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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I Recommend that the Directed Research Essay under my supervision by:

Siatwinda Crippen

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Entitled:

Zambia on the International Plane: A Critical Analysis of Zambia's Practice on
Recognition of States and Governments.

Be accepted for examination. I have checked it carefully and I am satisfied that it
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ABSTRACT

This essay considers Zambia's practice on recognition of states and governments with the ultimate view of determining how Zambia can join the rest of the members of the international community in dealing with the problem of unconstitutional changes of governments and unlawful attainment of statehood. In approaching the subject matter of the research, the essay starts by setting out the basic aspects of the research in chapter one, including the brief background and the modes of recognition. Chapter two proceeds to examining the legal issues of recognition. Considered under this are questions of whether recognition is purely a political act or it involves legal considerations as well. The essay then examines the distinctions between recognition of states and that of governments, and the tendency to confuse the two. Furthermore, the growing inclination towards adopting the Estrada doctrine by most states is also well thought-out. It concludes chapter two by looking at the legal consequences of recognition, especially on the entity to be recognized and the individuals of that entity.

In chapter three, a case study of Zambia's practice on recognition of states and governments is critically discussed. The essay notes with concern that the practice does not go far enough as it is characterized with inconsistencies and lack of transparent guidelines. Besides, the paper through research found that Zambia's practice is not well abreast with the developments in international law such as the need for an entity seeking recognition to be constituted on democratic principles and must have respect for human rights, as discussed in chapter four.

As such, this essay recommends in chapter five the adoption of a well articulated legal framework on recognition that will see Zambia leading the call to end these events that destabilize democratically constituted governments. As opposed to having a mere policy, a well articulated legal framework will bind each successive government that comes to power in Zambia and hence, it will ensure consistency, transparency and predictability on recognition which is necessary to deter any such unconstitutional changes of governments in future or illegitimate accession to statehood. The legislation in place should provide for recognition based on the basic criteria of democracy and respect for human rights. This will shape Zambia's practice on recognition and make it contribute progressively to political developments on the continent and the world at large.

DEDICATION

To my late mum and dad, 18 and 16 years respectively, may have passed but the training and guidance that you gave me, though in a short period of time, shall forever remain fresh throughout my lifetime; and to all those whom I have regarded as my parents during my academic years. Certainly, I have spent a great deal of my life trying only to do well in academics. This, however, may have come at an immense personal loss both to me and my family who have made sacrifices and have endured great pain to support me, especially when I needed them the most. Therefore, it is altogether appropriate and proper that I dedicate a part of this work to them. But, in a larger sense, I cannot dedicate; I cannot consecrate; neither can I measure to any degree what they've done for me. For this, I shall remain forever indebted to them.

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All praises are due to my creator God, the Beneficent, the Merciful; creator of the Heavens and the Earth and all that is in between. He who saw me without life, and breathed the spirit of life into my chest and spine giving me strength to accomplish all that I have accomplished thus far.

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TABLE OF INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights.

Charter of the United Nations.

Constitutive Act of the African Union.

EC Guidelines on the Recognition of States in Eastern Europe and the Soviet Union, 1992.

International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

Montevideo Convention on Rights and Duties of States, 1933.

Organisation of African Unity Charter.

Universal Declaration of Human Rights, 1948.

TABLE OF CASES

Constitutional Rights Project and Civil Liberties Organisation v. Nigeria (2000) AHRLR 191, Communication 102/93.

E.K. Sallah v. Attorney General of Ghana [1970] 2 G&G 493 (SC).

Uganda v. Commissioner of Prisons Ex parte Matova (1966) EA 514.

Tinoco Arbitration (1923) 1 R.I.A.A. 369.

Sir Dawda K. Jawara v. The Gambia (2000) AHRLR 107, Communications 147/95 and 149/95.

LIST OF ABBREVIATIONS AND ACRONYMS

AU – African Union

EC – European Community

ICJ – International Court of Justice

OAU – Organisation of African Unity

UN – United Nations

SADC – Southern Africa Development Community

TABLE OF CONTENTS

PAGE

Research Topic-----i
Declaration -----ii
Supervisor’s Approval -----iii
Abstract -----iv
Dedication -----v
Acknowledgements-----vi
Table of international instruments-----vii
Table of cases-----viii
List of abbreviations and acronyms-----ix

CHAPTER ONE

1.0 Introduction-----1
1.1 Background to the study-----1
1.2 Statement of the problem-----5
1.3 Objectives of the study-----5
1.4 Rationale and justification of the study-----6
1.5 Research Questions-----7
1.6 Methodology-----7
1.7 Operation definition of key terms-----8
1.8 Modes and forms of recognition-----8
1.9 Conclusion-----9

CHAPTER TWO

THE LEGAL ISSUES OF RECOGNITION

2.0 Introduction-----	11
2.1 Recognition of states-----	11
2.1.1 Statehood-----	11
2.1.2 Theories of recognition-----	14
2.2 Recognition of governments-----	16
2.2.1 The Estrada Doctrine-----	18
2.3 The legal effects of recognition-----	20
2.3.1 Internationally-----	20
2.3.2 Domestically-----	20
2.4 Conclusion-----	21

CHAPTER THREE

A CASE STUDY OF ZAMBIA'S PRACTICE ON RECOGNITION

3.0 Introduction-----	23
3.1 Recognition in the case of independence from colonial rule-----	23
3.1.1 Recognition of Guinea-Bissau and non-recognition of Rhodesia-----	23
3.2 Recognition in the case of secession-----	26
3.2.1 Recognition of Biafra and non-recognition of Somaliland-----	26
3.3 Recognition in the case of unconstitutional changes of governments-----	30
3.3.1 The cases of Ghana, Uganda and Congo-Kinshasa-----	30
3.3.2 The case of Madagascar and Zimbabwe -----	32
3.4 Conclusion-----	34

CHAPTER FOUR

**DEVELOPMENTS IN INTERNATIONAL LAW WITH SPECIAL REFERENCE TO
DEMOCRACY AND HUMAN RIGHTS: LESSONS FOR ZAMBIA**

4.0 Introduction-----35
4.1 Democracy as an international law standard for recognition-----35
4.2 Protection of human rights as international law requirement for recognition-----38
4.3 The African Union’s approach on recognition-----39
4.4 Conclusion-----42

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusions-----43
5.1 Recommendations-----47
Bibliography-----51

CHAPTER ONE

1.0 Introduction

This chapter introduces and covers the basic aspects of the research. These being the background, statement of the problem, objectives of the study, research questions, definition of key concepts, rationale and justification of the research, and methodology. It then discusses the modes and forms of recognition.

1.1 Background to the study

The appearance on the international plane of a new state must be a matter of interest to all other states, especially in modern times, when so many contacts in trade, aviation, radio, and other human activities do not depend on geographical proximity and when there is general acknowledgement of the worldwide interest in the existence of democratic, stable and peace-loving governments.¹

The recent political developments in Zimbabwe and Madagascar, once again, tested the international community's ability to solve problems of unconstitutional change of governments. The question of non-recognition in respect of such governments was invoked as a weapon to deal with the situation. One striking thing that came out clearly from the international community's reaction towards the question of recognition, was the fact that recognition is an area where law and politics are very closely linked that it becomes difficult to say which considerations, whether legal or political, should be the determining factor. Whatever the case, the question of recognition arises time and again due to the changes taking place in the international field.

The past produces scores of changes as old states vanish or amalgamate with other states or state to form a new state or crumble and divide into several new states or former colonial territories may by liberation achieve statehood. Even in the case of existing states, revolutions occur and the status of the new government becomes a matter of concern to other states and governments, which previously had dealings with the displaced government.² Thus, recognition in all these cases becomes an important issue as it has the effect of affecting the relations of a new state and government with the existing states.

¹ P Jessup, A Modern Law of Nations, The MacMillan Company, New York, 1968. Page 43

² J Starke, Introduction to International Law, Butterworths, London, 1972. Page 140

Furthermore, Harris, underscores the importance of recognition when he asserts that an entity that is not recognised by other states will, for example, not have the rights and obligations in the law of state immunity and will have problems working in the international community if it is not admitted to international organisations.³ Accordingly, in order to have a desirable relationship among states, it is essential that states and governments should only give recognition to the new emerging entity that deserves it. This will in turn promote political stability, world trade and also preserve peace in the international plane.

It is imperative from the outset then, to briefly distinguish between recognition of states and of governments. As will be elaborated in the next chapter, recognition of a state is the act by which another state acknowledges that the political entity recognised possesses the attributes of statehood.⁴ Recognition of governments, on the other hand, involves different considerations altogether dependant on the recognising state's practice. It has not been doubted that a state has continuity in the sense that, its existence as a state is not affected by changes in governments, whether or not the new government has secured recognition from other states.⁵

Thus, recognition of a state does not necessarily imply recognition of a government in control of that state. It is possible to have a recognised state whose government is not recognised. For instance, Somalia remained a recognised state, after President Barre's Government was overthrown by guerrillas in 1991, even though there was a total or partial breakdown of institutions of law and order and hence, lacked any stable government to be recognised.⁶

In a nutshell, as Mwanakulanga has observed, the establishment of an efficient rule of law in the international community is the only way to keep the world from the danger of its plunging into the holocaust of a nuclear war, which if it ever comes, will mean an over-rall obliteration.⁷ Thus, the power of recognition in promoting the rule of law in the international sphere cannot be under estimated. It is only with good policies on recognition that this world would be guaranteed of good relations among member states of the international community.

It is trite that undemocratic changes of governments deprive citizens of their inherent right to freely express their will and to choose leaders of their choice. Thus, such undemocratic

³ D Harris, *Cases and Materials on International Law*, Sweet and Maxwell, London, 2004. Page 146.

⁴ P Jessup, *A Modern Law of Nations*. Page 44.

⁵ P Jessup, *A Modern Law of Nations*. Page 55.

⁶ D Harris, *Cases and Materials on International Law*. Page 101.

⁷ A Mwanakulanga, *New Nations and the Development of International Law*. Obligatory Essay submitted in part fulfilment of the award of Bachelor of Laws Degree at the University of Zambia, 1979. Page 1.

tendencies are in themselves violations of human rights which no civilised state can, in this day and era, tolerate. This link between democracy and human rights was emphasised by the then Secretary-General of the United Nations, Kofi Annan, when he asserted that:

Democratic government helps to guarantee political rights, protect economic freedoms, and foster an environment where peace and development can flourish. Today, as never before, countries around the world are seeking to establish pluralistic systems of government in which political leaders are elected by the will of the majority to fixed terms of office and exercise their authority within legal limits. This is a very hopeful trend for Africa's future because in the absence of genuinely democratic institutions contending interests are likely to seek to settle their differences through conflict rather than through accommodation.⁸

In this regard therefore, recognition can be used as a tool for achieving the protection of human rights and prevention of undemocratic changes of governments through either refusing to recognise or withdrawing recognition in respect of such governments. If used properly, it can serve as a deterrent to any unconstitutional changes of government in the future.⁹ Thus, Zambia is not exempted in taking the lead role to enhance good policies on the recognition of states and governments.

However, Zambia's past conduct on recognition is not satisfactory as it is characterised by some inconsistencies, lack of transparency and proper guidelines. For instance, when in 1967 Biafra declared its independence of Nigeria, of which it had constituted the eastern region, Zambia recognised it as an independent state although it had not entered into diplomatic relations. The statement given by the then Foreign Minister is evidence of the factors that influenced Zambia's recognition. It read in part as, "...we have been, and are still, most concerned about peace, stability and unity among the people of that area. We have been even more concerned about the amount of blood which is being shed for what is obviously a futile cause..."¹⁰

Thus, it can be discerned from that statement that Zambia was mainly influenced by the philosophy of humanism in its recognition, which mainly centres on the welfare of men. This approach derogated from the Organisation of African Unity (OAU) Charter of respecting international boundaries drawn by the former colonialists. It should be noted that earlier on in 1965, Zambia never followed this approach when it withheld its recognition of the Ian Smith

⁸ United Nations General Assembly. The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa; text presented to the United Nations Security Council by the Secretary-General, u.n. doc. a/52/871-s/1998/318.

⁹ K Kufuor, *The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future*, University of East London Press, London, 1994. Page 400

¹⁰ Zambia's recognition of Biafra as a sovereign and independent state, Statement by Foreign Affairs Minister Reuben C. Kamanga, May 20, 1968.

Government of Rhodesia, after the Unilateral Declaration of Independence from Britain, even though blood was also shed by the Smith Government during the guerrilla warfare in a quest to consolidate its rule.¹¹ Furthermore, in March 1976, the Soviet-and Cuban-backed Popular Movement for the Liberation of Angola (M.P.L.A.) led by Agostinho Neto, claimed military victory in Angola. Zambia withheld its recognition of Neto's Government stating that it wanted a government of national unity to be formed in Angola, despite the guerrilla warfare that led to a breakdown of peace, stability and unity in that country.

In contrast to the Angolan position, Zambia has not, to date, recognised Somaliland and its government, which declared its independence in the north west of Somalia in 1991, despite there being unity, a stable and effective government in control of its territory.¹²

In light of the above observed inconsistencies, therefore, it is quite clear that Zambia took into account different considerations in each situation. Notwithstanding its current measures, however, this paper argues that Zambia's practice on recognition does not go far enough and needs to be elaborated further with rules that bind it to adhere to articulated and transparent procedures.

The analysis and proposals in this paper seek to contribute to the discussion on how Zambia can deal with the problem of overthrow of constitutional regimes and the emergency of new states. For Zambia to be a meaningful state that contributes to political stability and development in Africa and the world at large, and thus help to arrest the progressively debilitating conditions on the continent, it must be an engine of democracy on the continent. It can be that engine if it adheres to and constructively reinforces its emerging position on the recognition of states and governments.

Questions that may be posed and that clearly call for consideration then are; how can Zambia deal with the problem of unconstitutional changes of governments and illegitimate accession to statehood? What factors influence Zambia's practice on recognition of states and governments? In addition, what principles underlie those factors? In what ways can these factors be improved to better the recognition practice of Zambia?

¹¹ D Harris, *Cases and Materials on International Law*. Page 110.

¹² D Harris, *Cases and Materials on International Law*. Page 101.

1.2 Statement of the problem

In this era of human rights and democracy, it cannot be reasonably disputed that coups and other non-democratic changes of governments have no safe haven. However, despite the recent political developments in the international plane such as those in Zimbabwe where there was a disputed election characterised by massive human rights violations and the unconstitutional change of government in Madagascar, most African states, took a rather disappointing passive role amidst the international community's call for non-recognition of such governments in order to arrest such political developments. Such political developments exposed most African states' deficiency in dealing with them and raises a lot of doubts as to whether indeed, there are adequate measures to cover for such eventualities.

This is further compounded by the fact that, as alluded to above and as argued in this paper, Zambia's past record on recognition has not been satisfactory. This is evident in the inconsistencies and lack of transparency over the years on recognition of states and governments, which to some extent, suggest lack of adequate measures on the practice. From the writer's inquiries, there seem to be very little critical minds on Zambia's practice on recognition, not because there are good policies in place, but because of complacency. Thus, it is the object of this paper to investigate where in the problem lies by reviewing Zambia's conduct on recognition over the years with a critical eye.

These political developments of unconstitutional changes of governments and illegitimate accession to statehood by some entities are bound to happen time and again. Accordingly, the question that may be posed is, how is Zambia's current practice on recognition of states and governments deficient in promoting a democratic, politically stable and peace-loving international community, and what measures should be put in place in order to remove this deficiency? This question forms the crux of the problem of this research and hence calls for a thorough research on this important subject that would help Zambia deal with the problem if and when it resurfaces.

1.3 Objectives of the study

The ultimate objective of this study is to critically analyse Zambia's practice and the legal regime on recognition of states and governments over the years in light of the developments in international law with a view to finding a meaningful path it should take in the future. The following are the specific objectives:

- i. To evaluate Zambia's practice and the legal regime on recognition of states and governments over the years from the first Republic to date.
- ii. To examine how the practice is deficient with regard to the developments in international law.
- iii. To highlight the practice of international organisations such as the African Union and determine what lessons Zambia can learn from it.
- iv. To determine the factors that influences Zambia's practice on recognition.
- v. Finally, to assess how Zambia can best deal with the problem of unconstitutional changes of governments and illegitimate attainment of statehood.

1.4 Rationale and justification of the study

The study is timely and pertinent considering the political developments in the international plane that have and are still bound to occur. It endeavours to abate the problem of observed inconsistencies and apparently lack of transparency and policy guidelines on recognition of states and governments that has led to the inability to properly deal with these occurrences and make proposals that effectively responds to the needs of the international community. This problem is not new as it started way back in the first Republic. Thus, it has become so entrenched in the system that each successive government has adopted it. The success of any legal regime rests not on the challenges or problems it has encountered in its operations but on its ability to provide meaningful solutions to the problems.

The importance of addressing the question of recognition of states and governments cannot be over emphasised. This is because it goes to the very root of peace and stability of nations that constitute the international community. It is indeed the concern of every state and the international community at large, that accession to statehood and any change of government should be done in an acceptable and legitimate manner. Thus, every state is expected to have a policy on recognition which is in furtherance of the interest of the international society.

The recent political developments in Zimbabwe where there was a disputed election characterised by massive human rights violations, and in Madagascar where there was an unconstitutional change of government, are all but clear indications of the significance of the question of recognition. Non-recognition of such unconstitutional governments acts as a deterrent of any future resurfacing of such unacceptable happenings. Recognition may be withheld whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. It is a weapon that a recognising state such as Zambia can use

to force a new government to make concessions to the demands of the recognising state. Thus, following such developments in the international plane, it is not expected of the Zambian government to be taking a rather passive role.

It is therefore against this background that the writer, as a student of international law, got interested to study the principles that must inform the practice of the Zambian government on recognition of states and governments. This is in a quest to provide meaningful proposals that might help address and abate the problem.

1.5 Research Questions

The following research questions guided the researcher in collecting the research data:

- i. How can Zambia deal with the problem of unconstitutional changes of governments and illegitimate accession to statehood?
- ii. How is Zambia's current practice on recognition of states and governments deficient in promoting a democratic, politically stable and peace-loving international community?
- iii. What measures should be put in place in order to remove this deficiency?
- iv. What factors, if any, influence Zambia's practice on recognition of states and governments?
- v. Has Zambia come to grip in her practice with the developments in international law on recognition?
- vi. Are there any challenges Zambia has and still is facing in deciding whether or not to confer recognition to new states and governments?

1.6 Methodology

The research work was a qualitative one. It involved mostly desk research while in a few instances, primary data in form of interviews was used. Secondary data used include international statutes, judicial decisions, textbooks, journals, articles and reports. Internet sources were also consulted especially where the above mentioned fell short of the required data or where it was difficult to access them. The research thus, employed both the legal centralist approach and the pluralistic approach in order to obtain maximum results.

1.7 Operational definition of key terms

The following are the definitions of key terms that were encountered in this research.

Recognition: Acknowledging as reality something which has hitherto been tentative, namely the independence of the body claiming to be a state, and to pronounce the recognising state's keenness to accept, the usual consequences of that fact, namely the usual courtesies of international intercourse.

Government: A stable political organisation.¹³

State: An entity that possesses a permanent population; a defined territory; a government; and capacity to enter into relations with other states.¹⁴

1.8 Modes and forms of recognition

Recognition may either be express, that is, in the form of a formal and unambiguous communication or it may be implied. As rightly stated by Harris:

There are no precise catalogue of acts that imply recognition. Entry into diplomatic relations clearly implies it, as, normally does the making of a bilateral treaty arranging for commercial or other relations or support for a state's admission to the United Nations. The crucial question is that of intention. Participation in an international conference with a state or government will not indicate recognition if it is made clear that it is not intended to have this effect.¹⁵

Thus, where a state acts in a certain manner, it may be possible to impute recognition by that state of another state or government. Therefore, a state has to make it clear by way of an express declaration that a particular action with another party is not to be interpreted as implying any recognition. This happened in 1954 when Foreign Ministers from the United Kingdom, the United States, the USSR and France convened the Geneva Conference to discuss Korea and Indochina and invited the government of the People's Republic of China and the two Koreas. A communiqué was issued stating that it was understood that neither the invitation to, nor the holding of, the above mentioned meeting shall be deemed to entail diplomatic recognition in any case where it has not already been accorded.¹⁶

¹³ D Harris, Cases and Materials on International Law. Page 101

¹⁴ The Montevideo Convention on Rights and Duties of States, 1933. Article 1

¹⁵ D Harris, Cases and Materials on International Law. Page 146

¹⁶ Communiqué on the 1954 Berlin Conference dated February 18, 1954, Documents on American Foreign Relations (1954), Page 219, quoted in D Harris, Cases and Materials on International Law. Page 147

It is worth to note that in some instances recognition may be conditional. This means that it may be given only subject to fulfilment of certain specified conditions. One notable instance in this regard was the Litvinov Agreement of 1933 whereby the United States recognised the Soviet government upon the latter undertaking to avoid acts prejudicial to the internal security of the USA, and to come to a settlement of various financial claims.¹⁷

Recognition may take two forms namely, *de facto* and *de jure*. International law conditions for the recognition of a new regime as the *de facto* government of a state requires that the new regime should have, in fact, effective control over most of the state's territory and that this control should seem likely to continue. On the other hand, the conditions for the *de jure* recognition of a government requires not merely effective control over most of the state's territory, but that the new regime should also be firmly established.¹⁸ Thus, as Shaw rightly states:

Recognition *de facto* implies that there is some doubt as to the long-term viability of the government in question. Recognition *de jure* usually follows where the recognising state accepts that the effective control displayed by the government is permanent and firmly rooted and that there are no legal reasons detracting from this, such as constitutional subservience to a foreign power. *De facto* recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de jure* recognition when the doubts are sufficiently overcome to extend formal acceptance.¹⁹

Furthermore, he asserts that:

By this method a recognising state could act in accordance with political reality and its own interests while reserving judgment on the permanence of the change in government or its desirability or legality. It is able to safeguard the affairs of its citizens and institutions by this, because certain legal consequences will flow in municipal law from the recognition.²⁰

In practice, *de facto* recognition does not generally involve the exchange of diplomatic relations while *de jure* recognition does.

1.9 Conclusion

This chapter has introduced the research and examined the basic features of recognition. The next chapter proceeds to discuss the legal issues of recognition. Considered first, is the question whether recognition is purely a political act or it involves legal considerations as well. Thereafter, the recognition of states is well thought-out, under which is discussed the

¹⁷ M Shaw, *International Law*, Cambridge University Press, Cambridge, 2008. Page 465

¹⁸ D Harris, *Cases and Materials on International Law*. Page 157

¹⁹ M Shaw, *International Law*. Page 460

²⁰ M Shaw, *International Law*. Page 460

criteria of statehood in international law and the theories governing recognition. The chapter further focuses on the recognition of governments, which looks at the Estrada doctrine and the legal effects of recognition on both the state and the individual.

CHAPTER TWO

THE LEGAL ISSUES OF RECOGNITION

2.0 Introduction

This chapter discusses the legal and political issues of recognition of states and governments. The focus is on the recognition of states under which is considered the criteria of statehood and how state practice has evolved some additional criteria of statehood besides those contained in the Montevideo Convention, 1933, which is generally accepted as reflecting customary international law. The chapter then proceeds to look at the recognition of governments. Under this, the requirements of effectiveness and legitimacy, which are the main requirements for the recognition of governments in international law, are the centre of discussion. The discussion extends further to look at the political influences on these requirements.

Finally, the chapter concludes by looking at the legal consequences of recognition both internationally and internally on the state and government, and also on the individual.

2.1 Recognition of states

2.1.1 Statehood

It is necessary to determine whether recognition should be considered to involve legal or political considerations. The answer must be that both types of considerations are involved. There are and should continue to be certain definite criteria for determining whether an entity has the necessary attributes of statehood, that is, defined territory, permanent population, and a sufficient independent government able and willing to enter into international relations and to assume and discharge international obligations.²¹ The fixing of those criteria is in the nature of a legislative act for which the Montevideo convention of December 26, 1933 on Rights and Duties of States afford a model. Such a legislative act might take the form of a general convention proposed by the General Assembly and submitted to the states for ratification.²²

²¹ Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933.

²² P Jessup, A Modern Law of Nations, The MacMillan Company, New York, 1968. Page 46

Even when one comes to consider the so-called conditional recognition which, for some time now, has been the practice of some nations, Baty properly points out that:

Any entry into relations with the new state, as a governing authority, implies recognition of its state-hood. It follows that recognition cannot be conditional, either it is a fact or it is not. The very essence of recognition is that the recognising authority thereby declares that it has satisfied itself that the recognised authority possesses the distinguishing marks of a state. To say that one recognises that it has them, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is right if she will promise to be a good girl.²³

Thus, the foregoing exposition shows that recognition though invariably is overtaken by political considerations, has a strong legal element. This is so because a state cannot rely purely on political factors as a basis for according recognition. First and foremost, an entity to be recognised has to meet the international law requirements for statehood as laid down in the Montevideo Convention on the Rights and Duties of States, 1933, which is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law.²⁴

It is worth to note that besides the traditional requirements of statehood at customary international law, recent practice indicates the evolvement of some additional requirements. These include the prohibition of the illegal use of force, respect of the right of self-determination and respect for human rights in general (not only of the right of self-determination).²⁵

The requirement of prohibition of the illegal use of force has its origin from Article 2(4) of the United Nations Charter.²⁶ Crawford argues in relation to the protection of states provided under Article 2(4) that:

It extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness. [However] [t]he question is whether modern law regulates the creation of states to any greater degree than this, in a situation involving illegal use of force.²⁷

Furthermore, Crawford argues that:

Illegality of intervention in aid of independence of a self-determination unit does not then, as a matter of law, impair the status of a local unit. On the other hand, *semble*, where a state

²³ Baty, So-called *De Facto* Recognition, 31 Yale L.J. 1922. Page 469

²⁴ D Harris, Cases and Materials on International Law, Sweet and Maxwell, London, 2004. Page 99

²⁵ R Piotrowicz and B Tsamenyi, Public International Law: An Australian Perspective, Oxford University Press, Melbourne, 2005. Page 191

²⁶ United Nations Charter, Article 2(4)

²⁷ J Crawford, The Creation of States in International Law, At the University Press, Oxford, 2006. Page 132

illegally intervenes in and foments the secession of part of a metropolitan state, other states are under the same duty of non-recognition as in the case of illegal annexation of territory. An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a state.²⁸

Thus, Article 2(4) accords protection to states from having their international personality extinguished through the illegal use of force. It also provides a basis for non-recognition of an entity that emerges through the illegal use of force.

The right to self-determination has emerged to be another additional requirement of statehood besides those contained in the Montevideo Convention. This right is provided for in Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As rightly asserted by Harris, “the Southern Rhodesian case may indicate that an extra requirement of statehood has evolved, namely that independence be achieved in accordance with the principle of self-determination.”²⁹ Southern Rhodesia was never recognised by any state despite it having satisfied all the requirements of statehood at customary international law because its independence was achieved in furtherance of its illegal racist policies and contrary to the principle of self-determination.³⁰

In addition, states created in violation of human rights of the character of *jus cogens* may not receive recognition in this human rights era.³¹ This then adds to the list of additional requirements of statehood besides the traditional ones at customary international law.

However, it is stating the obvious to point to the very strong political influences that bear upon this topic. It is a fact that in more cases than not the decision whether or not to recognise usually depends more upon political considerations than exclusively legal factors. Recognition is not merely applying the relevant legal consequences to a factual situation, for sometimes a state will not want such consequences to follow, either internationally or domestically.³²

²⁸ J Crawford, *The Creation of States in International Law*. Page 99

²⁹ D Harris, *Cases and Materials on International Law*. Page 110

³⁰ D Harris, *Cases and Materials on International Law*. Page 110

³¹ J Dugard, *Recognition and the United Nations*, Grotius Publications, Cambridge, 1987. Page 102

³² M Kaplan and N Katzenbach, *The Political Foundations of International Law*, New York, 1961. Page 109. Gives an example of the United States when it refused for many years to recognise either the People’s Republic of China or North Korea, not because it did not accept the obvious fact that these authorities exercised effective control over their respective territories, but rather because it did not wish the legal effects of recognition to come into operation.

Notwithstanding the considerations that might have been instrumental, once recognition has occurred, the pertinent legal consequences will flow. As such, recognition constitutes participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically like in municipal courts.

2.1.2 Theories of recognition

Basically, there are two theories of recognition and these are the constitutive and the declaratory theory. According to the constitutive theory, it is only and exclusively through recognition that a state becomes an international person and a subject of international law. Thus, it is the act of recognition by the existing states that creates a new state and grants it legal personality under international law and not the process through which it acquired its independence. Hence, the will and consent of existing states establishes new states.³³

This theory has its own shortcomings namely; a state that is not recognised will not be subject to the obligations imposed by international law such as non-intervention and non-use of force. It simply implies that an unrecognised state has neither rights nor duties under international law. Besides, a further complication occurs in an event of partial recognition where an entity is recognised by some states but not others. What then will be the position of such an entity?

The second theory is the declaratory one which is more in line with practical realities and is supported by both modern writers and arbitral practice. According to this theory, a state may exist without being recognised, and where such is the case, then, it has the right to be treated by them as a state whether or not it has been formally recognised by them.³⁴ Thus, recognition is merely an indication of acceptance of the already existing situation by states. This means that a particular factual situation is what creates a state and not the consent of the existing states. Hence, a new state does not have to await the procedure of recognition by other states but instead, it is legally constituted by its own efforts and circumstances.

However, the declaratory approach is not satisfactory as it does not explain why recognition is still important. Indeed:

³³ J Crawford, *The Creation of States in International Law*. Page 19

³⁴ I Brownlie, *Principles of Public International Law*, At the University press, Oxford, 2003. Page 87

It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognizing it as such. If it were to acquire this legal status before and independently of recognition by the existing states ... this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state.³⁵

Thus, since the declaratory theory postulates that recognition does not bring a state into legal existence which did not exist before, it simply implies that non-recognition has little or no relevancy since an entity will already have acquired legal existence by virtue of the factual situation. Hence, there will be virtually no consequences of non-recognition.

Furthermore, legal character under international law, which non-recognition was planned to thwart, would by now have been acquired, and non-recognition would then in a sense be ineffective and without this flaw, of non-recognition, having any momentous legal consequences under international law.³⁶

Therefore, the foregoing argument suggest that despite the general perception that recognition is merely declaratory, it cannot be reasonably disputed that it does have some constitutive elements since international personality may depend on recognition.³⁷ It is in view of this line of argument that some writers suggest that existing states have a duty to grant recognition to an entity once the criteria of statehood have been met, and thus, granting it rights and duties of a state.³⁸

In most instances, however, state practice supports a middle position between these two perceptions, declaratory and constitutive. The act of recognition by one state of another indicates that the former regards the latter as having conformed with the basic requirements of international law as to the creation of a state. It acknowledges a factual situation, that is, meeting of the statehood criteria, and creates a new legal situation, that is, awards statehood to the entity in question. Suffice it to say, recognition is highly political and is given in a number of cases for purely political reasons.³⁹

³⁵ C Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*, Peter Lang Verlag, Frankfurt, 1998. Page 494

³⁶ C Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*. Page 494

³⁷ C Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*. Page 494

³⁸ H Lauterpacht, *Recognition in International Law*, At the University Press, Cambridge, 1948. Page 12

³⁹ R Piotrowicz and B Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 2005. Page 193

2.2 Recognition of governments

While the recognition of states involves examining the factual situation in terms of the criteria of statehood, recognition of governments involves different considerations and is even more political and controversial than the recognition of states. It has become a political tool for achieving foreign policy goals.⁴⁰ Notwithstanding this, Shaw observes that:

Recognition constitutes acceptance of a particular situation by the recognising state both in terms of the relevant factual criteria and in terms of the consequential legal repercussions, so that, for example, recognition of an entity as the government of a state implies not only that this government is deemed to have satisfied the required conditions, but also that the recognising state will deal with the government as the governing authority of the state and accept the usual legal consequences of such status in terms of privileges and immunities within the domestic legal order. Political considerations have usually played a large role in the decision whether or not to grant recognition. However, certain criteria have emerged to cover recognition of illegal changes in government. Such criteria amounted to an acceptance of the realities of the transfer of power and suggested that once a new government effectively controlled the country and that this seemed likely to continue, recognition should not be withheld.⁴¹

Recognition of governments is only relevant where a particular regime usurps power unconstitutionally.⁴² Thus, governments that come to power by constitutional means, such as elections, do not require recognition in international law.

However, it must be noted that in all situations where the recognition of a government is in question, the effectiveness and legitimacy of such a government are the overriding considerations.⁴³ Thus, the efficacy of a government is a *sine qua non* of recognition of an entity as the government of a state; recognition of an entity before it has become effective is “precipitate” and intervention in a state’s affairs contrary to international law.⁴⁴ Hence, as one of the requirements of statehood, government is a *sine qua non* of a state as there cannot be a government without a state and vice-versa.

The requirement of a government to have effective control does not consider how the government has come to power but simply admits the situation of a new effective government being in power. This proposition is fortified by the case of **Uganda v. Commissioner of Prisons Ex parte Matova**⁴⁵. In that case, Milton Obote became Prime Minister of Uganda pursuant to the 1962 constitution. In 1966 he declared himself executive President and made

⁴⁰ M Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, Macmillan, Basingstoke, 1997. Page 3

⁴¹ M Shaw, *International Law*, At the University Press, Cambridge, 2008. Page 454

⁴² D Harris, *Cases and Materials on International Law*. Page 156

⁴³ B Roth, *Governmental Illegitimacy in International Law*, At the University Press, Oxford, 1999. Page 136

⁴⁴ B Roth, *Governmental Illegitimacy in International Law*. Page 136

⁴⁵ (1966) EA 514

the 1966 constitution. The court after applying Kelsen's theory of law stated that the test of legality of the new regime is that of effective control which is a question of fact. It then found as a fact that the new regime was in effective control and thus, the 1966 constitution was valid.

As Kelsen properly asserted, the government brought into lasting power by a revolution or a *coup d'état* is, according to international law, the legitimate government of a State, whose character is not affected by these events.⁴⁶ Thus, international law recognises revolutionary governments without paying regard to the mode of ascending to power as long as they are in effective control of the state's territory.

The effective control concept was also relied upon in the **Tinoco Arbitration**⁴⁷. In that case, Chief Justice Taft, the sole arbitrator, referred to the problems of recognition or non-recognition as relating to the Tinoco administration. He decided that since the administration was in effective control of the country, it was the valid government irrespective of the fact that a number of states, including the United Kingdom, had not recognised it.

He further stated that where recognition has been refused because of the illegitimacy or irregularity of origin of the government in question, rather than because of the lack of effectiveness of its control in the country, such non-recognition loses some of its evidential weight. Thus, this then is where the question of recognition by the states come into play. As already alluded to, the legal rules that need to guide states when granting recognition are that the new government to be recognised should have effective control over the state's territory and also that if effective control is lost by an old government, it should cease to be regarded as the government of that state.⁴⁸

Besides effectiveness as a requirement for recognition of governments, there is also the principle of legitimacy or the Tobar doctrine. This principle requires that a government which came to power unconstitutionally should not be recognised until the change has been accepted by the people.⁴⁹ Shaw summarises the principle as follows:

⁴⁶ H Kelsen, *Principles of International Law*, Holt, Rinehart and Winston, New York, 1966. Page 220

⁴⁷ (1923) 1 R.I.A.A. 369

⁴⁸ M Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, Macmillan, Basingstoke, 1997. Page 35

⁴⁹ M Shaw, *International Law*. Page 457

Logically, of course, the concept amounts to the promotion of non-recognition in all revolutionary situations and it is, and was, difficult to reconcile with reality and political consideration. In American eyes it became transmuted into the Wilson policy of democratic legitimacy. Where the revolution was supported by the people, it would be recognised. Where it was not, there would be no grant of recognition. It was elaborated with respect to the Soviet Union until 1933, but gradually declined until it can now be properly accepted merely as a political qualification for recognition to be considered by the recognising state.⁵⁰

However, as will be seen in the following chapters, individual states have adopted some extra requirements on recognition of governments such as democratic legitimacy by the United States and how the new regime adheres to the protection of human rights.

2.2.1 The Estrada Doctrine⁵¹

The universal trend in state practice has been that of moving towards minimising the role of recognition, that is, from explicit recognition of governments to not recognising at all.⁵² This new approach adopted by an increasing number of states is in accord with the Estrada doctrine. Galloway observes in line with this new approach as follows:

In each region [of the world] the movement is towards de-emphasising or completely eliminating the recognition issue. However, it is doubtful that the recognition question will be eliminated in the foreseeable future because, in a significant minority of cases, nations consider the political factors strong enough to make an issue of recognition. The desire to de-emphasise recognition in the majority of cases has resulted in the adherence of over thirty states to the Estrada Doctrine, but with the proviso that in certain situations they grant recognition based on political considerations. The desire to de-emphasise recognition also affects the adherence of well over thirty other states to an ad hoc policy based on political considerations in which recognition is usually downplayed and finessed by the euphemism that relations are continuing, or that relations are being resumed. Taken together, the two approaches account for over 75 of the states included in this study.⁵³

The Estrada doctrine has gained acceptance simply because most states allege that express recognition of a government was misunderstood by other states to mean approval of the new regime. For instance, the United States stated in 1977 that:

One result of such complex recognition criteria was to create the impression among other nations that the United States approved of those governments it recognised and disapproved of those from which it withheld recognition. This appearance of approval, in turn, affected our decisions in ways that have not always advanced U.S. interests. In recent years, U.S. practice has been to deemphasise and avoid the use of recognition in cases of changes of governments

⁵⁰ M Shaw, *International Law*. Page 457

⁵¹ This doctrine is named after the Mexican Minister of Foreign Affairs Genaro Estrada who, in 1930, made a proclamation on behalf of Mexico that its government in the future shall issue “no declaration in the sense of grants of recognition, since [Mexico] considers that such a course is an insulting practice and one which, in addition to the facts that it offends sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes.” *Estrada Doctrine* (1930), reprinted in B Roth, *Governmental Illegitimacy in International Law*, Oxford University Press, Oxford, 1999. Page 137

⁵² D Harris, *Cases and Materials on International Law*. Page 156

⁵³ Galloway, *Recognising Foreign Governments* (1978). Page 138. Quoted from D Harris, *Cases and Materials on International Law*. Page 156

and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments. The administration's policy is that establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct our affairs with other governments directly.⁵⁴

This approach of the United States is shared by many other countries such as Britain and Australia. This is evidenced from the statement of the then British Foreign Secretary, Lord Carrington to the effect that, this practice, of express recognition, has sometimes been misunderstood and despite explanations to the contrary, recognition has been interpreted as implying approval. For example, in situations where there might be genuine public concern about the violations of human rights by the new regime, it has not sufficed to say that a proclamation of recognition is simply an impartial procedure.⁵⁵

Thus, the Estrada doctrine places much emphasis on diplomatic relations with the new regime without expressing any opinion as to recognition, *vel non*. Hence, states now confine themselves to questions of whether to continue with diplomatic relations with the new regime and not express recognition. However, despite the decline in express recognition or non-recognition of governments, state practice still suggest that in some instances, states do depart from the Estrada doctrine. These instances are summed up by Talmon in three categories as follows:

[1] There exist two or more local de facto authorities each claiming to be the only legitimate government of a (recognized) State ... [2] the government of a State claims to continue to be the government of a part of the State's territory that has de facto seceded ... [3] an authority in exile claims to be the government of a State which is under the effective control of a colonial power, a belligerent occupant or its local puppet, or an authority which came to power by coup d'état or revolution.⁵⁶

Thus, despite its advantages of acknowledging the full sovereignty of the state and eliminating foreign interference in internal affairs of governments which are not constantly stable⁵⁷, the Estrada doctrine suffers from the disadvantage of being unrealistic in situations where there are competing governments. Besides, Jessup rightly observes the difficulties that are implicit in the Estrada doctrine as follows:

Granted that the diplomatic relations remain unaffected by changes of government, with whom are the foreign diplomats to deal? Should they continue to carry on business with the local officials who are in the capital, even if the revolutionarists are in de facto control of all the rest of the country? Should they carry on the business with the revolutionary leaders if the

⁵⁴ 1977 US Department of State statement, reprinted in D J Harris, Cases and Materials on International Law. Page 159

⁵⁵ Statement by the Foreign Secretary (Lord Carrington), Hansard, HL Vol. 408, cols 1121-1122. April 28, 1980.

⁵⁶ S Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile, Clarendon Press, Oxford, 1998. Page 7

⁵⁷ P Jessup, A Modern Law of Nations, The MacMillan Company, New York, 1968. Page 61

latter seize the capital, although the government to which the diplomats were originally accredited retains control of all the rest of the country? Will the “constitutional” government be quite willing that the foreign representatives should deal with revolutionary leaders in certain parts of the country? If money payments should fall due to the state during a revolutionary disturbance, to whom should the sums be paid?⁵⁸

Therefore, the above observation is a clear indication that the Estrada doctrine has its own inherent difficulties. These difficulties cannot be resolved even by accepting the argument that the Estrada doctrine assumes that diplomatic representatives should be considered as accredited to the state and not to the government.⁵⁹ As a result states are justified on the necessity of choosing between rival claimants by way of express recognition.

2.3 The legal effects of recognition

Although recognition is invariably overtaken by political considerations, it nevertheless entails significant legal consequences both internationally and domestically.

2.3.1 Internationally

Internationally, an entity that is not recognised will have difficulties asserting its rights for example, in the law of state immunity, and will have difficulties functioning in the international plane if it is not admitted to international organisations.⁶⁰

It should be noted that even though recognition is the legal acknowledgement of the factual state of affairs, it should not however be easily assumed that non-recognition will deprive an entity of the rights and duties under international law unless it is, of course, a proper case where recognition is constitutive of the legal duty.⁶¹ As noted above, recognition is independent of the political existence of a state and hence, an unrecognised state must still be deemed subject of international law.

2.3.2 Domestically

Recognition also has important consequences internally. Since recognition is principally a political act reserved to the executive branch of government, the courts cannot recognise a state or government, but instead, will enforce the legal consequences which flow from the

⁵⁸ P Jessup, *A Modern Law of Nations*. Page 62

⁵⁹ P Jessup, *A Modern Law of Nations*. Page 62

⁶⁰ D Harris, *Cases and Materials on International Law*. Page 146

⁶¹ M Shaw, *International Law*. Page 470.

executive's political discretion and give legal effect to its decisions.⁶² Where the executive has extended recognition to a particular state or government and has informed the judiciary by way of a certificate, that state or government will stand on a different footing within the domestic sphere in so far as its rights and duties are concerned.⁶³

In this regard, recognition itself is constitutive because the act of recognition confers legal personality on that state or government. As Shaw stated, it may take legal action in the domestic courts and be granted immunity from suit in certain instances. Its own parliamentary and executive acts will be given effect to in the courts of the recognising state and its own diplomatic representatives will be able to claim the assorted immunities accorded to the official envoys of a recognised state. In addition, it will be at liberty to ownership in the recognising state of property belonging to its predecessor.⁶⁴

An individual also may have a direct interest in the recognition of a state. This according to Jessup may happen where, if he travels in a foreign country, he is concerned with the acknowledgement of his passport issued by the authority of the state whose nationality he claims. If he is a member of an unrecognised entity, he may be as badly off as a stateless person.⁶⁵ Thus, besides having effects on states and governments, recognition may have direct effects on individuals as well.

2.4 Conclusion

As the discussion above has shown, the act of recognition is fundamentally a political act reserved to the executive branch of government, that nevertheless entails legal consequences. However, in the exercise of this political power, first and foremost, the recognising state has to ensure that an entity seeking recognition has satisfied the criteria for recognition under international law. Thus, it is in this regard that it becomes difficult to separate political considerations from legal ones, and in most cases, it is the former that takes prominence.

This chapter has examined how the recognition of states has evolved to include additional requirements of statehood. It has also examined the recent trend in state practice on recognition of governments of moving towards minimising the role of recognition and

⁶² M Shaw, *International Law*. Page 471

⁶³ M Shaw, *International Law*. Page 471

⁶⁴ M Shaw, *International Law*. Page 471

⁶⁵ P Jessup, *A Modern Law of Nations*. Page 65

focusing on whether or not to have or continue diplomatic relations with the new regime. This new approach stems from the Estrada doctrine, which to some extent, is as a result of political considerations on recognition. This paper in this chapter has argued that the Estrada doctrine, despite its increasing acceptance by most states, has its inherent difficulties in situations of different rivals claiming to be the government of the state.

In view of this, this chapter concludes that political considerations must not completely overlook the legal elements whenever the issue of whether or not to extend recognition arises but the two must be mutually dependent. Being one branch of international law, recognition is a tool at the disposal of the existing states that can help strengthen international law in its quest to bring about international peace and stability of states.

Having laid this background on recognition of states and governments, the next chapter focuses on the practice of Zambia on recognition.

CHAPTER THREE

A CASE STUDY OF ZAMBIA'S PRACTICE ON RECOGNITION

3.0 Introduction

This chapter critically analyses the cases of Zambia's practice on recognition of states and governments from the first Republic to date.

It is imperative from the outset to state that Zambia's membership of the non-aligned bloc contributed significantly to its practice on recognition. On December 6, 1963, a document known as the "UNIP Policy" was issued. Under the subheading "Foreign Relations", it was stated that non-alignment will be followed in foreign affairs and that Zambia will be maintaining friendly relations with all countries not hostile to her irrespective of their ideologies. The policy of non-alignment was also in accordance with the Organisation of African Unity Charter (OAU).⁶⁶ In pursuance of this policy Zambia announced its recognition of China and West Germany on October 27, 1964, against the wishes of the super powers as the United States had not recognised communist China while the Soviet Union had not recognised West Germany.

When the conference of Non-Aligned Nations was held in Lusaka in September 1970, President Kaunda in his opening speech denounced western nations for their political, economic and military support for the racist regimes in South African and Rhodesian governments stating that such actions by western nations gave stamp of recognition to dominance of majority by minority.⁶⁷ Thus, the policy of non-alignment made it possible for Zambia to freely attack publicly the two blocs, western and eastern. It also made it possible for Zambia to freely make decisions on recognition without much external influence.

The following is a case study of Zambia's practice on recognition of states and governments over the years.

3.1 Recognition in the case of independence from colonial rule

3.1.1 Recognition of Guinea-Bissau and non-recognition of Rhodesia

In the 15th century, Guinea was discovered, and the Cape Verde Islands were under the colonisation of Portugal from about 1460. On September 19, 1956, the *Partido Africanus da*

⁶⁶ Organisation of African Unity Charter (OAU), Article III (7)

⁶⁷ Africa Diary-Weekly Record of Events in Africa, 1970. Page 24213.

Independencia da Guine edo Cabo Verde (PAIGC), was formed by Amilcar Cabral in Bissau. In 1961, PAIGC took an explicit armed confrontation fighting the colonial army until their triumph after capturing the camp of Copa. On September 24, 1973, the country's "first popular National Assembly" which met in the "liberated area" proclaimed the Sovereign and Democratic Republic of Guinea-Bissau according to a statement published by PAIGC in Dakar on September 26, 1973.⁶⁸

This edict was termed as a "propaganda act" by the Portuguese delegation at the United Nations and that the supposed independence of the new state was a "fiction devoid of any legal or moral foundation and corresponding in no way to the conditions prevalent in this Portuguese province."⁶⁹ However, despite this resistance by Portugal, Keesing's states that "within four weeks of its proclamation, the new "Republic" was officially recognised by over 70 governments of non-aligned or Communist countries. These included most member states of the Organisation of African Unity (OAU) and several Asian states."⁷⁰

On November 2, 1973, the United Nations General Assembly with ninety-three votes to seven with thirty abstentions adopted a draft resolution sponsored by sixty-three member states, welcoming the independence of the Republic of Guinea-Bissau and condemned Portugal for its illegal occupation of the Republic.⁷¹ Portugal gave *de jure* recognition of Guinea-Bissau on September 10, 1974.

As alluded to, Zambia was one of the first seventy countries to have recognised Guinea-Bissau. This recognition by Zambia in light of Portugal's resistance to acknowledge Guinea-Bissau's Independence, cannot be disputed in terms of international law as contained in the charter of the United Nations. Article 73(b) of the UN charter provides for member states with colonies to develop self-government, take due account of political aspirations of the peoples, and to assist them in the progressive development of their free political institution.⁷²

In instances in which the metropolitan state forcibly denies self-determination and where a liberation movement is supported by the inhabitants and controls considerable territory, the circumstances would come out to be that the principle of self-determination operates as it

⁶⁸ Keesing's Contemporary Archives-Weekly Diary of World Events, November 12-15, 1973. Page 26196A

⁶⁹ Keesing's Contemporary Archives. Page 26196A

⁷⁰ Keesing's Contemporary Archives. Page 26196A

⁷¹ General Assembly Resolution 3061 (XXVIII), G.A.O.R., 28th Session, Supp. 30. Page 2.

⁷² United Nations Charter (Hereinafter called the UN Charter), Article 73(b)

were to shift legal sovereignty to the self-determination unit, thereby, legitimising recognition of it by other states.⁷³

Thus, Portugal being the metropolitan state, violated the provisions of Article 73(b) of the UN Charter by not developing self-government and not taking due account of the political aspirations of the peoples and hence, member states of the UN who recognised Guinea-Bissau did not violate the sovereignty of Portugal over Guinea-Bissau and by the same token, the UN was not in breach of Article 2(7) of its Charter.

Thus, Zambia's recognition of Guinea-Bissau against the wishes of Portugal was justified under international law. However, a sharp contrast to the Guinea-Bissau case in Zambia's practice is to be found in the earlier case of Rhodesia.

A policy of no independence before majority rule was adopted by the British government, which meant that colonies with a considerable population of white settlers would not obtain independence except under conditions of majority rule. The European minority Rhodesian government, led by Ian Smith opposed the policy. The British government ruled over the self-governing colony of Southern Rhodesia until consultations between the colonial government and the British government broke down in 1965.⁷⁴

Smith's government declared the country independent from British rule on November 11, 1965, in what became known as the Unilateral Declaration of Independence (UDI). The rebel Smith Government wanted in this way to continue white rule in Rhodesia. On the orders of Queen Elizabeth II, Ian Smith and his ministers were pronounced suspended from office. The Governor representing the monarch called on the armed forces, the police, civil service and the general public to desist from all acts furthering the objectives of the illegal authorities.⁷⁵

The international community condemned the UDI. The UN Security Council authorised a wide-ranging regime of economic sanctions and called upon all states not to recognise this illegal racist minority regime. However, not all states complied with these sanctions as Iran South Africa, Israel and Portugal helped Rhodesia in an assortment of ways.⁷⁶

⁷³ J Crawford, *The Creation of States in International Law*. Page 99

⁷⁴ <http://www.en.wikipedia.org/wiki/Rhodesia>. (Accessed on November 21, 2010).

⁷⁵ *Africa Diary-Weekly Record of Events in Africa*, November 27-December 3, 1965. Page 2619A

⁷⁶ J Crawford, *Creation of States in International Law*. Page 99

Zambia joined the international community in refusing to recognise Rhodesia and condemning the UDI. This is evidenced in the broadcast of November 11, 1965, by President Kaunda under which he condemned the UDI and alleged that two battalions of white Rhodesian troops were dug in along the Zambezi river and warned Smith that Zambia would not hesitate to meet force with force if the territory were invaded or violated.⁷⁷

The non-recognition of Rhodesia raises some issues to be resolved. First of all, it cannot be disputed that Rhodesia had complied with the requirements of statehood in the Montevideo Convention as it had a permanent population; a defined territory; a government; and capacity to enter into relations with other states. One would then wonder where in the problem was? It seems therefore, that Zambia and other states in the international community adopted some additional requirements of statehood, discussed in chapter two. One such additional requirement is as Harris puts it that independence be obtained in accordance with the principle of self-determination.⁷⁸

Thus, in contrast to the Guinea-Bissau case, Smith's regime was a white minority that did not qualify as a self-determination unit and hence, his UDI ran counter the aspirations of the people of Southern Rhodesia for self-determination. Therefore, Smith's independence was not achieved in accordance with the principle of self-determination. Furthermore, the UDI violated Article 73 of the UN Charter requiring colonial masters to prepare the peoples of their dependencies for eventual independence.

In this regard therefore, Zambia's non-recognition of Rhodesia went beyond considering the traditional requirements of statehood and took into account additional requirements originating from general international law. To this end, Zambia can be said to have had adhered to the rules of international law on recognition.

3.2 Recognition in the case of secession

3.2.1 Recognition of Biafra and non-recognition of Somaliland

The Biafran announcement of independence from Nigeria on May 30, 1967, came after a period of political tensions in the country. This was evidenced in the two military coups that

⁷⁷ Keesing's Contemporary Archives-Weekly Diary of World Events, December 18-25, 1965. Page 21135B

⁷⁸ D Harris, Cases and Materials on International Law. Page 110

happened in 1966, that is, one on January 15, and another on August 1.⁷⁹ These political tensions continued to destabilise the country despite the Head of the Federal Military Government, Colonel Yakubu Gowon's, warning that he was resolute to uphold the unity of Nigeria and that "if circumstances compel me to preserve the integrity of Nigeria by force, I shall do my duty to my country."⁸⁰ Furthermore, he also reiterated the indivisibility of Nigeria and gave a strong caution to foreign individuals and governments not to attempt to foster any secession as was the case in Katanga.⁸¹

Thus, as reported by Africa Diary, "the east's secession came after 18 months of bitter inter-tribal strife and bloodshed and mounting evidence that there appeared to be no room for compromise..."⁸² The Nigerian civil war that broke out as a result of the secession only came to an end on January 12, 1970, after the Biafran Army Chief surrendered to the Nigerian Federal Government.

Amidst the Nigerian civil war, Zambia extended her recognition of Biafra as a sovereign and independent state on May 20, 1968. Because of what it is worth to this study, the salient aspects of the statement by the then Minister of Foreign Affairs, Mr. Reuben Kamanga deserves to be partially reproduced. It read as follows:

The tragedy which has befallen the Federation of Nigeria is a most unwelcome event in the phase of Africa's development. The current war and the atrocious exercises committed in waging the war, the loss of human life and property have shaken this continent and there are no prospects yet that Biafra can yield to what has almost become a war of attrition. The Zambian Government has been concerned about the future of this area of Africa. We have been, and are still, most concerned about peace, stability and unity among the people of that area. We have been even more concerned about the amount of blood which is being shed for what is obviously a futile cause. War, in our opinion, will not induce surrender. It will, as had already been seen, continue to widen the gap between the two combatants and increase fear among those who are the victims of war. Even before the crisis burst into military hostilities, the Zambian Government did everything in its power to prevent the increasing tension from escalating into a shooting war. Since the outbreak of war, Zambia has employed all available means to avert further loss of life and property. But the indiscriminate massacre of the innocent civilian population has filled us with horror.⁸³

Mr. Kamanga further pointed out issues of morality and expressed belief that the horrifying war would not yield any political unity and thus, justifying the Zambian Government's change of mind to recognise Biafra as an independent state. To use his words he stated as follows:

⁷⁹ Keesing's Contemporary Archives, 1965-66. Page 21212A.

⁸⁰ Keesing's Contemporary Archives, February 4-11, 1967. Page 21859A.

⁸¹ Keesing's Contemporary Archives, February 4-11, 1967. Page 21860B.

⁸² Africa Diary-Weekly Record of Events in Africa, 1967. Page 3453A.

⁸³ Statement by the Foreign Minister, Reuben C. Kamanga on Zambia's recognition of Biafra as a sovereign and independent state. Dated: May 20, 1968.

Whereas it is our ardent desire to foster African Unity, it would be morally wrong to force anybody into Unity founded on blood and bloodshed. For unity to be meaningful and beneficial it must be based on the consent of all parties concerned, offering security and justice to all. This horrifying war will make it impossible to create any basis for political unity of Biafra and Nigeria. The Zambian Government has therefore decided to recognise the Republic of Biafra as a Sovereign and independent state. We hope that the establishment of this Republic will now allow Nigeria and the people of Biafra to work out a better framework for cooperation, in order to ensure a better platform for more realistic unity among themselves, in order to live in peace and to foster African Unity in the spirit of brotherhood and mutual cooperation for the benefit of all the peoples of that region.⁸⁴

Zambia's recognition of Biafra conflicted with international law standards in various ways. First of all, the recognition was contrary to the spirit of Article II of the Charter of the Organisation of African Unity (OAU),⁸⁵ which implicitly rejected unilateral secession on the African continent.⁸⁶ Besides in Africa, Bangladesh failed to secure UN membership until in 1974 when Pakistan withdrew its objection to Bangladesh secession and recognised its statehood.⁸⁷

Thus, state practice suggest that a secession, such as the Biafra one, has to be accompanied by the consent of the parent state and hence, a secessionist state cannot be recognised if the parent state still objects as was the case with Nigeria. Besides that, Biafra had violated the Charter of the OAU provision on respecting boundaries drawn by colonial masters.

Further, any claims to the right of self-determination by the Biafrans would not stand in light of the General Assembly Resolution 1514, Paragraph 6, which provides that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."⁸⁸ This according to Harris means that it would be too disturbing of international firmness to allow self-determination within those colonial boundaries for minorities, for instance, the Biafrans in Nigeria.⁸⁹ Furthermore, Harris asserts that where the principles of self-determination and *uti possidetis* come in conflict, the latter must prevail.⁹⁰

⁸⁴ Statement by the Foreign Minister dated May 20, 1968.

⁸⁵ Similar provisions are now found in Articles 3(b) and 4(b) of the 2000 Constitutive Act of the African Union. Adopted on 11 July 2000.

⁸⁶ S Blay, Self-Determination: A Reassessment in the Post-Communist Era, 22 Denver Journal of International Law & Policy 275, 1994. Page 280

⁸⁷ J Crawford, The Creation of States in International Law. Page 180.

⁸⁸ Declaration on the Granting of Independence to Colonial Territories and Peoples, G.A. Resn. 1514 (XV). December 14, 1960.

⁸⁹ D Harris, Cases and Materials on International Law. Page 113

⁹⁰ D Harris, Cases and Materials on International Law. Page 113

Worse still about Zambia's recognition of Biafra is the fact that it was premature as Biafra was later on crushed and hence, it amounted to an intervention in the internal affairs of Nigeria contrary to international law.

As was categorically stated by Mr. Reuben Kamanga in his recognition statement that, "whereas it is our ardent desire to foster African Unity, it would be morally wrong to force anybody into Unity founded on blood and bloodshed," it is clear that Zambia opted for morality rather than the accepted international law requirements discussed above. While this might be understandable, it overlooks the overriding need of creating peace and stability of states constituting the international community.

If Zambia opted for morality considerations in her recognition of Biafra, one would then wonder why Zambia has not done the same with Somaliland which has not been recognised to date?

Somaliland declared its independence in the north west of Somalia in 1991, and has not been recognised by any state despite having a stable and effective government.⁹¹ Zambia is still withholding the recognition of Somaliland in circumstances which are difficult to justify. Somaliland has fulfilled the fundamental condition for diplomatic recognition: An existing independent nation with its own colonial-drawn borders- a legal basis for diplomatic recognition. Somaliland fulfils the criteria of statehood according to the Montevideo Convention on the Rights and Duties of States, 1933, Article 1: It has a permanent population; a defined territory (the former British Somaliland) with clear international boundaries of which it has an effective control; a democratic government, and a capacity to enter into relations with other states.

Furthermore, Article 4(b) of the African Union charter provides that the organization respects and recognizes borders existing on achievement of independence. In fact, the diplomatic recognition of all the 54 current African states is based on these colonial borders. Besides, the provisions on sovereignty in the charters of the UN and Arab League also support and recognize independence based on colonial borders. Somaliland is not a breakaway or a separatist country. The UN, the African Union, and the Arab League have undisputed knowledge that Somaliland achieved independence before Somalia on June 26, 1960, within

⁹¹ D Harris, Cases and Materials on International Law. Page 101

its colonial borders, and was one of the 17 African countries that obtained independence in 1960 from Europe.⁹²

However, it had an unratified merger with Somalia for 30 years (July 1960- January 1991) but withdrew from that union due to the atrocities and destruction that had befallen the merger. In the same year of independence, 1960, and before the merger, 35 countries recognized Somaliland diplomatically including Egypt, Israel and the five Permanent Members of the Security Council.⁹³ Why not now? What is the difference between then and now?

The non-recognition of Somaliland by Zambia exposes its shocking double standard that on one hand advocates for peace and stability-as was the case in the Biafra recognition and, on the other hand, ignores peaceful, stable and democratic Somaliland by denying it of diplomatic recognition. This denial, as argued above, has no legal basis in international law.

Besides, Zambia has not taken into account moral considerations which influenced her in her recognition of Biafra. As opposed to the recognition of Biafra, the recognition of Somaliland can have the backing of international law as shown above. Therefore, it goes without saying that this inconsistency in Zambia's practice is attributable to political considerations, which as this paper has argued, should not be the sole factor for refusing recognition if this world is to achieve its goal of maintaining peace and stability of states.

3.3 Recognition in the case of unconstitutional changes of governments

3.3.1 The cases of Ghana, Uganda and Congo-Kinshasa

The reaction of Zambia to unconstitutional changes of governments has not been consistent and cannot easily be reconciled with international law requirements of effectiveness and legitimacy.⁹⁴ This is evident in the cases surveyed in the following paragraphs.

When on February 24, 1966, President Kwame Nkrumah of Ghana was overthrown by a military coup led by Colonel Emmanuel Kwashie Katoka,⁹⁵ Zambia did not recognize the

⁹² <http://www.en.wikipedia.org/wiki/Somaliland>. (Last accessed November 21, 2010)

⁹³ <http://www.en.wikipedia.org/wiki/Somaliland>. (Last accessed November 21, 2010)

⁹⁴ Effectiveness and legitimacy as international law requirements for recognition of governments have been discussed at length in chapter two under the recognition of governments.

⁹⁵ K kufuor, the OAU and the Recognition of Governments in Africa: Analyzing its practice and proposals for the future. Page 373

new military regime. In fact, in order to signify its disapproval of the military coup, the Zambian Government recalled its High Commissioner in Accra on March 4, 1966, and announced on March 17, that it would not receive the Ghanaian delegation that was to have explained the *coup d'état* against the Nkrumah administration. Thus, the act of recalling the High Commissioner to Ghana was an act signifying the severing of diplomatic relations with that country.

It cannot be disputed that the military regime in Ghana had effective control of the territory. This proposition is supported by the case of **E.K. Sallah v. Attorney General of Ghana**⁹⁶, where the court stated that the military regime had effectively overthrown the 1961 constitution and was in effective control of the country. Thus, it is clear that Zambia's non-recognition of the military regime in Ghana was not influenced by the need to have a government which was in effective control of the country. This practice by Zambia of non-recognition of coups was repeated in the case of Uganda.

When on January 25, 1971, President Milton Obote of Uganda was overthrown in a military *coup d'état* by General Idi Amin, the Zambian Government refused to recognize the military regime and further stated on February 5, 1971, that it hoped countries outside Africa would not follow Britain which had already recognized the military regime in Uganda.⁹⁷

While this practice by Zambia of non-recognition of coups is commendable, it raises questions of whether it was an attempt to adopt some other requirements, such as democratic principles and adherence to human rights,⁹⁸ for the recognition of unconstitutional governments since the test of effectiveness was never followed, or whether it was influenced by political reasons. The latter seems to have been the case in view of Zambia's earlier reaction to the coup in Congo-Kinshasa. When General Joseph-Desire Mobutu, Commander-in-Chief of the Congolese National Army deposed President Kassavubu on November 25, 1965,⁹⁹ Zambia extended her recognition of Mobutu's Government in the hope that peace and stability would be restored in Congo.

How then can Zambia's recognition of the military takeover in Congo-Kinshasa be reconciled with the non-recognition of similar military takeovers in Ghana and Uganda? Thus, this is a

⁹⁶ [1970] 2 G&G 493 (SC).

⁹⁷ Keesing's Contemporary Archives, February 13-20, 1971. Page 24450B

⁹⁸ These requirements will be discussed in the next chapter.

⁹⁹ Keesing's Contemporary Archives, December 18-25, 1965. Page 21137A

clear case of lack of uniformity and an exhibition of double standards in Zambia's practice. Only political considerations can give possible explanations for this discrepancy. This is because Zambia had problems on the southern border with Ian Smith in Rhodesia who had declared the UDI on November 11, 1965, which Zambia did not recognize. Therefore, the Zambian Government did not want to create another problem with the Government of Congo-Kinshasa by refusing to recognize it as this was going to jeopardize Zambia's economic prosperity because of being a landlocked country.

3.3.2 A move towards democratic principles and adherence to human rights as requirements for recognition of governments: The case of Madagascar and Zimbabwe

As will be seen in the next chapter, democratic legitimacy and human rights have found a permanent place in international law and thus, have crept into the field of recognition as well. It is left to be seen whether Zambia has come to grip with these requirements. A case study on the unconstitutional change of government in Madagascar indicates that Zambia is moving towards adopting democratic principles as a ground for refusing recognition of such governments.

The soldiers of the Malagasy army, on March 16, 2009, stormed one of the palaces of President Ravalomanana. This event followed a previous call from opposition leader Andry Rajoelina for the President's arrest. Rajoelina insisted that the palace attack was not a coup, even though he instantly occupied the presidential offices of the captured palace.¹⁰⁰ However, Madagascar's constitutional court found the transfer of power, from Ravalomanana to the military board and then to Rajoelina, to be legal, although it did not state any justifications for its decision.¹⁰¹

Zambia and the African Union at large condemned the incident stating that it was a coup. In its statement, the Zambian Government stated that the Madagascar events threatened democracy. Foreign Affairs Minister Kabinga Pande called Andry Rajoelina's coming to power in Madagascar "a setback and danger to the entrenchment of democracy and

¹⁰⁰ Pressure grows on Madagascar head. BBC, 17 March, 2009. <http://news.bbc.co.uk/2/hi/africa/7947381.stm>. (Accessed November 21, 2010).

¹⁰¹ Madagascar dissolves Parliament. *Al Jazeera*, 19 March, 2009. <http://www.webcitation.org/5iejizW0Q>. (Accessed November 21, 2010).

constitutional rule on the continent which should not be allowed to take root.”¹⁰² Zambia also led the call for economic sanctions against Madagascar and suspension of the country from the SADC and AU.¹⁰³

This move by Zambia is commendable even though it is inconsistent with its recognition of the unconstitutional government of General Joseph Mobutu in Congo-Kinshasa in 1965. Thus, it represents Zambia’s move towards democratic principles as a basis of recognition of states and governments in international law and as a deterrent to any unconstitutional changes of governments in future. It is hoped that this will form the basis of Zambia’s recognition practice henceforth.

Similarly, in cases of disputed elections, Zambia was one of the few African states that criticised the Robert Mugabe regime based on human rights abuses and electoral malpractice in both the 29 March and 27 June, 2008, elections in Zimbabwe. Botswana and Zambia openly criticised the Zimbabwe Elections Commission (ZEC)’s handling of the election results and both refused to accept Robert Mugabe as the legitimately elected president of Zimbabwe.¹⁰⁴ Botswana went so far as to boycott the subsequent SADC meeting in South Africa at which Robert Mugabe still held the status of Zimbabwean head of state.¹⁰⁵

Indeed, this criticism of the Mugabe regime by the Zambian government was in line with the Principles and Guidelines Governing the Conduct of Democratic Elections of the Southern African Development Community (SADC 2004), which aims at “enhancing transparency and credibility of elections and democratic governance as well as ensuring the acceptance of election results by all contesting parties.”¹⁰⁶ Thus, the practice of Zambia in this regard, was influenced by her membership of SADC. This consideration of transparency and human rights in the electoral process contributes positively on the international law of recognition of such governments and is in accord with the recent developments in international law as will be seen in the next chapter.

¹⁰² “Zambia says Madagascar events threaten democracy”. International Herald Tribune. Associated Press. 19 March 2009. <http://www.iht.com/articles/ap/2009/03/19/africa/AF-Madagascar.php>. (Accessed November 21, 2010).

¹⁰³ <http://www.iht.com/articles/ap/2009/03/19/africa/AF-Madagascar.php>. (Accessed November 21, 2010).

¹⁰⁴ African Security Review, Volume 17, No. 4 of December 2008. Page 10

¹⁰⁵ African Security Review, Volume 17, No. 4 of December 2008. Page 10

¹⁰⁶ African Security Review, Volume 17, No. 4 of December 2008. Page 2

3.4 Conclusion

This chapter has examined cases of Zambia's practice on recognition of states and governments. While the practice is commendable in some instances, the study has revealed that it is mainly characterised by inconsistencies even in situations involving the same set of facts and lack of transparency on how the decision whether to recognise or not is arrived at. The application of double standards has strongly come out clearly in the cases surveyed and this has been found mainly to be politically driven. Thus, political considerations at the expense of legal factors accounts for most of the observed inadequacies in Zambia's practice on recognition of states and governments. Such considerations if left unchecked have the potential of denting Zambia's image as a meaningful state that contributes to political stability and development in Africa and the world at large.

Therefore, Zambia's practice on recognition does not go far enough and needs to be elaborated further with rules that bind it to adhere to articulated and transparent procedures. In view of this, the next chapter will look at the developments in international law on recognition from which Zambia may take a leaf that will aid her in future.

CHAPTER FOUR

DEVELOPMENTS IN INTERNATIONAL LAW WITH SPECIAL REFERENCE TO DEMOCRACY AND HUMAN RIGHTS: LESSONS FOR ZAMBIA

4.0 Introduction

For Zambia to be a meaningful country that contributes positively to the subject of recognition, it is imperative that she pays attention to new trends in the international law of recognition. These include the requirement that an entity to be recognised must be constituted on democratic principles and must have respect for human rights. This chapter provides a detailed analysis on the contribution of democracy and respect for human rights in the field of recognition.

4.1 Democracy as an international law standard for recognition

As will be seen, the promotion of democracy as a legal principle means that international law may take a direct interest in the way that a government of a state is constituted.

Gregory Fox rightly states that “from monitoring national elections to condemning military coups to inserting democratic principles in criteria for recognising new states and governments, the international community appeared to view democracy as increasingly central to a variety of traditional legal concerns.”¹⁰⁷ After the end of the cold war, the international community began turning its attention to matters of national governance thus, blurring the line between domestic politics and international relations. International law therefore, found an interest in democracy promotion, not only because it would benefit citizens of target states, but because it can enhance its own regulation of inter-state behaviour.

To this end, the international community now comes out strongly against any undemocratic change of government and is determined to use force where necessary. For instance, under the auspices of the United Nations, on two occasions, the international community has responded vigorously to military coups against elected governments, endorsing the use of

¹⁰⁷ G Fox, *Internationalizing National Politics: Lessons for International Organizations*, *Widener Law Review*, Volume 13. Page 265

external armed force to restore the deposed governments of Jean-Bertrand Aristide in Haiti in 1994 and Ahmad Tejan Kabbah in Sierra Leone in 1998.¹⁰⁸

Indeed, it is not difficult to see why the international community took such stern measures as this was in accordance with the development of international law in the area of national politics. Article 21(3) of the Universal Declaration of Human Rights articulates the core precepts of democracy when it states that “the will of the people shall be the basis of the authority of government.”¹⁰⁹

What is discernible from all this is that international law now denies recognition to undemocratic regimes. Thus, this is a break from the traditional view that any government that has effective control over a territory is entitled to recognition.¹¹⁰ This stems from the argument advanced by Michael Reisman when discussing the 1990s United States intervention in Panama. He argued that because the Noriega government was in the process of losing an election when the invasion occurred, it had no standing to object to the intervention, which quickly resulted in the acknowledged winner of the vote, Guillermo Endara, being sworn in as President. This was because international law still protects autonomy, but, not surprisingly, it is the people’s sovereignty rather than the sovereign’s sovereignty.

This view has been followed by a number of regional organisations such as the African Union (AU), the Organisation of American States (OAS) and the Commonwealth. Article 30 of the Constitutive Act of the African Union provides that Governments which shall come to power through unconstitutional means shall not be authorized to play a part in the conduct of the Union.

Similarly, Article 9 of the Charter of the Organization of American States, 1997, is to the effect that a member of the organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to contribute in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the

¹⁰⁸ Security Council Resolution 1162, Para. 2, UN Doc. S/RES/1162 (April 17, 1998) (Commending ECOWAS after the fact for its role in the Sierra Leonean transition); S.C. Res. 940, Para. 4, U.N. Doc. S/RES/940. July 31, 1994. (Authorizing armed intervention in Haiti).

¹⁰⁹ Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. Res/217A, at 75, Article 21(3) (December 8, 1948).

¹¹⁰ G Fox, *Internationalizing National Politics*. Page 273

Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies recognized.

By the same token, Principle Commonwealth Human Rights Treaties, requires that in the event of an unconstitutional overthrow of a democratically voted government, Commonwealth member states should take quite a lot of steps, including: imminent reinstatement of democracy, barring of the government concerned from participation at ministerial-level meetings of the Commonwealth, as well as Commonwealth Heads of Government Meetings.¹¹¹

Thus, the above exposition goes to show how democracy has been entrenched in international law. An obvious additional indication that non-democratic constitutional structures will no longer be accepted by the international community can be derived from the fact that most international political organizations today explicitly require new members to be internally organized in a democratic fashion as alluded to above. It is worth noting that this requirement is most strongly stated in the most recent documents of that kind, which underpins the assumption that it is at least in an ongoing process of emerging as an international constraint on constitution-making.

This democratic requirement also applies to the recognition of states. As the Montevideo Convention put it already in 1933, there needs to be a defined territory, population and a government which possesses “effective control” over the territory in question and the capacity to enter into international relations with other states. In principle, these criteria are still not disputed; but there is a new tendency appearing on the international plane which tries to define “effective government” as meaning, in fact, democratic government.¹¹² For instance, the European Union provided the lead role on this development in the Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union, which it promulgated in 1992 to deal with the break-up of Yugoslavia and the Soviet Union.

¹¹¹ Milbrook Commonwealth Action Programme on the Harare Declaration, at 13, part I.B.vi, November 12, 1995. Available at http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/%7B1B46C2E0-B8F8-4484-AA9E103ADD42B166%7D_HumanRightsPrinciples.pdf. (Accessed on January 15, 2011)

¹¹² R A Lorz, International Constraints on Constitution-Making, November 2005. Page 9. (Available at http://www.dias-online.org/82.0.html%23_ftn42). (Accessed on January 15, 2011)

In these Guidelines it was stated that the Union and its member states would recognize new states emanating from the changes in the region only after they had constituted themselves on a “democratic basis”, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations, and supplemented these by setting up other specific requirements which the candidates had to meet.¹¹³

Thus, the Guidelines clearly created an expectation that the new states which were to emerge had to be constituted as democracies. By setting this expectation the EU is responsible for a major shift in the process of recognition in international law.

4.2 Protection of Human Rights as international law requirement for recognition

Individuals have continuously gained importance as subjects of modern public international law. The preamble to the Universal Declaration of Human Rights adopted on December 10, 1948 emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” In the same vein, the Charter of the United Nations in its preamble and Article 1(3) provides for the respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Thus, no state today could anticipate any more to be given international recognition for its constitutional order if this order would not provide for the protection of individual rights and freedoms.¹¹⁴ Hence, it cannot be reasonably disputed that human rights protection has since gained acceptance as a requirement for the recognition of states and governments. A classical example of this development is found in the recognition of New States in Eastern Europe and in the Soviet Union in 1992. The successor states had to undergo an examination of their internal human rights situation and the corresponding constitutional provisions before being recognised by the international community as full members.

As a matter of fact, the non-recognition of unconstitutional governments reflects the development of international law with respect to human rights. This is because unconstitutional changes of governments deprives the people of their political rights to freely

¹¹³ R A Lorz, International Constraints on Constitution-Making. Page 9

¹¹⁴ R A Lorz, International Constraints on Constitution-Making. Page 6

elect their leaders enshrined in most human rights treaties. This proposition is fortified by the pronouncements made by the African Commission on Human and Peoples' Rights. The Commission had occasion to state whether unconstitutional changes of government amounted to a violation of Articles 13 and 20 of the African Charter on Human and Peoples' Rights. In the 1990s, the Commission, which is responsible for ensuring respect of the African Charter, was required to interpret Articles 13 and 20 of the Charter, on political participation and self determination, in relation to two forms of unconstitutional changes of government, in cases against Nigeria and The Gambia.

In the case of the **Constitutional Rights Project and Civil Liberties Organisation v. Nigeria**¹¹⁵, where the military regime in Nigeria annulled a general election mid-way through the announcement of voting returns in June 1993. Deciding on a communication challenging this decision, the African Commission held that the annulment violated Articles 13 and 20(1) of the Charter. In a later case of **Sir Dawda K. Jawara v. The Gambia**¹¹⁶, brought by deposed Gambian President Dawda Jawara, the Commission concluded that a "military *coup d'état* was, therefore, a grave violation of the right of the Gambian people to freely choose their government as enshrined in Article 20(1) of the African Charter."

Thus, it is clear from the foregoing that human rights have received international acceptance as standards for recognition of states and governments.

4.3 The African Union's approach on recognition

The Constitutive Act of the African Union lays a strong legal framework on recognition of states and governments. In the preamble of the AU Charter the member states declare their determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. This is supported in Article 3 (g) whereby one of the objectives of the AU is to promote democratic principles and institutions, and also popular participation. Besides, the AU Charter provides among the foundational principles of the AU established by Article 4 that the Union shall function in accordance with; respect for democratic principles, human rights, the rule of law and good governance; respect for the sanctity of human life, condemnation and rejection of impunity

¹¹⁵ (2000) AHRLR 191, 198, Communication 102/93.

¹¹⁶ (2000) AHRLR 107, 118, Communications 147/95 and 149/95.

and political assassination, acts of terrorism and subversive activities; and Condemnation and rejection of unconstitutional changes of governments.

Furthermore, the Constitutive Act of the Union in Article 30 categorically provides that: “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”

This is an impressive provision as it leaves no doubt as to what would happen to a regime that ascends to power unconstitutionally. Such a government shall not be allowed to participate in the activities of the Union. Interestingly, it is the only commitment whose breach a sanction is prescribed. The prohibition of unconstitutional changes in government by the Constitutive Act may thus be seen as a distinct African recognition of a right to constitutional democratic governance in international law.

This approach by the African Union limits the general principle of domestic jurisdiction and non-interference in the internal affairs of states. It also sharply contrasts with the position under its predecessor, the OAU Charter in Article III (2), which provided for non-interference in the internal affairs of states. The founders of the OAU had deliberately created a weak Organisation by forbidding member states from interfering in the affairs of the other member states and declared sovereign equality of all members.

Thus, the very thinking of its Members, coupled with the powers given to it, made the OAU virtually powerless to deal with coups, even if they resulted in the overthrow of governments that were staunchly committed to its goals.¹¹⁷ This can be said to account for an increase in the number of coups during the OAU period.¹¹⁸

However, the OAU member states realised the need to effectively deal with the growing problem of unconstitutional changes of government on the continent. In this regard, the long awaited measures came after 1997 when the OAU Assembly of Heads of State and Government adopted two decisions both reaffirming the right to participation as the basis of

¹¹⁷ K Kufuor, *The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future*. Page 377

¹¹⁸ A Adeyanju, *Africa records 78 coups in 30 years*, *The Guardian*, Lagos, 9 February 1997.

legitimate government, and setting a time limit for governments established by *unconstitutional means to restore constitutional government*.¹¹⁹

Furthermore, in the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government adopted in 2000,¹²⁰ the Assembly agreed on the following definition of situations that could be considered to be unconstitutional changes of government; military *coup d'état* against a democratically elected government; intervention by mercenaries to replace a democratically elected government; replacement of democratically elected governments by armed dissident groups and rebel movements; and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

In 2007, the African Charter on Democracy, Elections and Governance, Article 25(5), added a fifth category to the ones contained in the Framework for an OAU Response to Unconstitutional Changes of Government adopted in 2000, namely; “manipulation of constitutions and legal instrument for prolongation of tenure of office by an incumbent regime.”

Therefore, all these developments were meant to counter the weaknesses that were inherent in the OAU Charter and hence provided a strong legal foundation for dealing with unconstitutional changes of governments. Thus, by emphasising on democratic principles and institutions, the Constitutive Act of the AU, together with the other supplementary documents discussed above, have strengthened the role of democracy in international law. As rightly observed by the South African President and the first Chairperson of the AU, Thabo Mbeki, “the expectations of the people of Africa for democracy, peace and development have been enhanced.”¹²¹

Thus far, the question that remains for consideration is whether or not these international developments are reflected in the practice of individual member states such as Zambia? For it

¹¹⁹ Decision on Unconstitutional Changes in Government, AHG/Declaration 142 (XXXV), 1999.

¹²⁰ C Odinkalu, Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government, Open Society Justice Initiative, January 2008. Page 3

¹²¹ Statement by President Thabo Mbeki, Chairperson of the African Union at the Official Opening of the First Extra-Ordinary Assembly of Heads of State and Government of the AU, Addis Ababa, 3 February 2003, available at <http://www.au2002.gov.za/docs/speeches/index.html>. (Accessed on January 15, 2011)

is only if individual member states are prepared to abide by their international commitments that positive change can be manifested.

4.4 Conclusion

Is Zambia's practice reflective of these international developments?

It is clear from chapter three¹²² that Zambia's practice on recognition of states and governments does not go far enough in as far as the new developments in international law, discussed above, are concerned. Chapter three has revealed some inadequacies characterised by inconsistencies and lack of transparency in conferring recognition while chapter four indicates that Zambia's practice does not go far enough to encompass the idea of democracy and the protection of human rights as requirements for recognition.

In view of this, the next chapter is devoted to providing satisfactory recommendations that will see Zambia coming to grip with the new developments in international law and thus, having a good practice on recognition of states and governments.

¹²² Chapter three discusses at length Zambia's practice on recognition of States and Governments.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

This study set out to analyse Zambia's practice on recognition of states and governments. The basic question at the centre of the study being, "how should Zambia join the rest of the members of the international community in dealing with the issue of new entities attaining statehood in various ways and seeking recognition, as well as regimes that ascends to power unconstitutionally?" Having set out the study as laid down in the preceding chapters, the paper concludes as follows:

Chapter one considered the background and the basic aspects of the research. Chapter two then proceeded to discuss the legal issues of recognition. The issues for consideration under this chapter turned out to be whether recognition should be considered to be a purely political act or it should embrace considerations of a legal nature. It was resolved that even though recognition is first and foremost a political act granted by the executive arm of government, a government conferring recognition should first of all, ensure that the requisite legal requirements for recognition under international law are satisfied. This means that states must put aside their selfish political interests with an entity seeking recognition and advance their international commitments and obligations.

Furthermore, it is the position of the paper that recognition, though argued to be declaratory in nature by most scholars, should be understood to embrace both theories, namely, declaratory and constitutive. According to the constitutive theory, it is only and exclusively through recognition that a state becomes an international person and a subject of international law. Thus, it is the act of recognition by the existing states that creates a new state and grants it legal personality under international law and not the process through which it acquired its independence. Hence, the will and consent of existing states establishes new states.¹²³

This theory has its own shortcomings as it implies that a state that is not recognised will not be subject to the obligations imposed by international law, implying that an unrecognised state will have neither rights nor duties under international law.

¹²³ J Crawford, *The Creation of States in International Law*, At the University Press, Oxford, 2006. Page 19

The declaratory theory, on the other hand, states that, a state may exist without being recognised, and where such is the case, then, it has the right to be treated by them as a state whether or not it has been formally recognised by them.¹²⁴ Thus, recognition is merely an indication of acceptance of the already existing situation by states. This means that a particular factual situation is what creates a state and not the consent of the existing states. It is submitted that better results can be obtained if recognition is understood to consist of the two theories.

The paper has also noted with concern the tendency of overlapping recognition of states and that of governments. Non recognition of a government should not be taken to mean non-recognition of a state as well. It is possible to have a state whose government is not recognised. The grant or refusal of recognition of a new Government has nothing to do with the recognition of the State itself: they are separate issues. If the Government of one State refuses to recognise a new Government in another existing State, the existing State does not thereby cease to be a State.

Akin to this, the paper discussed the tendency of most states in their practice on recognition to adopt the Estrada doctrine. Going by this doctrine, states no longer extend formal recognition, whether *de facto* or *de jure*, to new governments taking power in other countries.¹²⁵ Instead, they just prefer to conduct relations with new regimes to the extent and in the manner which may be required by the circumstances of each case.

This doctrine, even though carrying some advantages to its side is difficult to justify. This is because where one state does not recognise the government of another, and yet chooses to conduct relations with it, one is left to wonder the significance of recognition in that regard. What is the purpose of withholding recognition while maintaining any other relations? The whole essence of withholding recognition is thereby defeated as the unrecognised state or government will still enjoy the benefits that comes with recognition.

The paper noted that most of the states that have adopted this doctrine justifies it on the basis that recognition of a government was misunderstood in the public minds to mean approval or disapproval of that government. But whether one accepts this argument or not, the

¹²⁴ I Brownlie, *Principles of Public International Law*, At the University press, Oxford, 2003. Page 87.

¹²⁵ D Harris, *Cases and Materials on International Law*, Sweet and Maxwell, London, 2004. Page 156.

inescapable conclusion of the doctrine is that conducting relations with unrecognised regime is as good as indirectly recognising it and hence approving of it. One cannot easily draw a line between withholding recognition and yet conducting relations with the same unrecognised regime.

In this regard therefore, this paper argues that the Estrada doctrine does not offer the best approach to the issue of recognition. This is so especially in the African context where stern measures are required to deal with and arrest any political instability that have continued to disturb the African states. This doctrine only justifies the political selfish interests that states would still want to advance with the same unrecognised state. It is thus, argued that this position has to be reconsidered as states need to be categorical and unequivocal in denouncing any unacceptable regime.

Chapter three was a case study of Zambia's practice on recognition. The aim was to analyse the practice with a view to identifying the inadequacies in the practice so as to find ways and means of rectifying the problem. The study under this chapter revealed that Zambia's practice does not go far enough. A lot of unexplained inconsistencies came out clearly where Zambia would recognise one regime and at the same time, withhold recognition of another under similar circumstances. No doubt these inconsistencies were found to be attributable to having placed more weight to political considerations and completely ignoring the legal factors in international law. This should not have been the case.

It also came out clearly that, Zambia was mainly influenced by two factors in her practice on recognition, namely, the philosophy of humanism that dominated most of the first and the second Republics, and geographical factors. The philosophy of humanism as a factor in deciding whether or not to confer recognition was evident in the recognition of Biafra as a state in 1967. Because of the blood that was being shed in that civil war in Nigeria for what Zambia described as a "futile cause", the government decided to recognise the state of Biafra in violation of international law on respecting boundaries drawn by colonial masters. Interestingly, the government has not yet recognised Somaliland which is peaceful and was recently having its democratic elections.

Further, Zambia being a landlocked country has in the past faced a lot of challenges when it comes to withholding recognition to an illegitimate regime in a neighbouring country. This is

because some other considerations came into play such as economic factors. This happened in the first and second Republics when Zambia was required to make a decision whether to recognise the military regime of General Mobutu in the then Zaire, and also Neto's Government in Angola. Around the same time Zambia was facing hostilities from Ian Smith in Rhodesia. It was thus, imperative for Zambia to exercise its recognition strategy with care as most of the borders were going to be closed down and hence, endanger its economic prosperity.

Recently, Zambia was faced with another challenge of confronting the Mugabe regime after the disputed 2008 elections in Zimbabwe. It was not easy for Zambia to withhold the recognition of the Mugabe regime due to the geographical proximity. Worsening relations with neighbours has its own ramifications, and that is the situation Zambia found herself. Thus, although Zambia was one of the few voices that were against the Mugabe regime after the disputed elections in Zimbabwe, the government could not come out strongly on the issue of withholding the recognition of Mugabe pending a just settlement of the matter.

Chapter four discussed at length the developments in international law on recognition with special reference to democracy and the protection of human rights. It was found that the requirements of statehood in international law contained in the Montevideo Convention of 1933,¹²⁶ have been supplemented by the need of an entity seeking recognition to be constituted on democratic principles and should have respect for human rights.

It was also clear that although international law initially recognised a regime that ascended to power unconstitutionally as long as it was in effective control of the territory, international law has developed to a level where such regimes can no longer be recognised as they violate the requirements of democracy and the human right of people to freely elect their political leaders. Thus, whenever there is such an undemocratic change of government, states now insist that a smooth transition should occur within a reasonable period of time. The practice of the African Union on recognition as contained in its Constitutive Act, especially Article 4 which contains the core principles of the Union, provides a model for Zambia's practice.

¹²⁶ Montevideo Convention on the Rights and Duties of States, 1933. Article 1

These developments have not fully been integrated in Zambia's practice on recognition as established in chapter three. Moreover, Zambia currently does not have any legal framework or definite policy on recognition of states and governments. In view of this, therefore, recommendations shall now be made.

5.1 Recommendations

Having examined Zambia's practice on recognition of states and governments, and based on the conclusions reached above, the paper proposes the following recommendations for purposes of reform:

Firstly, the issue of recognition, being an international one, can best be tackled if Zambia first put its house in order. In order to guard against considerations of political expediency to the exclusion of the legal requirements in international law, as was the situation in the cases studied, there should be a well articulated legal framework on recognition under which the government will be given authority to formulate a policy on recognition that does not contravene the requirements of international law. This is because legislation has a binding effect and will ensure uniformity on the practice as successive governments will be bound to follow it. Besides, it is a solution to the observed inconsistencies as the criteria applied in every similar situation will be the same and also transparency will be upheld.

This legislation should provide that the policy formulated should have as its core values, the principles embedded in Article 4 of the Constitutive Act of the African Union stipulating respect for democratic principles, human rights, the rule of law and good governance; respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; and condemnation and rejection of unconstitutional changes of governments. These principles can be subdivided as follows:

a) Recognition of states

The Montevideo Convention of 1933, and the appreciation of the relevance and importance of the question of self-determination by the people of a State whose recognition is under consideration should be the basis of determination of statehood. The requirements under the Montevideo Convention are accepted as reflecting customary international law, and hence, binding on every state. These are; defined territory, permanent population, and a sufficient

independent government able and willing to enter into international relations and to assume and discharge international obligations.

Furthermore, it should be made clear that any entity that purports to attain statehood in breach of Article 2(4) of the United Nations Charter, shall not be recognised. Article 2(4) accords protection to states from having their international personality extinguished through the illegal use of force. It thus, provides a basis for non-recognition of an entity that emerges through the illegal use of force.

In addition to these, the legislation should also provide that the policy formulated should be well abreast with the developments in international law and thus, should include the requirements that an entity to be recognised should be constituted on democratic basis, must have respect for human rights as guaranteed in the Constitution and other Parliamentary legislation, there must be separation of powers and judicial independence in order to safeguard against arbitrariness and should promote political pluralism.

b) Recognition of governments

The legislation should categorically and in an unequivocal terms denounce strongly any unconstitutional changes in government. This in fact is the fundamental principle of the African Union and is contained in Article 30 of its Charter. Unconstitutional changes in government establish dictatorships, subvert democratic governance, preclude the exercise of the rights of people to constitute or change their government, and lead to gross violations of human rights. Thus, the prohibition of unconstitutional changes in government by the Constitutive Act may be seen as a distinct African recognition of a right to constitutional democratic governance in international law.

However, by way of exception, where undemocratic regimes have been overthrown, as is the case in the Arab countries now, the government should grant provisional recognition to the new regime on condition that a transfer of power to an elected civilian administration should take place within a reasonable period of time. Such transfer of power to an elected civilian administration should be done under free and fair elections conducted in the presence of international observers. Where the same member of the military regime contest the elections

and wins, then he should only be recognised if the elections have been declared to be free and fair by international observers, in order to avoid a continuation of the military regime.

Second, in order for the legislation to be comprehensive, it has to be clear on what amounts to unconstitutional change of government. In this regard, the definition adopted in 2000 by the OAU Assembly of Heads of State and Government in its Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, is sufficient in this respect. The Assembly agreed on the following definition of situations that could be considered to be unconstitutional changes of government:

- i. military *coup d'état* against a democratically elected government;
- ii. intervention by mercenaries to replace a democratically elected government;
- iii. replacement of democratically elected governments by armed dissident groups and rebel movements; and
- iv. the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

In addition to these definitions, a regional Charter on Democracy, Elections and Governance adopted in January 2007, added another definition namely, “manipulation of constitutions and legal instruments for prolongation of tenure of office by an incumbent regime.” Thus, these definitions should form the basis of what amounts to unconstitutional change of government in Zambia’s practice.

Third, Zambia should not adopt the Estrada doctrine in its practice. As argued in this paper, the Estrada doctrine is not suitable in the African context where stern measures are required to deal with the problem of unconstitutional change of government. Abandoning the practice of expressly recognising or withholding recognition can do more harm than good. It serves no purpose to withhold recognition and yet continue conducting relations with the same unrecognised regime.

Finally, the recognition of a State should not be taken to imply any judgment whatsoever on the Government of that State. Thus, it should be possible to have a recognised state whose government is not recognised.

It is hoped that these reforms, once implemented, will change the face of Zambia's practice on recognition of states and governments for better as they will act as a deterrent to any illegitimate accession to statehood and unconstitutional changes of governments in future. For Zambia to be a meaningful state that contributes to political stability and development in Africa and the world at large, and thus help to arrest the progressively debilitating conditions on the continent, it must be an engine of democracy on the continent. It can be that engine if it adheres to and constructively reinforces its emerging position on the recognition of states and governments.

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