 on the Rights and Duties of a State provides certain requirements that have to be fulfilled by an entity in order to be recognized as a State in the international legal community, those criteria have not been universally followed.

In this backdrop, this article attempts to evaluate the State practices concerning the recognition of States from a third world perspective on international law (TWAIL) by using recent examples which are discussed as case studies. Thus, this paper has reflected on cases of the problems relating to recognition of Kosovo, South Sudan, Crimea and Catalonia for the analysis as these cases provide the most recent examples of State practices related to the recognition of new States and entities. The TWAIL perspective is particularly taken into consideration due to the fact that many of the nations who are termed as 'third world countries' face many difficulties and issues particularly due to their religious and ethnic diversity, where such tensions occasionally escalate to a level where it results in secessionist movements that may pose a threat on the sovereignty of such States.

The third world has in recent times has advocated a nuanced approach that helps to understand and define international law from a difference perspective[4]. This approach is termed as 'Third World Approach to International Law', commonly known as TWAIL. It has provided a trenchant critique of the contemporary international law regime, using concrete historical and cultural evidence to show that the central doctrines of international law are highly Eurocentric and, therefore, not representative of the values and beliefs of a large portion of the world's population[5]. It becomes evident then, that the rules and customs of the mainstream international

3 H. Lauterpacht, *Recognition in International Law* (1st Edn, CUP 1946) 1

4 A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese Journal of International Law.

5 Andrew F. Sunter, 'TWAIL As Naturalized Epistemological Inquiry' [2007] 20 The Canadian Journal of Law and Jurisprudence 475, 480.

law would not be for the benefit of the third world. Anghie[6] states that the conventional history of international law is based on three fundamental premises; Firstly, international law is created through the history and experience of the West or, even more particularly, with the influence and sponsorship of European countries.

2. Brief overview of Recognition of States

Many of the States that have emerged from the continents of Africa, Asia, and even Eastern Europe, occurred after the second world war with the process of decolonization, except for those countries that emerged in Europe.[7] When these States emerged as former colonies, their status as newly formed States were never questioned. For example, when India and Pakistan were separated in 1947, their status as two independent States were never put into question. However, after the end of the official decolonization process, the emergence of new State could only occur through seceding from already established nations either through peaceful means or through separatist movements, which for the most part has been covered with violence and disregard for human rights. Since the emergence of a new State in the modern world is dependent on the breaking up of an already established State, formulating rules of international law related to the recognition of such a breakaway State has become both difficult and grappling.[8]

When one considers these issues from a TWAIL perspective, it becomes apparent that, current State practices related to State recognition are mainly based on politics or/and policies than one made with a legal proposition. Hence, the unpredictability of those policy or political decisions seriously hampers the sovereignty of those countries which belong to the so called third world camp. Analysis of the case studies in this article will showcase that the third world countries under the discussion have had no control over the recognition of new States due to the current power dynamics apparent in the contemporary international society.

3.1 Inconsistencies on defining the 'Statehood'

No formal international legal instrument defines a State in an overarching manner to fit with all purposes[9]. Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of a

6 A. Anghie, 'LatCrit and Twail' [2012] 42 Cal. W. Int'l L.J. 311, 313.
7 L. Dunoff, S. Ratner and D. Wippman, *International Law, Norms, Actors and Process* (4th Edn, Wolters Kluwer 2015) Chapter 3
8 *Ibid*
9 D. Wong, 'Sovereignty sunk? The position of 'sinking states' at international law' [2014] Melbourne Law Review 346

State defines a 'State' as possessing a permanent population, a defined territory, a form of government with the capacity to enter into relations with other States.[10]

During the disintegration of the Soviet Union and the emergence of new nation States in the European continent, the European Union introduced additional requirements to be fulfilled by an entity that claimed for Statehood[11]. Although the Council's Declaration of 16 December 1991 on "the Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union" sets out a framework, which opened the way to recognize new independent States of the former Soviet Union,[12] even the EU has failed to apply them.[13] In this backdrop, it is evident that even as of today, there is no proper definition as to what constitutes a State for the purpose of recognizing an entity claiming for Statehood. As there is no guideline as such, much of the controversy surrounding the recognition has been left as a policy/political decision. Also, it is rather difficult to find a common practice among the States which may eventually turn to a principle of customary international law to the contrary effect.[14]

When one considers the above situation from a TWAIL perspective, the problem seems quite threatening over their sovereignty because many of the countries which belong to the third world are still struggling to safeguard their right to self-determination due to a variety of reasons. Particularly, the diverse ethnic and religious groups in these countries frequently attempt to secede from the mainland in order to declare separate State's entities.

3.2 Theories of Recognition

Theories related to recognition of States are observed as more theoretical than pragmatic since they have failed to underpin the State practices concerning the recognition of new States and appear as too abstract. Among those theories, the declaratory theory of recognition forms the view that once an entity fulfils the criteria of Statehood outlined in the Montevideo convention, it becomes a State. Under this theory what is required is the formal act of recognition only. The

10 The Badinter Arbitration Committee in 1991 defined a State in similar lingo, where it held that a State is commonly defined as a community which consists of a territory and a population subject to an organized political authority and such a State is characterized by sovereignty

11 These new criteria were put forward for the countries in the European Union for the sole purpose of recognizing emerging entities that broke up from the USSR

12 These guidelines included criteria such as the need respect for the provisions of the UN Charter, respect for democracy and rule of law in their respective territories, protecting the rights of ethnic minorities, respecting the inviolability of frontiers, accepting the commitments towards disarmament and nuclear non-proliferation along with accepting peaceful means of settling disputes with other nations

13 For Example, regarding the situations that arose in the cases of Croatia, Slovenia, and Bosnia-Herzegovina where those entities were recognized as States rather hastily, though they have even failed to showcase the existence of the Montevideo criteria of Statehood as a minimum qualification to be recognized as a 'State'.

14 M. Shaw, *International Law* (8th Edn, CUP 2017) Chapter 8

other States, which recognize the completion of the requirements as stipulated in the Montevideo Convention, merely acknowledge the status of the entity under question as a State equal to them.[15] However, this theory hinders the autonomous decision of a sovereign State since it does not allow the recognizing States to determine by their choice whether they are accepting the entity as a State or not. On the other hand, the Constitutive theory argues that an entity becomes a State only when it will be formally recognized by the existing States irrespective of such an entity fulfilling certain criteria. Accordingly, the act of recognition provides the fuel to the decision but not the criteria stipulated the Montevideo Convention. Hence, the act of recognition, perhaps, provides an undue recognition pre-maturely to an entity yet to satisfy the criteria set out in the Convention, probably based on non-legal considerations. However, the State practices on recognition of States do not provide uniformity or consistency in following these theories. Therefore, both the theories seem problematic when analyzed from a TWAIL perspective.

Declaratory theory becomes problematic since the factual situation envisaged under the Montevideo Convention has failed to established itself as a well-found principle of international law which could give rise to an automatic recognition of an entity as a State. In such an absence, it would not be possible to speak of an automatic recognition. The constitutive theory too is problematic since it only focuses on the determination of the Statehood of a particular entity. An already existing State may use the act of recognition to fulfil its geo political objectives, which may affect the solidarity, territorial integrity and political independence of the countries in the third world[16]. Bangladesh provides a classic example for the geo-politics in the spectrum of recognition even from a third world perspective.

3.3 Status of a recognized State in the international sphere

Under international law, only subjects of international law can have rights and duties with the ability of vindicating such rights under rules and principles of international law. Despite the several changes encountered over the centuries, still States are considered as the main legal

15 *Ibid*

16 Bangladesh was established as a separate country after a third war which occurred between India and Pakistan in 1971. Prior to the establishment of Bangladesh, it was known as East-Pakistan and after these events in 1971 it became an independent state known as Bangladesh and India was the second country to recognize it as such after Bhutan. However, being a close neighbour to India, Sri Lanka did not follow pursuit in immediately recognizing the existence of Bangladesh as an independent nation, since it also faced internal unrest with the civil unrest and uprising in its own territory. In 1974 Bangladesh was admitted to the United Nations where on the same year Pakistan also recognized Bangladesh as an independent State

person of international law[17]. Hence, when an entity is recognized as a new State it becomes entitled to enjoy all the rights and duties possessed by other States. However, when such an entity is not recognized by some, such circumvention does not impose any obligation on them. Lauterpacht terms this as 'grotesque spectacle' where the same entity is recognized as a State by some countries and not by the others.

4. Selected Case Studies

In recent years, the issue of recognition has posed difficult questions due to the non-availability of a proper criteria for the purpose. This study discusses the issues pertaining to the recognition of Kosovo, South Sudan, Crimea and Catalonia as examples to demonstrate the inconsistent State practices related to recognition of new States.

4.1 Kosovo

The recognition of Kosovo as a new State in 2008 created much controversy as there was a great divide among the international community over the status of Kosovo when it seceded from Serbia through a unilateral declaration of independence (UDI). This secession occurred despite the UN Security Council resolution 1244 of 1999, which had affirmed the territorial integrity of Serbia[18]. This matter was referred for the advisory opinion of the International Court of Justice (ICJ). The ICJ[19] opined that the UDI of Kosovo was not illegal under the prevailing principles of International Law but was very careful not to lay down any standards or guidelines regarding the recognition of a new State. However, most of the third world countries, including India and Sri Lanka, under the threats of secessionist movements, refused to recognize Kosovo as a new State. These States seemed to be afraid of setting a precedent by recognizing an entity which would in turn affect their own case and would make them liable for a new customary international law rules to be created for their disadvantage by letting them to be subsequent objectors. ICJ also failed to engage in any meaningful discussion as to the requirements that has to be met in order to be recognized as a State[20]. From a TWAIL perspective, the outcome of Kosovo is alarming for protecting its interest, since the incidents

17 R. Wallace, *International Law* (7th Edn, Sweet and Maxwell 2013) 63
18 Resolution 1244, adopted by the Security Council at its 4011th meeting, on 10 June 1999
19 Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Available at https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf
18 The Kosovo judgment is more important regarding what the Court did not say rather than for what it did say

related to Kosovo's case reiterates the political nature of State recognition and the polarization of the western and nonwestern divide which is influenced by geopolitics[21].

4.2 South Sudan

South Sudan became an independent State on 09 July 2011 following a referendum held in the country to allow the people living there to exercise their right to self-determination, whereby the people voted for the establishment of a new State in the name of South Sudan. While the emergence of South Sudan was rather less controversial than the cases of the formation of Kosovo and Crimea, the post conflict that arose after the establishment of South Sudan has brought many questions as to the insecurities, which may be faced by newly recognized States.

The main issue regarding the recognition of South Sudan lies with the fact, whether its recognition was a too premature recognition, since even after South Sudan was recognized in 2011, it went through a troublesome period from 2014 to 2020 due to several turmoils within the country. While the hostilities have ended, one can argue that if another fraction from South Sudan were to make a claim for their right to self-determination, what an impact such would have on South Sudan, which itself came in to being only a several years earlier.

When one considers the situation in South Sudan from a TWAIL perspective, it can be argued that while the recognition of South Sudan was not problematic as in other instances[22] the way in which South Sudan could exercise its right to self-determination might be against the interests of those countries belonging to the third world since there is no coherence of State practice as to when an entity exercising its right to self-determination should be recognized. [23]

4.3 Crimea

The Crimean case provides an excellent example for the non-uniformity of State practices concerning the recognition of States. While the Crimean issue cannot be equated to a claim for a separate State, it does involve the issue of secession of a territory from the State of which it

[21] The politicization of 'State recognition' can be seen from distinguishing the approaches taken with regard to the recognition of Kosovo and Crimea, where the regional politics were ever more visible since the European Union did not hesitate to recognize Kosovo, but it vehemently declined to recognize Crimean annexation to Russia

[22] since it came into being with an agreed secession similar to Slovakia and Czech Republic, which separated from Czechoslovakia,

[23] If self-determination is to be loosely provided for any fraction of a population claiming for their right to so called internal self-determination, without having proper principles and guidelines contained in a treaty or a principle of customary international law, such could be more problematic than the issues faced by the third world countries due to non-availability of such guidelines and principles concerning the recognition of a new State

was originally a part and annexing itself to another sovereign State. During the period that expanded from February to March 2014, in a haphazard manner, Crimea seceded from Ukraine, held a referendum, and annexed with Russia. Several States refused to recognize this annexation and its recognition as a part of Russia remains disputed.

When one considers the situation of Crimea from a TWAIL perspective, it again showcases the lack of uniformity and certainty of State practice regarding the recognition of new States. While Russia opposed recognizing Kosovo as a State, it abruptly recognized the changes that occurred in Crimea and made an agreement for its annexation. The actions of Russia could not be stopped at the Security Council because it has the veto power. The highly politicized nature of the recognition and annexation of Crimea is problematic from a TWAIL perspective since many of the third world countries do not have capacity to stop such an arbitrary act if a similar situation had occurred in their territories. Therefore, cases such as Crimea, if allowed to set a precedent, would become detrimental to the interests of the third world countries.

4.4 Catalonia

One of the more recent controversies relating to recognition of new States emerged in Catalonia, a part of Spain, which tried to secede from the mainland through its exercise of the right to self-determination by holding a referendum and then making a unilateral declaration of independence on October 2017.[24] The European Union clearly made a statement that Catalonia would not be recognized independently from Spain. The United States also issued a statement supporting the sovereignty of Spain and Catalonia being a part of that sovereignty.[25] In the aftermath of the UDI, the central government in Spain decided to temporarily suspend the autonomous powers granted to Catalonia and made plans to prosecute the leaders who took part in and promoted the idea of an independent Catalonia from Spain.

When considering the situation of Catalonia from a TWAIL perspective, while it can be appreciated that the global community stood for the protection of Spain and its territorial integrity, it cannot be considered as a general practice, since when similar circumstances were present Kosovo was recognized and Catalonia was not due to political reasons. Therefore, such varied sporadic State practices of recognizing new States, which lack the quality or authority of being a general principle of international law obliging a State to behave in a particular

24 The main argument put forward by the Catalonians was that, it was paying too much taxes to sustain the poorer parts of Spain and due to which they were making a demand for getting separated from Spain

25 Tom Ginsburg and Mila Versteeg, 'From Catalonia to California: Secession in Constitutional Law' [2019] Ala L Rev 923

manner, may adversely affect the sovereignty of the third world countries, which are continued to be affected by the geo-politics of their former colonial powers.

5. Assessing the Recognition of New States from a TWAIL Perspective

From the above case analysis and the preceding discussion, it is evident that the current practices related to recognition of new States are not favour the best interest of the third world countries. A lack of uniformity in the State practices coupled with the lack of formal legal sources for the recognition of new States, the third world countries are at the mercy of their western counterparts when it comes to protecting their sovereignty, political independence and territorial integrity. Hence, it is argued that there should be a formal mechanism that should be put forward and implemented to protect the rights and interest of the third world countries in their quest to protect their sovereignty.

In addressing the factors that has to be considered from a TWAIL perspective concerning the recognition of new States, any thought of entertaining the right to self-determination through a referendum should be strictly scrutinized and a principle of international law should be developed for the internal evaluation for scrutinizing the legitimacy of such a claim through an independent body. In crafting a definition of a 'State', for the purpose of international recognition, it is suggested that the ill-equipped criteria provided in the 1933 Montevideo Convention is required to be revised and a new set of criteria to be developed, taking the interests of the countries in the third world into account. However, these criteria should be included in a treaty or proved as a binding principle of customary international law before they are given any recognition.

In determining the other factors, such as the protection of human rights, disarmament, non-violability of borders and peaceful resolution of disputes, there should be a mechanism available for both pre- and post-evaluation of the situation with a way of determining the feasibility of an entity claiming for Statehood, in fulfilling these obligations to be undertaken. Imposing an obligation upon the States for both the purposes; recognition and refraining from recognizing a new State, should be the goal to be realized.

6. Conclusion

Recognition of States remains one of the most unresolved controversial issues in the contemporary discourses on international law hampered both by a lack of legal principles governing State recognition and the inconsistency of State practices. This especially affects the countries in the third world, which too became independent mostly through the decolonization process. The above discussion exposes that State recognition is largely a matter of policy than a matter of law, whereby the western countries have posed their hegemonistic authority in deciding what entities are to be recognized or not. While lacking an updated, accepted definition for the term 'State' for the purpose of recognition, the idea of self-determination has been put forward as a strategic tool for making a claim for recognition. As this research demonstrated, in the absence of an obligation to recognize an entity as a new State, the prevailing State practices with no uniformly runs counter to the interests of the third world. In this backdrop, from a third world perspective, there prevails a strong need to craft a mechanism founded in international law for both recognition and non-recognition of entities, which claim recognition, based upon factors that would help to advance the rights of those countries in the third world, continuously striving to protect their sovereignty and Statehood without being victims of a polarized world.

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