ARE THE CONDITIONS OF STATEHOOD SUFFICIENT? AN ARGUMENT IN FAVOUR OF POPULAR SOVEREIGNTY AS AN ADDITIONAL REQUIREMENT FOR STATEHOOD, ON THE GROUNDS OF JUSTICE AS A MORAL FOUNDATION OF INTERNATIONAL LAW

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Abstract

The Montevideo Convention of the Rights and Duties of States (1933) codified the declarative theory of statehood as accepted as part of customary international law and laid down the five requirements for statehood which are often summarized as 'the principle of effectivity': (a) permanent population, (b) defined territory, (c) organised power (government) and (d) ability to enter into relations with other states. The aim of this article is to discuss the possibility of an additional requirement: popular sovereignty in a specific historic sense. I will also discuss whether this requirement should be regarded as a necessary and/or sufficient condition for statehood. The importance of this additional condition will be explained in the light of the legitimacy of exercise of power. Furthermore, it will be argued that this additional requirement may help promote the suggested primary goal of international law, that being justice (instead of peace as easily inferred by the UN Charter) in the specific sense of the protection of basic human rights, as suggested by Buchanan in Justice, Legitimacy and Self-Determination. It has to be noted that both main points, namely Buchanan's suggested notion of justice as the primary goal of international law and my main argument of popular sovereignty in a specific historical sense as a requirement of statehood are not to be regarded as relating to any form of Natural Law Theory. It is not the case that I maintain that any international norm which violates justice as ethical foundation of international law is, because of that reason, legally invalid. Although the Legal Positivism vs Natural Law Theory is certainly not the focus of this paper, if one wishes to regard Legal Positivism and Natural Law Theory as mutually exclusive, my suggestion falls entirely under the umbrella of Legal Positivism for reasons that will be explained.

Keywords: *statehood, constitutive and declarative theory, popular sovereignty, goal of international law, human rights*

1. Introduction

This paper covers the matter of the conditions of statehood, based on moral foundations of international law. I agree with the distinction between the requirements for recognition of an entity *as* a state (the criteria for statehood) and the requirements for recognition *of* a state, that is, the preconditions for entering into optional or discretionary relations with it (the conditions for recognition)[1]. The former is a legal issue, specifically an issue of international law, whereas the latter is partly legal though mostly a political issue, since several states decide to recognize or not to recognize each other often on political considerations. This became very obvious during the Cold War where certain states would not recognize other states mostly, if not entirely, because of the difference in political regimes. This paper deals only with the criteria for statehood, not for the conditions for recognition. In

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[1] Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?' *British Yearbook of International Law* 75 (2004): 108.

particular, the argument made is a deontological argument: what is argued is not how the law is, but what the criteria of statehood ought to be, based on a moral/philosophical foundation of international law. The studied matter is important because although states and international organisations are still, despite the rise of transnational law, the main subjects of international law, the law regarding the creation of states is problematic. Whether an entity is a state is often a debatable and controversial issue. The Montevideo Convention (1933) has not been applied consistently while the International Law Commission, through, Crawford, its former Special Rapporteur on state responsibility, has taken up the issue advancing highly contestable criteria of legality as conditions for statehood[2]. Therefore, the debate regarding what the conditions of statehood remains contemporary and important for the future of states and the development of international law. I will try to answer this matter by explaining why both the constitutive and declarative theory are problematic, then by presenting popular sovereignty as a requirement for statehood and then by providing a moral basis of this requirement on justice, in the sense of realization of human rights, as what the primary goal of international law ought to be. Finally, the relation between the paper and the already existent literature -which is often drowned in elaborate analyses of state practice and de lege lata conditions- is that advanced criteria of statehood, like the criteria of legality mentioned above, have not been based on any moral/philosophical foundations of international law.

2. Content

2.1. The two competing theories of state recognition: Constitutive and Declarative theory

According to the Constitutive theory of statehood, a state is a subject of international law if, and only if, it is recognized as sovereign by other states[3]. Because of this, new states cannot immediately become part of the international community or be bound by international law, and recognized nations do not have to respect international law in their dealings with them[4].

By contrast, according to the declarative theory, an entity's statehood is independent of its recognition by other states. This is stated in the Article 2 of the Montevideo Convention on the Rights and Duties of States (1933). More specifically, the declarative theory, as stated in the Article 1 of the aforementioned Convention, identifies the state as a person in international law if it meets the following criteria: 1) a defined territory, 2) a permanent population, 3) a government and 4) a capacity to enter into relations with other states.

The declaratory theory concentrates on the internal factual situation and the constitutive theory concentrates on the external legal rights and duties. They both miss a portion of the analysis[5].

2.2. State practice

Although one might expect that the international realm would strictly follow the declarative theory of state recognition because of the fact that it is the one expressly stipulated in an international convention, state practice seems to be situated somewhat between the two

[2] See e.g. Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?' *British Yearbook of International Law* 75 (2004): 122.

[3] Lassa F.L. Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (D. McKay, 1955), 125.

[4] See, e.g. Tim Hillier, *Sourcebook on Public International Law*, (Routledge, 1998): 201–202.

[5] Worster, William *Sovereignty Two competing theories of state recognition* fhttp://www.exploringgeopolitics.org/Publication_Worster_Willliam_Sovereignty_Constitutive_Declatory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html sixteenth paragraph.

theories[6]. In particular, both Croatia and Bosnia and Herzegovina were recognized as independent states by European Community member states and admitted to membership of the United Nations (which, according to article 4 of the UN Charter, is limited to states) in 1992 at a time where in both states non-governmental forces controlled substantial areas of the territories in question in civil war conditions. Also, recognition is often withheld when a new state is regarded as illegitimate or has come about in breach of international law. Almost universal non-recognition by the international community of Rhodesia and Northern Cyprus are good examples of this. In the former case, recognition was widely withheld when the white minority seized power and attempted to form a state along the lines of Apartheid South Africa, a move that the United Nations Security Council described as the creation of an "illegal racist minority régime"[7]. In the latter case, recognition was widely withheld from a regime created in Northern Cyprus on land illegally invaded by Turkey in 1974[8]. In general, it seems that Broms is right to observe that in actual practice, the criteria are mainly political rather legal[9].

2.3. Popular sovereignty as a requirement of statehood

I suggest that popular sovereignty in a specific historical sense be regarded as a necessary requirement for statehood. This is a clearly deontological statement, so I argue why it should be so, without making any ontological claims. The popular sovereignty requirement that I am advancing is as follows: a necessary requirement for a regime to be a state is that at one specific point in time, the majority of an identifiable number of people permanently living within an identifiable territory and having a government freely vote[10] for a constitution. For the action of voting to be free, voters must be exercising self-rule or in other words their individual autonomy, the standard requirements[11] of which are the following:

a) The action has to be intentional, i.e. the voters must intentionally be performing the action of expressing their opinion of whether they want to bring that specific constitution into effect. In a hypothetical imaginative scenario where voters vote for a constitution while intending to vote for inclusion to another state, then their action does not count as a free action.
b) The action has to be based on sufficient understanding. Several reasons can cause lack of understanding, two of which are lack of information and lack of mental capacities of understanding which should also exclude children. Adequate information requires that the people have been informed of the constitution well advance so that they had enough time to read it and hopefully reflect on it.
c) The action has to be free from external constraints. These include physical barriers deliberately imposed by others and different forms of coercion, including deliberate use of force or the threat of harm. The coercer's purpose is to get the person being coerced to do something that that person would not actually be willing to do.

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[6] Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 197 'The relationship in this area between factual and legal criteria has been is a crucial shifting one.'
[7] United Nations Security Council Resolution 216.
[8] United Nations Security Council Resolution 541.
[9] '...one is led to the conclusion that the granting of recognition has become primarily a legal-political solution whereby the political element weighs heavier than the legal one.' in B. Broms 'IV Recognition of States', 47-48 in *International law: achievements and prospects*, UNESCO Series, Mohammed Bedjaoui (ed), Martinus Nijhoff Publishers, 1991.
[10] In this discussion, freedom and autonomy overlap and can be used interchangeably, as is usually the case. Some writers make a distinction between the two terms which is here not relevant because freedom/autonomy refer to one specific action, i.e. the voting of the constitution. Such writers are Dworkin who maintains that freedom concerns particular acts whereas autonomy is a more global notion. See Gerald Dworkin, *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988), 13-15, 19-20.
[11] Regardless of the specific articulation and the specific content in which they function, I regard these to be the standard requirements of autonomy in philosophy. See, e.g. Thomas A. Mappes and David DeGrazia *Biomedical Ethics* (6th edition, McGraw-Hill Higher Education, 2006), 41-45.

Therefore, for example, if people are threatened that if they vote for the constitution the nearby state will invade, then the act of voting is not free.

d) The action has to be free from internal constraints. Examples of internal constraints are intense fears and acute pain as they influence people to make choices that represent departures from their stable values and usual priorities. Therefore, for example, voting which takes part right after a regime causes the emotion of extreme fear is not free.

2.4. Popular sovereignty: necessary and/or sufficient condition for statehood?

I suggest that a regime should not be able to obtain the status of statehood unless it satisfies the popular sovereignty requirement. Therefore, popular sovereignty is a necessary condition for statehood. Now I want to explore whether popular sovereignty is also a sufficient condition for statehood.

It would be hard to imagine a state that does not satisfy the first three requirements of the Montevideo Convention – territory, population and government. A regime that does not satisfy these criteria is a regime that would probably not be relevant to the discussion of statehood. Therefore, one could conclude, if the requirement of popular sovereignty is accepted, it can only be a necessary but not sufficient condition, because it being sufficient condition would entail that a regime can be a state without satisfying those three requirements, which sounds absurd.

If that's the case, then how does the constitutive theory make any sense? If the constitutive theory means that recognition by other states is necessary and sufficient condition for state recognition whereas the territory/population/government requirements are not necessary conditions and a regime can be a state without them as long as it is recognized by other states, then the constitutive theory would be equally absurd. Notably, the distinction between the two theories is not that these three requirements are regarded as necessary by the declarative theory alone whereas constitutive theory does not regard them as necessary, but the issue of recognition[12]. The difference between the two theories is that the constitutive theory makes statehood contingent on recognition from other states, whereas the declarative theory does not. Therefore, to make more sense of the constitutive theory, one would have to include the territory/population/government requirements in order to be able to talk about any kind of regime at the first place. Seen in this light, the constitutive theory implies the three aforementioned requirements. By the same token, popular sovereignty can be seen as implying, and thus necessarily including the territory/population/government requirements. This would mean that when referring to certain people freely voting for a constitution, we assume that we are referring to an identifiable group of people, permanently living within an identifiable territory and having a form of government which would allow the people to decide whether to vote for a constitution. This does not seem to me to be too much of a stretch.

The requirement that has been left out is the capacity to enter into relations with other states. According to the popular sovereignty theory I am proposing, it is not the case that capacity to enter into relations with other states is a necessary condition for statehood as the declarative theory suggests. By contrast, the popular sovereignty theory I am suggesting regards the capacity to enter into relations with other states as a consequence of statehood, so the existence of the capacity necessarily requires that the status of statehood has been obtained first.

A comment that many would feel ought to be made here is that states are not the only ones which enter into relations with states. International organisations and other non state

[12] William Worster, 'Sovereignty Two competing theories of state recognition' http://www.exploringgeopolitics.org/Publication_Worster_Willliam_Sovereignty_Constitutive_Declatory_Statehood_Recognition_Legal_View_International_Law_Court_Justice_Montevideo_Genocide_Convention.html fourth paragraph

entities enter into relations with other states. Therefore, it could be argued that entering into relations with states is not by itself a manifestation of statehood. This is entirely true and I have two comments to make here. Firstly, the issue of non state entities entering into relations with states leaves my argument entirely unaffected because I do not maintain that entering into relations with states is a characteristic of states alone. What I am suggesting is that in the case of state recognition in particular, we can see the capacity of entering into relations with other states as a consequence of statehood and not as a requirement. This position is neutral to whether non state entities can enter into relations with other states, though modern international law and the emergence of transnational law make it relatively easy to provide a straightforward answer. Besides, if one would want to entertain the grammatical stipulation of the theory, reliance on the word 'other' in the expression 'other states' suggests that the capacity of entering into relations with other states in the context of this discussion has to do with states alone, which is rather unsurprising since both the constitutive and the declarative theory are theories of statehood and should not be seen as making any claims regarding non state entities.

Therefore, if one wants to get on board with the popular sovereignty theory, he would be confronted with three choices. The first choice would be to regard the popular sovereignty requirement which necessarily encompasses the territory/population/government element as a necessary and sufficient condition for statehood. The second choice would be to keep the articulation of the declarative theory, at the same time enjoying the privilege of being closer to the letter of the theory laid down in codified international law, and merely add the popular sovereignty condition as another necessary but not sufficient condition. In this case, the popular sovereignty condition would be deprived of the territory/population/government element in order to avoid repetition and one would also require a capacity of entering into relations with other states. Finally, the last choice would be the same as the second one, but without the capacity of entering into relations with other states as that would be regarded as a consequence of statehood and not a requirement. I strongly believe that the important issue is whether one would accept the popular sovereignty in the historical sense as I presented it, namely the fact that at one specific point in time a group of people freely voted for a constitution, as a necessary condition of statehood. I regard the choice among the three aforementioned options as a minor issue. Personally, I opt for the first option for two main reasons. Firstly, presenting popular sovereignty in that rich sense as a necessary and sufficient condition makes it clear that in the discussion of statehood, the important component is the voting of a constitution. Besides, the territory and the population do not have to be exact, but merely identifiable. The government does not, officially at least, need to satisfy any internal/substantial criteria, i.e. it does not need to particularly democratic, observe human rights, or be a 'good' government in any substantial sense. Although many theorists advance the suggestion that governments must be democratic, it is not the case – fortunately or unfortunately - that international law requires democracy as a necessary condition for statehood. Therefore, some flexibility is allowed in these conditions. On the contrary, the voting of the constitution has to be free according to the requirements mentioned above. Besides, when there is a discussion about whether a regime should obtain statehood, it is usually the case that it enjoys the territory/population/government criteria, or else the discussion would not arise. The second and relevant reason is that popular sovereignty, being in the centre of this theory, is exactly what is justified by what I agree to be regarded as being the primary goal of international law, namely justice in the sense of a minimum protection of basic human rights.

Although the elements of territory/population/government/capacity to enter in relations with other states – when seen independently and irrelevant to the popular sovereignty requirement- are entirely factual circumstances that can be determined by force

and which may be resulting in gross injustices, there is a certain moral aspect in the right of a group to govern themselves with a constitution. This requirement is in line with the recognized notion of self-determination. (I am intentionally avoiding any reference to 'right' of self-determination, as it seems to me the case that self-determination can itself be broken sown in several other rights, but this is irrelevant to this discussion which about statehood, not self-determination).

2.5. Justice as the primary goal of international law

There are two compelling reasons for accepting the theory of popular sovereignty I stated above as the theory of statehood. Firstly, it is obviously more democratic, because it is based on the direct will of the people, or at least the majority of the people. Secondly, and in my opinion more importantly, it promotes what Buchanan in *Justice, Legitimacy and Self-Determination* rightly advances as a de lege ferenda primary goal of international law, namely justice, in the sense of protection of basic human rights. Justice is better served when human rights are observed.

I agree with Buchanan that it is reasonable to regard justice, meaning protection of basic human rights, as the primary goal of international law[13]. Justice largely subsumes peace. Justice requires the prohibition of wars of aggression because wars of aggression inherently violate human rights. To that extent, the pursuit of justice is the pursuit of peace. Sometimes, justice requires violating peace and the fight of the Allies in the Second World War when they fought to stop fascist aggression with all its massive violations of human rights meets out moral intuitions that in such cases justice is worth more than peace. In addition to this rationale, Buchanan also brings two arguments regarding why justice is morally imperative[14]. Although I find his two arguments very convincing, I feel I am not required to refer to them because they are not necessary for my argument, which is that popular sovereignty theory of statehood is preferable. All that is needed to support this argument is that justice is preferable to peace when it comes to being the primary goal of international law. The fact that in cases of conflict the weight goes to justice instead of peace is enough to make my point and I do not need to ground justice as a primary goal of international law any further, as this is not my main point.

Here I have to state that although I agree with Buchanan with justice being the primary goal of international law, the popular sovereignty theory I advance departs from Buchanan's theory on statehood, which disregards the issue of popular sovereignty, holding the position that statehood ought to be granted to entities that observe human rights. Although I find his theory very persuasive and much better grounded than either the constitutive or the declarative theory, I think the popular sovereignty theory has two simple advantages over Buchanan's theory. Firstly, the popular sovereignty theory is much more easily observed, and in this specific sense, much more realistic. Buchanan's suggestion requires the existence and impartial functioning of institutions that would observe whether the entity in question actually observes human rights. Although I am very sympathetic to this idea, I am very doubtful whether institutions will necessarily be unbiased simply because they are non state entities. Secondly, although protecting human rights is indeed in full accordance with the definition of justice, when it comes to statehood in particular, what must also be seriously considered is the issue of the will of the people. Let's suppose that within a given territory, entity A is striving for statehood. Entity A does refer to an identifiable population within identifiable territory and with a form of government. Let's suppose that this entity actually observes human rights and the protection of human rights is way above the minimum level of protection expected by the

[13] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 74-82.
[14] Ibid, 83-97.

international community. However, for reasons irrelevant to human rights, people are not happy with that constitution. For example let's suppose that that constitution lays down processes which slow down the system and reduce dramatically the economic development of the country and that these processes are laid down in non amendable clauses of the constitution. Since there cannot be two entities A, let's suppose that there is a metaphysical world, exactly identical to this one, but in the respective entity, let's call it "A", which has the same population, territory and government, the system again observes and protects human rights, but the level of protection of human rights is insignificantly lower than the level of protection provided by entity A but of course, again, much higher than the minimum level of protection expected by the international community. However, the people in entity "A" are much happier with the constitution they freely voted and the economic development of their entity. It seems to me that it would not be unreasonable to hold that the entity the international community would preferably be granting statehood to is entity "A".

I do not wish to diminish Buchanan's view; on the contrary, I find it very convincing and a path of development of contemporary international law. I definitely regard it as a great progress in comparison to the constitutive and declarative theories. However, I believe that there can be reasonable alternatives that take into account other factors apart from the protection of human rights when it comes to an all-things-considered decision about which theory is most appropriate for statehood. That said, I totally agree with Buchanan as justice in the sense of protection of human rights as the primary goal of international law.

2.6. Stepping into Natural Law?

In short, no. Both main points, namely Buchanan's suggested notion of justice as the primary goal of international law and my main argument of popular sovereignty in a specific historical sense as a requirement of statehood are *not* to be regarded as relating to any kind of Natural Law Theory. It is *not* the case that I maintain that any international norm which violates justice as ethical foundation of international law is, because of that reason, legally invalid.

Regardless of the specific legal positivist position that different philosophers of law might take, e.g. Kelsen and Hart who are both legal positivists but greatly disagree in many points, I take the main proposition of Legal Positivism per se to be the following: In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits[15]. Therefore, if one maintains that an international legal norm is valid because of its sources, or, in other words, that the reason of validity of an international legal norm is its sources, then this view would fall under the umbrella of positivist views. By contrast, if one regards that an international legal norm is valid because of its merits, or, in other words, that the merits of the law – e.g. whether the law if moral or immoral based on whatever theory – are the reason of validity of an international legal norm, then this view would fall under Natural Law Theory.

Although one may be mislead by the use of morality in the goals of international law, it is incorrect to assume that just because of the reference to a certain kind of moral value, this moral value is to be regarded as a criterion of validity of norms. That is most certainly not the case here. Neither Buchanan nor I make such claims. The claim that a norm is invalid because it is against justice is not made here. On the contrary, I hold that justice *is* not the goal of international law, but it *ought* to be. This is a deontological, not an ontological statement. As Buchanan puts it 'justice is a goal in the sense of an ideal state of affairs, a moral target that we aim at, and which we can strive to continue to approach more closely, even if it is not

[15] John Gardner, 'Legal Positivism: 51/2 Myths,' *American Journal of Jurisprudence* 46 (2001): 199.

possible ever to achieve it fully or perfectly'[16]. In practice, this goal has to do with many issues, e.g. how international law ought to develop, how international legal norms ought to be laid down, minimum requirements of the content of international legal norms, principles governing international institutions, what functions we ought to see international law as having, etc., but it is most certainly not to say that justice is a criterion of validity. We therefore accept that unjust laws are, sadly, legally valid because of their sources.

Similarly, I do not maintain that international legal norms according to which states have already obtained statehood or norms according to which entities will obtain statehood in the future are in any way invalid because they were or might be unjust. On the contrary, I recognize the declarative theory of statehood as the legally valid international norm regarding statehood (even though it has not always been applied with absolute consistency) and I am suggesting that it ought to change in the future.

Therefore, although Legal Positivism per se is not within the scope of this discussion, if one wishes to place these theories in the Legal Positivism vs Natural Law Theory discussion, then both Buchanan's theory of justice – with which I obviously agree- as the primary goal of international law and my theory of popular sovereignty as a requirement of statehood are both legal positivist and not natural law theories.

3. Conclusions

In conclusion, I have briefly referred to the two main competitive theories of statehood in international law and then advanced my theory of popular sovereignty as a necessary and/or sufficient condition of statehood. I stated that there are three ways one could follow using the popular sovereignty argument in relation to the territory/population/government requirements and the requirement of the capacity to enter relations with other states. I stated that I personally prefer the first version in which popular sovereignty is more robust and has a richer content, including the territory/population/government requirements. I then explained how my theory is justified by Buchanan's position – with which I agree- that justice, in the sense of protection of basic human rights, and not peace, ought to be the *primary* goal of international law. I then offered reasons why I depart from Buchanan's notion of statehood according to which requirement for statehood ought to be protection of basic human rights, excluding popular sovereignty. Lastly, I explained why neither Buchanan's theory nor my suggestion of popular sovereignty have to be confused with any Natural Law Theory, and that as regards the Legal Positivism vs Natural Law Theory debate, this discussion remains within the limits of the former. If the idea of popular sovereignty as a requirement for statehood based on justice as a primary goal of international law is adhered to, the discussion regarding conditions of statehood will be geared in a direction of justice which will satisfy peoples' moral and legal intuitions. Finally, further research must be done, especially in the detailed structure of the idea of popular sovereignty in the modern transnational world. Further questions should be answered, e.g. whether the idea of popular sovereignty as a requirement for statehood should remain in a narrow framework as conceived by Rousseau, i.e. delimitation of state sovereignty rested on a contract between people and government, or if the idea of popular sovereignty as a condition for statehood should lie within the more contemporary framework of procedural popular sovereignty.

References

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[16] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 78. See also 'By a moral goal of the international system I mean a goal the system ought to promote, not one it does promote or has up to the present been designed to promote.' at 77.

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