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A response to Kurtulus

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In the initial section of his article, Ersun Kurtulus criticises the approach to sovereignty which I advanced in my *Sovereign Statehood* (1986). There I argued that the characteristic which distinguishes a sovereign from a non-sovereign state is constitutional independence—that is to say, a territorial entity's possession of a constitution which is not subordinate to that of another territorial entity. The most obvious and graphic way of identifying this distinction is to compare the position of a sovereign state with that of a territory which is part of a federal state. Thus Iceland is a sovereign state; Texas is not. It is her constitutional independence which, in international practice, is deemed to confer sovereignty on Iceland, and so make her eligible for full international actorhood. By contrast, non-sovereign territorial entities do not enjoy such actorhood, and most have none whatsoever.

Kurtulus, it seems, is ill at ease with my emphasis on the terms of a territory's constitution. He says that in a 1999 *Political Studies* article, I try 'to bolster the notion that constitutions are indispensable and ubiquitous' (fn.4). As to my general line of argument in *Sovereign Statehood*, he objects that it involves 'a formalistic view' (p. 760) of constitutional independence. Indeed so, for the reason, as I see it, that a constitution is necessarily a formalistic arrangement, as well as being a necessary one for any territorial (or any other) group. It sets out the body of principles and basic rules on the basis of which the territory in question is meant to be governed. If the territory is constitutionally part of a larger entity, that will be expressed both in its constitution and in that of the larger body. If not, there will be no such indications—and the territory in question is sovereign.

However, the phrase 'constitutional practice' is also to be found in my book. Kurtulus says that I do not give a precise explanation of what I mean by it, and that 'an understanding of constitutional independence, which incorporates an ambiguous notion of "constitutional practice", introduces a tension—if not outright inconsistency—into the empirical parts' (p. 761) of my analysis. In support of this he cites my disparate treatment of Australia and Canada on the one hand and of puppet states on the other.

I wonder whether Kurtulus has read more than I meant into the phrase 'constitutional practice'. My impression is that I did not much use it. But I did do so to indicate a short cut to the terms of a constitution. I suggested (on p. 58–9, to which Kurtulus refers) that usually it would be possible to tell whether a territory's constitution was independent or not by noting whether some of the territory's laws had been enacted by a legislature lying beyond its boundaries, or whether governmental authority was sometimes uncontroversially exercised within the territory by an external body. Comparably, I sometimes used the term 'effectiveness', thinking of

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the possibility that competing constitutional claims might be made about a territory's status, or that a territory's constitution might not be the most reliable guide to the basis on which it was governed.

Australia and Canada illustrated this last remark. I pointed out that if the criterion of constitutional independence was rigorously applied, it resulted in Canada (prior to the 'repatriation' of her constitution in 1982) and Australia—two states whose capacity to enjoy a full international life was unquestioned—being designated as non-sovereign. This egregious anomaly seemed best dealt with by saying that such a description would be 'unreal' (James, p. 111), and that the circle could be satisfactorily squared by noting the empirical fact that the 'limitations on the power of these two states to amend their constitutions were and are entirely nominal' (ibid). However, when I came to consider puppet states—those which, although constitutionally independent, were 'mere appendages' (James, p. 139) of another state—I argued that despite this situation their constitutional independence required that they (negligible in number) be classed as sovereign.

Kurtulus says that I cannot have it both ways. If a state can be considered sovereign despite its nominal constitutional dependence, then a state should be considered non-sovereign if its constitutional independence is nominal; and that once one talks about a nominal measure of constitutional independence or dependence, 'it is not possible to employ "constitutional independence" as *the* criterion—at least not the *only* criterion—for sovereignty' (p. 761).

My treatment of puppet states was in line with my general approach. But I agree with Kurtulus that in respect of Australia and Canada I did not make a strict application of my usual test. However, I do not think I thereby undermined the case for constitutional independence as *the* criterion for sovereignty. For that emerged from the general practice of states, which it was the purpose of my book to depict. What I was trying to do was to identify the characteristic which enables certain territorial entities to be designated (by themselves and their fellows) as sovereign, and hence as eligible to participate fully in international life. Overwhelming international practice indicated that the answer lay in the domestic legal status of a state's constitution—its independence of any wider constitutional scheme. Accordingly, even if Australia and Canada were excluded from the category of sovereign states, that—as I see it—weakened my basic argument very little, if at all.

However, Kurtulus goes on to claim that 'the thesis that there is a certain amount of consistency in the practice of states as regards sovereignty . . . is *not* empirically tenable' (p. 761). In support of this assertion and with reference to my analysis he cites the international response to two groups of states. First, the refusal to treat as sovereign both the entity resulting from Rhodesia's unilateral declaration of independence in 1965, and the black Homelands (or Bantustans) established by South Africa in the late 1970s in pursuance of her policy of apartheid. And second, the continued acceptance throughout the Cold War of the sovereignty of the East European states and Mongolia, depite the fact that their 'constitutional independence was in serious doubt' (*ibid.*).

As regards the latter group of states, it was never my impression that doubt existed about their constitutional independence. Certainly, there was well-founded doubt about their political independence. But, as I argued in my book, such 'dependence has no bearing on sovereignty, when that term means constitutional independence, for the two are quite separate matters' (James, p. 192).

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As to Rhodesia, I saw its position as problematic in that there were two directly opposed claims regarding its constitutional status—one emanating from Salisbury (now Harare), and the other from London. Moving, therefore, from constitutional assertions to the test of constitutional effectiveness, it seemed to me that as in day-to-day terms post-1965 Rhodesia was ruled from Salisbury and not London, it could be said to be constitutionally independent, and hence sovereign. For rather different reasons the Homelands were even more problematic. But as in constitutional theory they existed separately from South Africa (without any competing constitutional claim), it seemed to me—as a political scientist—that my basic argument called for them to be classed as sovereign.

Virtually all states, however, refused to accept that either Rhodesia or the Homelands were sovereign. Kurtulus argues that this shows the test of constitutional independence to be empirically untenable. I see it rather differently. As the structure of my book indicates (the second of its three Parts is called 'Quandaries'), it was never my suggestion that the application of the constitutional independence test is always uncomplicated. Sometimes the facts are unclear; and occasionally, for political reasons, states are averse to acknowledging the facts. The last point applied powerfully to Rhodesia and the Homelands, as states had no wish to give them the rhetorical boost which the resonant term 'sovereignty' would have supplied. But the absence of a completely uniform, and politically blind, use of the constitutional independence test did not seem to me necessarily to veto the drawing of an overall conclusion about the practice of states regarding the character of sovereignty. And instances of the Rhodesian and Homelands kind were relatively few; whereas those in which constitutional independence was treated as conferring sovereignty were many. Even, therefore, in the light of states' denial that Rhodesia and the Homelands were sovereign, it did not appear to me that my claim regarding the key element in sovereignty had been undone.

Kurtulus raises a further critical point in connection with my treatment of Rhodesia and the Homelands. It is that while I say sovereignty is a necessary but not sufficient condition for membership in international society, I 'do not offer any discussion of what this sufficient condition might be' (p. 762). As *Sovereign Statehood* was rather sharply focused on the necessary condition for membership, my failure to say a lot about an associated but distinct issue is, perhaps, explicable. In the final chapter of my book, however, there is a section on 'International Society' (pp. 269–74), where I say that the concept of 'membership' in it is surrounded by 'some uncertainty', as the issue is not dealt with by 'formal arrangements and procedures of the kind which are common in other societies' (p. 270).

But whatever one's understanding of the idea of membership, it seemed to me that there is a clear distinction between eligibility for and actual participation in international life. As I therefore emphasised throughout my book, sovereignty only makes a state *eligible* for the latter. In a later article ('Diplomatic Relations and Contacts', in *The British Year Book of International Law 1991*) I explored the various subsequent steps which are necessary for international dealings to take place: recognition (as a state) and the establishment of diplomatic relations—which are often followed by the exchange of resident diplomatic missions. I think it is in these regards that the principle of *uti possidetis* and the consent of the mother state (referred to by Kurtulus as 'having leverage on the process of acquiring membership' (p. 762) in international society) may come into play. But they only do so in respect

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of entities whose eligibility for normal international activity is already indicated by their enjoyment of constitutional independence.

With respect, therefore, I venture to suggest that Kurtulus errs in concluding that there is no regular pattern of state behaviour as to which types of entities actually enjoy sovereignty. I would argue *a priori* that it is hard to imagine the collectivity of states doing without such a criterion. It serves as a most valuable ordering device, in that it helps to prevent controversy about which of the world's many territorial entities have the capacity to do such basic things as appear on the international stage, use established international mechanisms, and join interstate organisations. It also has the exceedingly important by-product of helping to establish clear interstate jurisdictional boundaries. Further, I would argue that it is empirically evident that the test of constitutional independence is the one which states have used at least throughout the twentieth century, and which they show no sign of abandoning. This is not to claim that it resolves all uncertainties—although I might observe that the instances on which Kurtulus bases his criticisms of me have all now disappeared: Rhodesia with the agreed emergence of Zimbabwe in 1980; the Homelands with the end of the apartheid regime in the 1990s; Canada (as mentioned) repatriated her Constitution in 1982; and Australia did the same in 1986. I imagine that in the future, as in the past, occasions will arise on which states will not be disposed just to examine the constitutional facts and draw the conclusion to which they point. But that they usually do so does not seem to me to be presently in doubt.

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