Recognition and secessionist in the complex environment of world politics

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Introduction

This conference is about the right of peoples to self-determination. The focus of this paper is the external aspect of the right: the right to Statehood and secession. The paper questions whether the incoherence in the doctrine and practice on external self-determination is the result of international lawyers using the wrong conceptual tools. In particular it asks whether a variant of systems theory know as 'complexity theory' might allow for the development of a more effective way of conceptualizing the emergence of States in world society.

Lack of clarity in the practice of recognition

The incoherence in the international law doctrine on the issue of statehood can be seen in the recognition and non-recognition of political communities claiming to be States. Why, for example, have Bosnia and Herzegovina and South Sudan been admitted to the United Nations, but Somaliland, Turkish Republic of Northern Cyprus, and Kosovo not? The issue is particularly striking in relation to Kosovo. At the time of writing, just under one-half of the member States of the United Nations have recognized Kosovo as a State, although the opposition of Russia and People's Republic of China to accepting the status of Kosovo as a 'State' precludes the possibility of its admission to the United Nations, which is normally taken as resolving controversies over the status of political entities. Moreover, Serbia continues to refuse to recognize Kosovo as a State, notwithstanding the territory's de

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facto independence from Belgrade, precluding the possibility of statehood by way of separation.

There is general agreement in the literature as to how the issue of Kosovo statehood should be addressed. There is consensus that the people of Kosovo are a 'people' for the purposes of the international law, and therefore have a right to self-determination. Further, the people of Kosovo have the right to declare their independence. Kosovo is not however a 'colonized' territory and the right of self-determination does not provide a right to statehood in this context. Whether the 'saving clause' is applicable in the case of Kosovo is also contested, although the protection accorded to the territory by the international community would seem to exclude the necessity of secession as a remedy of last resort to prevent future human rights abuses.[1]

The fact that self-determination does not provide a right to statehood does not preclude the possibility of Kosovo being established as an independent State, as secession is neither lawful nor unlawful as a matter of international law. The right of Serbia to territorial integrity is opposable to other States and not to Kosovo as a political entity. The test outlined by Lassa Oppenheim remains valid: a political entity able to establish itself 'safely and permanently' and to exclude the authority of the territorial State has a claim to be accepted as a State.[2]

Whilst there is consensus in the literature that effectiveness is the most important criterion of statehood, there is disagreement as to whether this is a sufficient criterion, or whether there might be additional criteria and on the content of the other criteria. Again, it is not clear where Kosovo fits within the scheme as its independence, which is disputed given the role of the international community in the administration of the territory, was established following the humanitarian intervention by NATO forces in 1999, which followed serious violations of the rights of the Kosovo Albanians, but which is regarded by a number of writers as being contrary to the prohibition on the unlawful use of military force (a norm of *jus cogens* standing).

[1] In cases of serious human rights abuses following the exclusion of one part of the population from the political process, a number of authors identify a remedial right of secession through a reverse reading of the so-called 'saving clause' in the Declaration on Friendly Relations (GA Res. 2625 (XXV)) and the emergence of Bangladesh as a sovereign and independent State. Whether the remedial right of secession establishes a right of independence opposable to the territorial State and all other States *erga omnes*, or simply negates the proscription on achieving of statehood with the support of external military assistance is unclear given the limited doctrine and practice.

[2] L. Oppenheim, *International Law: A Treatise*, Vol. I. Peace [1st ed.] (London, Longmans, Green, and Co., 1905), pp. 112-3.

The recognition of new States

The academic literature on Kosovo is, though, clear on one thing: the determination of the status of Kosovo as a State is independent of recognition. The debate between the declaratory and constitutive schools on recognition has been resolved in favour of the declaratory account, which has traditionally been associated with the question of effectiveness. Recognition declares the existence of a fact: 'An entity is not a State because it is recognized; it is recognized because it is a State.'[3] A political entity that meets the criteria of 'State' enjoys the inherent rights accorded to States (and not available to other political entities), including the right of territorial integrity and political independence.

The competing constitutive account holds that the legal status of 'State' is constructed by way of recognition by already existing States and that a sovereign State has an absolute discretion in deciding whether to recognize a political entity as a State or not. Whilst differences between the accounts can be overstated, and indeed understated, an essential difference between the approaches is that for the constitutive schools recognition is 'status-creating', whilst for the declaratory schools, 'it is merely status-confirming.'[4]

The declaratory School of recognition has come to predominate in the international law literature largely as a reaction to the relativism permitted by the constitutive account. According to declaratory school, an entity must either be 'a State' or 'not a State' (it cannot be both). This is not the case in relation to the constitutive account: the 'legal existence' of a State has 'a relative character. A state exists legally only in its relations to other states.'[5] A political entity can be a State in relation to those States that have recognized it, and not in relation to other States. James Crawford argues that the relativism of the constitutive position is 'a violation of common sense', and if it cannot be explained then 'the position itself must be flawed.'[6]

[3] James R Crawford, 'State' (2011) *Max Planck Encyclopedia of Public International Law*, para. 44.
[4] Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: *Tertium Non Datur*?' (2004) 75 *British Yearbook of International Law* 101, 101.
[5] Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605, 609.
[6] James Crawford, *The Creation Of States In International Law*, 2nd ed. (Oxford, Oxford University Press, 2006), pp. 21-22.

The criticism of the constitutive approaches follows naturally from the metaphors that describe the emergence of the State in the international community. Consider the following descriptions employed by Stefan Talmon: 'States are natural-born, i.e. absolute, subjects of international law and are not relative subjects of international law created by existing States'; States, 'like natural persons… attain legal personality at birth; that is, they are "born" subjects of international law'; '[m]uch like the birth of a child, the creation of a State is predominantly a question of fact, not of law'.[7] Understood in this way the reluctance of international lawyers to admit the possibility of relativism, whereby a political entity is at the same time both 'a State' and 'not a State', depending on the perspective of the observing State, appears understandable.

State as coupling of law and politics system

The anthropomorphic metaphor of *State as Person* has been a common feature of the concept of the State from the time of the early international law positivists. But a State is not a fact in the same way that a human person is a fact. From the time of Hugo Grotius and Emmerich de Vattel, the sovereign State has been understood as an independent political community organization in a particular territory under a system of government. The international law concept of 'State' can, then, be understood as a the joining of law and politics under a system of government. It is then possible to conceptualize the problem of the identification of 'State' in terms of the identification of a political entity that represents the structural coupling of the law and politics systems.[8] The boundaries of the State (on this understanding) can then be defined in terms of the territorial constitutional space 'occupied' by *both* the legal system and the political system, i.e. the space 'occupied' by an effective legal system – law, structurally coupled with politics – and a legitimate political system – politics, structurally coupled with law.

The claim to national self-determination is a claim for the recognition of the political entity as an independent political community and for the recognition of the boundaries of the system as international borders – the nature of the border gives an

[7] Talmon (n 4) *passim*.
[8] Cf. Niklas Luhmann, *Law as a Social System*, trans. Klaus Ziegert (Oxford: Oxford University Press, 2004), p. 410.

entity its (designated) character as a State. The question is whether a system establishes its own boundaries – and a single authoritative version of its own boundaries (within the practical and normative limits of the environment of world society) – or whether there can be multiple versions and visions of the boundaries of autonomous politico-legal systems.

Open and closed systems

The answer to the question depends on whether we understand law and politics as 'open' or 'closed' systems. A 'closed' system defines its own boundaries: both in terms of the scope of those boundaries and the nature of those boundaries (this is a single actor perspective on the establishment of a boundary). An 'open' systems approach accepts that other actors and systems can influence the way in which the system operates and that the boundaries of the system may be 'seen' differently by the different actors (this is a multiple actor perspective on the establishment of a boundary).

The closed systems model of *State* resonates to some extent with the traditional accounts of statehood in international law, which have tended to understand the State to be a self-willed or self-producing entity. The idea can be seen in the works, inter alios, of Thomas Hobbes, John Locke, and Emmerich de Vattel that seek to explain the establishment of Sovereign authority in the state-of-nature and in the declaratory account of recognition, which concludes that a community that understands itself to be a State and which establishes its factual political and legal independence *is* a State, subject only to the *factual* limits imposed by other systems – including the factual limit imposed on new States by the *uti possidetis* doctrine.

The problem for the model is that it proves deficient when contrasted with the extant practice of the international community, which does not accept that new States can emerge on their own terms (consider, for example, the statehood claims of Nagorno-Karabakh and Transdniestria); admits the possibility of limited recognition by neighbouring and other States (Turkish Republic of Northern Cyprus, Abkhazia and South Ossetia); and in the case of Kosovo allows significant disagreement as to whether the territory is a State, or not. In other worlds, whilst the closed system model

might be able to explain how a law or politics system can make sense of the world in its own terms, it cannot help us to solve the practical questions of the emergence of entities we call State in world society.

Rather than proceed from a single perspective – that of the self-producing system (or national self-determination unit) – we might accept that different visions and versions of the existence, nature and place of the boundary might be relevant in the establishment of the State. The approach is suggested by an application of one variant of 'open' systems theory: 'complexity theory'.

Complexity theory

Complexity theory emerged as a body of scientific thinking about certain 'complex' systems in the second half of the twentieth century that further challenged the Newtonian paradigm of a Clockwork Universe that could be taken apart and subjected to analysis, with the prior assumption being that all systems, even highly complicated systems, were 'the sum of their parts' and that the future shape and form of any system could, in principle, be predicted. (A complicated mechanism, like a clock, can be understood by examining its component elements.) The insight from scientists working on the weather and those looking at cells, the brain, ecosystems, etc. was that certain (chaotic and complex) systems could not be understood in this reductionist way: these systems were observed to be 'greater than the sum of their parts'. It is not possible, for example, to understand an ecosystem (the patterned behaviour of organisms within a particular space) simply by examining the constituent elements. The patterned behaviours of chaotic and complex systems were observed to be the result of the actions of the individual components, *and* their interactions with each other, *and* their interactions with the environment outside of the system.

The patterned behaviour of a complex system is the result of the actions and reaction of agents following rules. The emergent nature of the complex system that results from those actions and interactions means that no two systems will be the same – even if the constituent agents start in the same place. Consider the example of a game of chess: actors (the players) operate within a relatively simply set of rules; develop strategies within those rules; and respond to how the other players develop their

strategies. No two games of chess are ever the same (notwithstanding the limited set of rules) and the pattern of the game emerges from the actions and reactions of the players. The same can be said about human societies and the insights from complexity have been applied in a wide variety of contexts, in both the natural and the social sciences, including to economic systems, the world wide web, and to human societies, whether organized at the local or global level.

A rainforest ecosystem is the paradigmatic complex system. The example highlights the difficulty of modelling complex systems, which are defined by their *incompressibility* (they cannot be simplified without losing some element that makes them complex) and *openness* (agents sometimes interact directly with elements in the external environment). The open nature of complex adaptive systems means that it can be difficult to tell what is 'system' and what is 'not-system'. Establishing the place of the boundary of a complex adaptive system is then far from straightforward. As a result of the incompressibility and openness of a complex system, any description of the system and its boundaries inevitably involves the making of choices by the observer. This process of separating is called *framing*.

The key point is that the framing of a complex system is undertaken by an observer. Any description of a complex system concerns both the fact of patterned behaviour and the making of choices by those framing the system.[9] Given both the requirement to simplify a complex adaptive system in order to describe it, and the impossibility of capturing the complexity of the system in any description, there can be different descriptions of the same system by different observers, and no reason to conclude that each observer will 'see' the same version of the boundary: there can be multiple observations of the boundaries of a complex adaptive system.

'Complexity' concerns the study of complex adaptive systems that cannot be understood by an examination of the individuals parts: the whole is different from the sum of the parts. The nature and character of the system is provided by (1) the nature of the individual units (agents); (2) their interactions with each other; and (3) their interactions with the local and wider environment. A change in one of these areas can

[9] Paul Cilliers, *Complexity and Postmodernism, Understanding Complex Systems* (London: Routledge, 1998), p. 4.

have significant and unpredicted effects on the system as a whole. Melanie Mitchell identifies the following common properties of complex systems (mainly focused on complexity in the natural sciences): (1) Complex systems are self-organizing systems. Complex systems consist of large networks of individual components each typically following relatively simply rules with no central control or leader. It is the collective actions of the components that give rise to the complex patterns of behaviour. (2) Complex systems produce and use information and signals from their internal and external environments. (3) All these systems adapt (i.e. change their behaviour) through learning or evolutional processes.[10] This leads to a definition of the 'complex system': 'a system in which large networks of components with no central control and simple rules of operation give rise to complex collective behaviour, sophisticated information processes, and adaption via learning or evolution.'[11]

Observing complex systems of law and politics

Complex systems have, then, the following characteristics: agents follow rules, but act with some autonomy; agents are in a network of relationships; the patterned behaviours of agents can be framed as a system; system characteristics are not derived only from the actions of agents; agents act and react, relying on information within and outside system; the system therefore evolves without any guiding hand, although system memory constrains future possibilities. The argument here is that systems of law and politics can be understood as complex systems and modelled as patterned communications between authorities and subjects.

Consider the law system, for example. Law is self-organizing: there is no central controller or guiding hand – neither the legislature or supreme court is able to control the shape and form of the entire system. The law system is the emergent, undirected, pattern of normative communications framed in terms of law adopted by authorities and applied to subjects. It is the result of the communicative actions of a large network of agents (legislatures, courts, judges, lawyers, litigants and others), who are capable of responding to other actors and other systems, and who operate with no overall guiding hand. The patterned communications of the law system are a

[10] Melanie Mitchell, *Complexity: A Guided Tour* (New York, Oxford University Press, 2009), pp. 12-13.
[11] Ibid., p. 13.

consequence of the actions and reactions of law-actors within the system, with the legal system representing the 'memory' of previous actions and interactions and providing 'feedback' to agents, who operate in accordance with certain rules.

The politics system is the emergent patterned system of communications adopted by those in power to the subjects of the political regime. Politics is the pattern of regulatory communications concerned with the adoption of collective binding decisions by the government in relation to the governed. There is no single guiding hand or omnipotent power in the State: regulations can be adopted by legislatives, executives and administrative bodies. Collectively binding decisions emerge through the processing of information by agents within the system, often relying on feedback loops.

Conclusion: observing States complex systems

Where State is defined in terms of the observation of the emergent patterned communications of coevolved and coexistent law and politics systems, complexity theory suggests that the existence and emergence of States in world society is simultaneously a function of the activity of the system (there must be patterned behaviour that can be observed) and the product of the strategy of description involved in the act of observation when separating the law and politics systems from the background noise of world society.

The key insights from complexity are that (1) there must be complex law and politics system to be 'observed'; (2) the those law and politics systems do not establish a definitive account of their boundaries; (3) there is no natural boundary to the complex systems of law and politics; (4) the boundary is both a function of the operation of the relevant system and the strategic act of observation; (5) each strategic observer of the boundary can 'see' its own version of the boundary; and (6) given the limitations of knowledge regarding complex adaptive systems and the importance of perspective, there is no reason to prefer one version or vision of the boundary to another.

Complexity suggest, then, that the existence of States is both a function of domestic law and politics systems and the act of description in the observation of States in

world society, allowing the possibility of a political entity being (at one and the same time) ‘a State’ and ‘not a State’. The conclusion must be that statehood is not achieved by the actions of any single actor in world politics, but through the complex interactions of a number of agents. This insight provides the basis for an important agenda for future research and possibility the re-thinking our understanding of the ways that new States emerge.