Modelling Democratic Secession in International Law

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Introduction

Nationalism, in the words of Anthony Smith, is the belief that all those who share a common history and culture should be 'autonomous, united and distinct in their recognised homelands'.[1] It is a modern phenomenon that concerns, generally speaking, the demand by a group for a State, by virtue of the fact that the group is a 'Nation'. The claim is advanced in two related steps: first, that each Nation is, if it so chooses, entitled to its own State, and, second, the territorial State in which the Nation is located enjoys limited, if any, authority over certain subjects, by virtue of the ethnic, religious, and linguistic differences between the centre and the relevant group.[2] The manifestation of a sentiment of national self-determination is a reaction by the periphery to the homogenizing efforts of the language and culture of the centre, and a conflict over the assertion of political authority and the place and meaning of the boundary between the centre and the Nation.

A cursory glance at the different maps drawn since 1900 might suggest that the nationalist argument has proved highly effective, as world political society has changed form a handful of largely European Empires to over 200 sovereign and independent States.[3] This interpretation would be mistaken. The process by which new States have emerged – in particular in the period since the inception of the United Nations – has in fact undermined the distinctive claim of nationalisms, i.e. the right to a 'Nation-State'. The claim may appear

[1] Anthony D. Smith, *Nationalism in the Twentieth Century* (Oxford: Martin Robertson, 1979), p. 2.
[2] See generally Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); and John Breuilly, *Nationalism and the State*, 2nd ed. (Manchester: Manchester University Press, 1993).
[3] New States have emerged in a number of *waves*, notably at the time of the United Nations decolonization movement in the 1960s, during which decade 42 States were admitted to UN membership; and the partial collapse of the Soviet Empire and dissolution of Yugoslavia in the 1990s, when 32 new members were admitted. Since the turn of the twenty-first century, only 5 new States have been admitted to the United Nations (a significant decrease on the average).

paradoxical as many would claim that it was nationalism that replaced Empire as the organizing principle of world political society, and we continue to see new States emerge in response to the nationalist demands – a State of Montenegro for Montenegrins, for example. An examination of the international law doctrine and practice demonstrates, however, that when questions of legitimacy supplemented the criterion of effectiveness for the establishment of new States, political authority was framed in terms of a consent-based or 'democratic' self-determination, and not any nationalist principle. This is explained by reference to the turn to ethics in international law that accompanied the introduction of the United Nations as an organization of global governance capable of giving expression to the inchoate values of the international community, and which has resulted in arguments for significant modifications to the 'Montevideo checklist' for the identifications of new States and revised understandings as to the required conditions for the emergence of new States.

The objective of this chapter is to evaluate the extent to which the change in the emergent teleology of the international law system, reflected in a focus on the idea of legitimate political authority, can accommodate a right of democratic secession: the right of a group to a State by virtue of the fact that its political leaders have been able to mobilize majority support around a nationalist case in favour of independence. The work proceeds as follows. It first outlines the way in which international law responds to claims for recognition of the right of national self-determination – understood here as the claim to a sovereign and independent State. The extant incoherence in the existing doctrine and practice on political self-determination and statehood suggests a requirement for a new conceptual model to make sense of this problem. In common with a long tradition in the social sciences (including law), the chapter looks to developments in the natural sciences to make sense of the social world – in this case by reference to a variant of systems theory known as complexity, which is focused on emergent systems that represent the patterned communications of networks of agents, without any central controller or guiding hand.

The rationale for relying on complexity is grounded in the perceived advances of an approach that is considered to illuminate debates in international law in a way that is clear about its underlying conceptual base and consistent in its application. Complexity is relied on metaphorically: law and politics systems are understood to be *like* the complex systems we

observe in the natural world – and are therefore amenable to an application of the insights of complex systems theory thinking. Whilst there is an emerging literature that seeks to apply the insights from complexity to domestic law systems,[4] hitherto, complexity has had limited impact on international law scholarship, and there has been no attempt to apply its insights to the law on national self-determination.[5] Following the insights from complexity, we can develop an abstract model of *State* as the observation of the patterned communications of the coevolved and coexistent law and politics systems. The third part of the chapter relies on this abstract model to outline a right of democratic secession in three related steps: the rejection of the sovereign authority of the territorial State by certain subjects; the acceptance of the authority of emergent systems of law and politics of a new political entity; and observation (or 'recognition') of the political entity as possessing legitimate political authority. The work concludes by reflecting on the implications of the analysis for the events of 2014 in the Crimea, Donetsk and Luhansk regions of Ukraine.

The international law on national self-determination

The nationalist argument is the each Nation has the right, if it so chooses, to its own State. The justification for the position lies in the claim that Nations and their cultures are both valuable in themselves and important to individuals in terms of identity, well-being and flourishing, and that the Nation and those marked by the national culture are best protected within a sovereign and independent Nation-State. Where this is not already the case, the literature suggests that the group has the right to establish a State on one of three grounds: that each Nation has the right to a State on its territorial homeland; that individual members of the Nation have a choice-based, or democratic, right of secession; and that, in cases of extreme injustice, the group has a remedial right of secession. This section briefly outlines the ways in which international law responds to these claims.

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[4] See, for example, Hope M. Babcock, 'Democracy's Discontent in a Complex World: Cab Avalanches Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?' (1996-7) 85 *Geo. L. J.* 2085; Gregory Todd Jones, 'Dynamical Jurisprudence: Law as a Complex System' 24 *Georgia State University Law Review* 873; Julian Webb, 'Law, ethics, and complexity: Complexity theory & the normative reconstruction of law' (2005) 52 *Cleveland State Law Review* 227; and Thomas Webb, 'Tracing an Outline of Legal Complexity' *Ratio Juris* (forthcoming).

[5] Lars-Erik Cederman applies the insights from complexity in an attempt to explain the processes that lead to the establishment of new nation-states: Lars-Erik Cederman, *Emergent actors in world politics: How States and Nations develop and dissolve* (Princeton, NJ: Princeton University Press, 1997). See also Lars-Erik Cederman and Luc Girardin, 'Growing Sovereignty: Modeling the Shift from Indirect to Direct Rule' (2010) 54 *International Studies Quarterly* 27.

The term 'Nation' in international law can refer either to the State (the international *Law of Nations*), or to groups within the State or that cross State borders. For reasons of clarity, this work will use the more common international law terminology of 'State' and 'people'. The distinctive claim of nationalism, i.e. the right of a Nation to a State, is then reformulated in terms of the right of peoples to political self-determination, statehood and independence. The traditional position of international law has been that the establishment of a Sovereign political community is a question of fact: an effective political power under the rule of law has a *prima facie* claim to be accepted as a State. Outside of the state-of-nature, international law recognized a right of sovereignty where a political community was able to establish its independence 'safely and permanently' (in the words of the Lassa Oppenheim) from the previous sovereign power.[6] The position remains unchanged in the present day: an entity that can, by its own efforts, establish itself 'safely and permanently' within a territory has a claim to be accepted as a State.

Whilst there is consensus in the literature that effectiveness (the exercise of independent government functions over a territory and population) is a necessary, and often the most important, criterion of statehood, there is disagreement as to whether it is a sufficient criterion as a consequence of the non-recognition of certain State-like entities, including Southern Rhodesia and Turkish Republic of Northern Cyprus. A revised understanding is developed in one of two ways. First, as a modification of the 'Montevideo checklist':[7] a prohibition on statehood where independence results from an unlawful act of military intervention (Turkish Republic of Northern Cyprus), or where independence is achieved through a violation of the rights of people to self-determination based on political equality (Southern Rhodesia). Secondly, that certain principles related to an idea of legitimacy can support or undermine the claim to 'effectiveness': an ineffective but legitimate political community may be recognized as a State (Guinea-Bissau, Croatia, Bosnia and Herzegovina), whilst an effective but illegitimate political community may not be recognized (Southern Rhodesia, Turkish Republic of Northern Cyprus, and Transdniestria).

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

[7] According to Article 1 of the Montevideo Convention on the Rights and Duties of States (Adopted 26 December 1933. Reprinted (1934) 28 (Supplement) *American Journal of International Law* 75), *State* as legal person in international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; (d) and the capacity to enter into relations with other States (usually understood as independence).

The normal mechanism by which a new State is established is through its separation from the territorial State. This is a consensual process. Where the territorial State accepts and recognizes the newly independent State, the international community will normally follow its lead, unless the new State is established in violation of an international law norm of *jus cogens* standing. Where the territorial State does not consent to the establishment of the new State, the relevant process is unilateral secession. This can be achieved in one of two ways: through effective control of the territory 'safely and permanently' or by virtue of the right of peoples to self-determination. A positive application of the right to self-determination would logically accord a right to statehood in the absence of effective political control. Consider, for example, the practice of creating Nation-States following World War I, when the *Peacemakers* (*pace* Margaret Macmillan) sought, on objective criteria, to identify Nations and to establish their sovereign and independent existence – a process foreshadowed in President Woodrow Wilson's 'Fourteen Points' address to Congress in 1918, in which he called for the establishment of a State of Poland, 'which should include the territories inhabited by indisputably Polish populations'.[8]

The United Nations decolonization project took a different approach to the post World War I settlement, establishing a right of political self-determination and statehood only for non-contiguous colonised territories.[9] 'Colonized' peoples were defined by their relationship to the territory, and not any racial, ethnic, cultural, religious or linguistic characteristics. The territorial approach to defining 'peoples' was confirmed by the application of the principle of *uti possidetis*: the requirement for the recognition of colonial administrative borders as the boundaries of political self-determination. As Hurst Hannum explains, in the UN decolonization process, '[t]erritory, not "nationhood," was the determining factor'.[10] The negative aspect of the international law right of peoples to self-determination developed by the United Nations denies political legitimacy in cases of colonial rule and accords a right to independence and statehood to non-self-governing territories.

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[8] Point XIII. Woodrow Wilson, 'An address to a Joint Session of Congress' (The Fourteen Points Address)', 8 January 1918, reprinted *The Papers of Woodrow Wilson* 45 (Arthur S. Link et al. (ed.), Princeton NJ: Princeton UP, 1966-94), p. 534.

[9] GA Res. 1514 (XV), adopted 14 December 1960, 'Declaration on the granting of independence to colonial countries and peoples'.

[10] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University Pennsylvania Press, 1990), p. 36

The fact that the overwhelming majority of non-self-governing territories have achieved political self-determination by way of independence, integration or association does not exhaust the application of the right of peoples to self-determination. According to general, customary and conventional international law: '*All peoples* have the right to self-determination. By virtue of that right they freely determine their political status'.[11] Whilst, there is no agreed international law definition of 'people', four general criteria are normally considered to relevant in the identification of peoples: some identity characteristic that differentiates members of the group from others, based on race, ethnicity, culture, language, religion, or common economic life, etc.; historical continuity, understood in terms that peoples have a history and an imagined future; that the group is associated with a particular territory, or 'homeland'; and the self-conception of the group as an actual or potential unit of self-determination. Self-evidently these criteria can encompass ethno-cultural groups within the State, and it is accepted that the international law category of 'people' can be applied to groups within a State that consequently enjoy a right to political self-determination. It is less clear what the consequences of such a recognition entail, although there is general agreement in the international law doctrine and literature that the right of peoples to political self-determination does not (alone) accord a right to statehood for sub-State groups.

Whilst self-determination does not establish a right to statehood, this does not preclude the possibility of a group within the State declaring its independence,[12] or achieving statehood through the establishment of effective control over a territory and its population – as secession is neither lawful, nor unlawful, as a matter of international law.[13] The right of the State to its territorial integrity is opposable to (i.e. valid against) other States, not peoples and groups within the State. Where a politically effective people becomes de facto autonomous and independent, without external military support, it has a claim to be a State. But what about politically ineffective peoples? Outside of the colonial context, three possible scenarios can be identified for accepting a right of independence for groups seeking statehood, but which are unable to establish effective control: in cases of serious human rights abuses ('remedial secession'); the internationalization of promises of independence in certain

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[11] Article 1(1), common to the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI), 16 December 1966, into force 23 March 1976 (emphasis added).
[12] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403. para. 122.
[13] James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, Oxford University Press, 2006), p. 390.

circumstances ('promissory secession'); and following a positive vote in an independence referendum or its functional equivalent ('democratic secession').

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,[14] 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 statehood with the support of external military forces is unclear given the limited doctrine and practice. Whilst recognized by a number of authors, the existence of the remedial right of secession is disputed by many scholars as a matter of international law.

The second possibility for recognizing a right to statehood for politically ineffective peoples is where a domestic constitution or international peace agreement promises independence following the holding of a valid referendum ('promissory secession'). The relevant State practice concerns South Sudan, whose right to statehood via a democratic referendum was guaranteed under the Comprehensive Peace Agreement of 9 January 2005 and the domestic laws of Sudan;[15] the separation of Montenegro in accordance with the Constitution of Serbia and Montenegro;[16] and (arguably) the Edinburgh Agreement between the United Kingdom Government and the Scottish Government, which provided that the independence referendum should 'deliver a fair test and a decisive expression of the views of people in Scotland *and a result that everyone will respect*.'[17] The domestic or international guarantee is understood to 'trigger' a particular application of the right of peoples to political self-determination, in the form of a right to an independent State. International law scholars take different positions as to whether this argument can be sustained and there is limited evidence for the position in the relevant jurisprudence, although the Canadian Supreme Court did conclude that secession should be the result of a negotiated process between the relevant

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[14] GA Res. 2625 (XXV), adopted October 24, 1970, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'.

[15] See Jure Vidmar, 'Explaining The Legal Effects Of Recognition' (2012) 61 *International and Comparative Law Quarterly* 361, 368-9.

[16] Susanna Mancini, 'Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination' (2008) 6 *International Journal of Constitutional Law* 553, 582.

[17] Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 October 2012 (emphasis added). Available http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence (last visited 25 September 2014).

parties, and that the way in which the parties engaged with the process would influence the question of recognition by outside States.[18] In other words, the (internal) promise made by the State government (expressly or impliedly) to engage in a process leading to independence may well create (external) international law obligations opposable to the territorial State.

The third possibility is to recognize that a positive vote in support of independence in a valid referendum can create an international law right of secession for politically ineffective peoples ('democratic secession'). The mainstream international law position holds that the right of peoples to self-determination does not accord a right to statehood, even when there is a democratic vote for independence or its functional equivalent.[19] Certain writers claim, however, that a vote for independence is not irrelevant in the process of creating States.[20] Reflecting on recent events in Crimea, Anne Peters concludes that contemporary international law moves towards the position of requiring that all territorial realignments should be justified by democratic means, preferably through a territorial referendum.[21] There is then a emergent literature highlighting the relevance of democratic decisions-making by the affected population in determining the future of any territory.

How then are we to resolve the differences of scholarly opinion on the possibilities for statehood for politically ineffective peoples? In dealing with the problems that face the discipline, international lawyers often rely on abstract models of the international system, and they consider that these models should not only, or not merely, be of theoretical interest, but also helpful in answering the practical questions that face the discipline.[22] The dominant way in which international lawyers have modelled the State has been by reference to the idea of *State as Person*, which explains the reliance on *birth* to describe the emergence of new States.[23] The International Court of Justice has, for example, referred to the '*birth* of so many new States'.[24] The idea of *State as Person* also underpins the reliance by most

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[18] *Reference re Secession of Quebec* (1998), 2 SCR 217, paras. 103 and 143.

[19] Crawford (n 13), p. 417.

[20] See Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *International and Comparative Law Quarterly* 545, 580; and Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Oxford: Hart, 2013), p. 200.

[21] Anne Peters, 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum', in Christian Calliess (ed.), *Liber amicorum Torsten Stein* (2014) (SSRN), p. 8.

[22] Annelise Riles, 'Models and Documents: Artefacts of International Legal Knowledge' (1999) 48 *International and Comparative Law Quarterly* 805, 808.

[23] George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), p.117.

[24] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, p. 16, para. 52 (emphasis added).

international lawyers on the declaratory approach to the recognition of new States. Just like natural persons, States are *born*, and it is contrary to common sense to conclude that an artificial legal *person* can exist, or not exist, depending on the conclusions of another party.[25]

On the 'State as simple fact of the world' understanding, the democratic legitimacy (or otherwise) of a secessionist movement would be irrelevant to any claim to statehood. The problem for this model is that it cannot easily explain why effectiveness is no longer the only relevant criterion in the identification of new States (colonial States could not maintain authority over territory simply by virtue of effective control and new States cannot emerge only be seizing control of the territory from the previous sovereign power) or explain certain inconvenient facts like the existence of Abkhazia, Nagorno-Karabakh, Somaliland, Southern Rhodesia, Transdniestria, and Turkish Republic of Northern Cyprus. The presence of de facto regimes in world society suggests that the *State as Person* model no longer functions effectively to explain the international law on statehood – a point reflected in the ever more complicated and controversial modifications of the definition of 'State' that seek to explain why certain 'State-like' entities are not, in fact, 'States', but without reference to the criterion of recognition, given that academic international lawyers, with few exceptions, follow the declaratory position on statehood: 'An entity is not a State because it is recognized; it is recognized because it is a State'.[26]

The challenge, then, is to find a way of modelling State that helps solve the problem of the identification of new States. Rather than begin with the image of *Leviathan* emerging as a natural and adult *body politic*, the proposition here is that we should build on developments in understandings in the natural sciences, as applied to the social sciences, specifically the third wave of systems theory thinking known complexity theory to frame *State* as the observation of the emergent patterned communications of coevolved and coexistent law and politics systems. The justification for this approach lies in the fact that since Hugo Grotius and Emmerich de Vattel, *State* has been conceptualized by international lawyers (if not by others) as an independent political community, organization in a particular territory, under a

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[25] The anthropomorphic metaphor is clearest in the work of Stefan Talmon: '[m]uch like the *birth* of a child, the creation of a State is predominantly a question of fact': Stefan Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: *Tertium Non Datur*?' (2004) 75 *British Yearbook of International Law* 101, 125 (emphasis added).
[26] James R Crawford, 'State' (2011) *Max Planck Encyclopedia of Public International Law*, para. 44.

coercive system of government under the rule of law, which is not subject to the authority of any other political entity. *State*, in other words, is imagined as the coevolved and coexistent systems of law and politics, where the politics system is understood in terms of the adoption of collectively binding decisions that will be coercively enforced. This understanding is generally reflected (albeit expressed in different terms) in the international law literature and forms the basis of the Montevideo formula that defines 'State'.[27]

Systems theory thinking

The argument from general systems theory is that we can think of any collection of interacting objects, actors or agents as a 'system', and that all systems have certain shared characteristics, whether we are looking at the Solar System or Criminal Justice System. The objective in both cases is to observe, frame and explain the patterned behaviours of the objects, actors or agents in the system. Given its focus on relationships between actors or agents, systems theory thinking has proved influential in developing our understandings of the functioning of human social systems. A variant developed by Niklas Luhmann (*autopoiesis*), which focuses on communications, has resonated with a number of legal academic, given its conceptualization of 'law' as a self-producing system of law communications. Luhmann's closed systems theory imagines world society as a system of self-creating, self-maintaining and self-organizing – *autopoietic* – systems of communication.[28] These social systems are distinguished from the background noise of world society by virtue of the fact that each has its own functional specialism and its own binary coding that provides a positive and a negative value and through which the system creates its own understanding of the world from a perspective that is internal to the system.[29] The only relevant perspective is that of the system and the only relevant observer is the system.

Examples of autopoietic social systems include the law system, the politics system, the economic system, science, the education system, and the media. Systems of the same type may have different programmes, but each will have the same binary code. Law and politics

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[27] (n 7).

[28] The argument is self-evidently not a literal description of the world, but a way of modelling the complexities of human social existence by drawing on insights from science: autopoietic social systems of communication are self-creating, self-organizing, and self-reproducing – just *like* biochemical systems (the standard example is the biological cell).

[29] See, generally, Niklas Luhmann, *Theory of Society*, Vols. 1 & 2, translated by Rhodes Barrett (Stanford: Stanford University Press, 2012 & 2013).

are, according to Luhmann and others,[30] *autopoietic* systems of communication that build themselves from their own communications, which then constitutes the possibilities of future communications. The functional specialism of law is to maintain expectations in the face of disappointment. The binary coding is lawful/unlawful, or law/non-law. There can be different systems of law (different programmes in the language of systems theory), but all will have the same binary code. The function of the politics system is to provide society with a means of making (collectively) binding decisions on political questions. The binary coding is governing/governed, or authority/subject. The politics system is comprised of communications on those issues identified as requiring the adoption of collectively binding decisions that will be coercively enforced. Again, there can be different types of politics systems, but all with the same binary code: (coercively) governing/governed.

Law and politics are, in Luhmann's terms, *structurally coupled* under the State Constitution:[31] politics establishes the scope of effective law norms through executive enforcement; law translates power into legitimate political action. *State*, following the logic of autopoiesis, can then be modelled as the space *occupied* (metaphorically) by an effective law system (law, structurally coupled with politics) and a legitimate politics system (politics, structurally coupled with law): *State* is a *self-willed or self-producing entity, constituted through the emergence of coevolved and coexistent systems of law and politics, coupled structurally under a Constitution*. Consequently, the boundaries of the State are not the lines we observe on a world political map or manifested in our experiences at passport control, but the jurisdictional space occupied by the overlapping system boundaries of politics and law.

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

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[30] See especially Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated by Gareth Norbury (Oxford: Oxford University Press, 2012); and Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge: Cambridge University Press, 2011).

[31] Niklas Luhmann, 'Operational Closure And Structural Coupling: The Differentiation Of The Legal System' (1991-2) 13 *Cardozo L. Rev.* 1419, 1436.

factual political and legal independence *is* a State, subject only to the *factual* limits imposed by nature and other systems. The problem for the model from autopoiesis 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 model from autopoiesis might be able to explain how a law or politics system can make sense of the world in its own terms, it cannot anymore (if it ever could) help us to solve the practical question of the emergence of new States in world society.

Complexity theory

Niklas Luhmann's theory of autopoiesis forms part of what Keith Sawyer calls the 'second wave' of systems theory thinking. Sawyer concludes that this second wave has been of limited utility in explaining the functioning of social systems, but that a 'third wave' developed since the 1990s has proved more useful. This third wave of systems theory thinking is focused on micro level agents, communication and social emergence, with a particular concern with 'complex' systems whose patterned behaviour cannot be understood to be the result of some 'guiding hand'.[32] This chapter now turns to outline the insights from the third wave of systems theory thinking to develop a model of *State* as the coupling of *complex* systems of law and politics.

'Complex adaptive systems theory', or 'complexity theory', or simply 'complexity' emerged as a body of scientific thinking about certain systems in the second half of the twentieth century to further challenge the paradigm of a Clockwork Universe that could be taken apart and subjected to analysis. The prior assumption of Newtonian science was that all systems, even highly complicated systems, were 'the sum of their parts', and, like a clock, they could be understood by examining their component elements. The insight from scientists working on the weather and those looking at cells and the brain, etc. was that certain (chaotic and

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[32] R. Keith Sawyer, *Social Emergence: Societies as Complex Systems* (Cambridge: Cambridge University Press, 2005), chapter 2.

complex) systems could not be understood in this reductionist way. It is not possible, for example, to understand an ecosystem (the patterned behaviour of organisms within a particular space) simply by examining its constituent elements. The properties of chaotic and complex systems were seen to be the result of the behaviours of the individual components, *and* their interactions with each other, *and* their interactions with the environment outside of the system: the whole (of the system) was 'greater than the sum of its parts'.

Chaos theory observes that the elements of certain systems, the weather is the standard example, sometimes combine to produce unpredictable consequences and that small inputs can have disproportionately large outputs (non-linearity) – the, so-called, *Butterfly effect*, whereby the weather in Texas can be influenced by the flapping of the wings of a butterfly in Brazil. Both chaos and complexity have in common the idea that the patterned behaviour of a 'system' can be the result of a relatively simple set of laws followed by a large number of constituent agents. In chaos theory, those laws produce unpredictable outcomes and the system is highly sensitive to its original condition. In complexity, the actions and interactions of agents result in complex patterned behaviour at the *edge of chaos*: the place between entropy (where the system decays) and chaos (too much activity). The problem for the science of complexity is that complex systems cannot be modelled accurately because they cannot be simplified without losing some of their complexity. Any reductive description fails then to capture the full complexity and adaptability of the system, or loses some important element, meaning that predictions of the future shape and form of complex systems become impossible to make with any certainty.

Complexity is more firmly established in the natural sciences, where it has been applied, for example, to ecosystems and the brain. The insights from complexity have also been applied (metaphorically) by certain social scientists to examine economic systems, the Internet, and the functioning of human societies, from standing ovation in the concert hall, to the organization of nation State societies and beyond. In all of these cases, observed patterned behaviour is the result of the actions and reaction of agents following rules. Consider the example of a game of chess: agents (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 are ever the same (notwithstanding the limited set of rules) as

the patterns on the board emerge from the actions and reactions of the players. The same can be said about human societies – and the social systems that result from the actions and interactions of human agents, including the law system. Drawing on the insights from complex systems theory, this chapter now turns to develop a model of *State* as the framing of the emergent patterned communications of coevolved and coexistent law and politics systems – and explain the utility of the model for developing an argument for recognizing a right of democratic secession.

Complex adaptive systems

The dynamic character of a complex system is provided by the facts of emergence and self-organization. Emergence reflects the idea that patterned behaviour is a consequence of the actions of individual components following certain rules; self-organization that patterned behaviour is not the result of some central controller or guiding hand, but a consequence of individual agents responding to the unpredictability of emergence in a search for stability.[33] The capacity for self-organisation allows complex systems to change their internal structures in response to developments within the system and events in the external environment. The structure of the system (the positions, actions and reactions of agents) occurs spontaneously as the result of the interactions of the parts of the system as they react to the flow of information through the system: there is no central controller or guiding hand in a complex system. The capacity for self-organization is the property of a complex system that enables it to process and make sense of information in order to develop or change in response to changes in the environment.

Emergence is the key attribute of complexity. The patterns observed in a complex systems are the result of the actions and interactions of networks of agents. It is important to be clear that emergence is not random patterned behaviour: emergence reflects the idea that the interactions between the component agents and their interactions with actors outside the system and the wider environment can produce unexpected consequences. This is particularly the case as complex systems are *non-linear*: small inputs can have

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[33] See generally Melanie Mitchell, *Complexity: A Guided Tour* (New York, Oxford University Press, 2009), pp. 12-13; also Neil Johnson, *Simply Complexity: A Clear Guide to Complexity Theory* (London: Oneworld Publications, 2009), pp. 13-16; and Paul Cilliers, 'What Can We Learn From A Theory Of Complexity?' (2000) 2 *Emergence* 23, 24.

disproportionately large effects (the *Butterfly effect*), and an apparently stable system can change suddenly in unpredictable ways. Emergence is, then, focused on the properties of the system that cannot be deduced from examining the component elements.[34]

The basic components of a complex adaptive system are called *agents*. The term refers to actors able to respond to other agents and to the external environment. The key point is that agents are, to some degree, autonomous, whilst operating in accordance with certain rules.[35] When agents 'react' they do so in a *thinking* way, based on a collective memory contained within the system. Complex systems learn through the processing of information by agents and the presence of negative and positive *feedback* loops. Complex systems are also *learning systems*. This is an emergent property of the system: as the interactions of agents create new patterns in response to new information, the system can be said to have 'learnt' and adapted and evolved. In order to adapt, evolve and change – and not simply 'mirror' its environment, the system must have a memory, and therefore a history.[36] Learning is not possible without some form of *memory* that contains information important to the existence of the system, which is stored and dispersed throughout the system (even the most simple social animal must be able to distinguish friend from foe). The *history* of the system helps to determine its structure, representing the memory of the system of the processes of self-organization that resulted in its extant structure and processes. That memory also constrains the system's possible futures: the idea of *path dependency*.

As well as co-operating and competing with other agents within their locale, agents may be influenced directly by external actors and elements. In other words, complex systems are *open* systems. This makes the identification of the boundaries of a complex system particularly problematic. Take the example of the paradigmatic complex system: a rainforest ecosystem. As a result of the incompressibility (a complex system cannot be simplified without losing some element that makes them complex) and openness of the system (agents in the ecosystem sometimes interact directly with elements in the external environment), any description of the rainforest ecosystem and its boundaries inevitably involves the making of

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[34] Jeffrey Goldstein, 'Emergence as a Construct: History and Issues' (1999) 1 *Emergence* 49, 58.
[35] Francis Heylighen, Paul Cilliers and Carlos Gershenson, 'Philosophy and complexity' in Jan Bogg and Robert Geyer (eds.) *Complexity, Science and Society* (Oxford: Radcliffe Pub., 2007) 117, 125.
[36] Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (London: Routledge, 1998), pp. 91-92.

choices as to what is 'system' and what is 'not system'. This process of separating is called framing – and it is undertaken by an observer.[37] Any description of a complex system concerns, then, both the fact of patterned behaviour and the making of choices by those framing the system.

The complex systems of law and politics

Complex systems have 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; 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. 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) capable of responding to other actors and other systems, which operate with no overall guiding hand. The law system can, then, be mapped, or modelled, as a pattern of law normative communications between legal authorities and the subjects of the law regime: 'It is unlawful for X to kill Y', 'It is unlawful for A to break their contractual arrangement with B', etc., etc.

The patterned communications of the law system are a consequence of the actions and reactions of law-actors, with the legal system representing the 'memory' of previous actions and interactions and providing 'feedback' to law-agents, who operate in accordance with certain rules: higher courts bind lower courts, rules are interpreted logically and in accordance with precedent, etc. Information flows through the system; its source can be internal or external. Memory is distributed throughout: in statutes, court judgments,

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[37] Ibid., p. 4.

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academic textbooks, etc. That memory of the law system limits the possibilities of future communications (path dependency).[38] This is clearest in the practice of the common law,[39] and related judicial principle of *stare decisis*.[40] A law system evolves and maintains its fitness by adapting to developments within the system and in the wider environment, and by accommodating itself with other law systems. Law agents exchange information and the law system is able to rely on feedback loops and use information from within the system and from other law systems in order to adapt and change (consider the way in which legal systems in Europe have accommodated themselves to the emergence of the law system of the European Union). In its evolution, the law system builds on the collective memory of the system, but in ways that cannot be predicted as constitutions are revised or replaced,[41] legislatures adopt radical law reform, and supreme courts overturn long-established precedent. Any event (often unforeseen events) can influence the future shape of the law system in unexpected and significant ways. Finally, law systems are open systems: their boundaries have the characteristic of porous legality and it is not always easy to determine to which system a law norm communication belongs.[42]

The politics system at the level of the State can also be understood as a complex system.[43] 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 legislatures, executives and administrative bodies. Collectively binding decisions emerge through the processing of information by agents within the system, often relying on feedback loops. The politics system has its own memory, which limits the possible scope of future decisions, and its own ways of thinking.

[38] J.B. Ruhl, 'Law's Complexity: A Primer 2007-2008 24 *Georgia State University Law Review* 885, 894-5.

[39] On the idea of the common law as a complex system, see Daniel M. Katz et al., 'Social Architecture, Judicial Peer Effects And The 'Evolution' Of The Law: Toward A Positive Theory Of Judicial Social Structure' (2007-2008) 24 *Georgia State University Law Review* 977 (and references cited). See also J.B. Ruhl, 'The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy' (1996) 49 *Vanderbilt Law Review* 1407, 1471.

[40] On path dependency and *stare decisis*, see Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000-2001) 86 *Iowa Law Review* 601,

[41] Donald T. Hornstein, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 *Duke Law Journal* 913, 932.

[42] The idea of porous legality, or interlegality, is common in the literature on legal anthropology. The phenomenon has also been observed in colonial and post-colonial settings; in relation to new forms of pluralism within the State; and in the areas of transnational and other forms of global governance. The term 'interlegality' is taken from Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (London: Butterworths, 2002).

[43] For a useful introduction to complexity applied to the politics system, see Robert Geyer and Samir Rihani, *Complexity and Public Policy: A New Approach to 21st Century Politics, Policy and Society* (Abingdon, Oxon: Routledge, 2012).

Political systems can, though, change in unexpected ways (often quickly) – consider the democratic revolutions during the so-called 'Arab Spring'.[44] To survive, a politics system must adapt and evolve with the systems of world society. Politics systems are also open systems, interacting with other politics systems and political communications at one level can form part of the politics system at another – consider the way in which global political communications are part of domestic political communications, concerning, for example, military and humanitarian interventions, climate change, and commitments for overseas development assistance.

<u>Modelling 'State' as complex systems of law and politics</u>

The concept of *State* is understood by international lawyers in terms of coevolved and coexistent law and politics systems: an independent political community under a coercive system of government under the rule of law, which is not subject to the authority of any other political entity. The insight from complexity is that these law and politics systems are emergent, undirected systems. How, then, do we model 'State' against the background noise of world society in conditions of complexity? The first requirement is to separate each system from the environment of world society. The idea of a complex *system* presupposes the existence of a boundary that distinguishes 'system' and 'not-system'. If we understand world society in terms of communications, we can observe patterns of communications that we would recognize as 'law' and 'politics'. We can, further, frame networked communications as law systems and politics systems. The boundaries of these systems are not, however, to be understood as enjoying an 'objective' reality, or as being established only by the operations of the system (in contradistinction to autopoiesis). Boundaries are 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 system from its environment.

Any description of a complex system involves the making of choices by those observing the system. Different observers may frame the patterned communications differently, depending on their strategic and cognitive frames: constitutional lawyers see domestic law norms;

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[44] See, generally, Seva Gunitsky, 'Complexity and Theories of Change in International Politics' (2013) 5 *International Theory* 35.

international lawyers see international law norms, for example. Where there is more than one observer, there may be multiple perspectives on the existence and scope of the system (and no reason to conclude that each observer will *see* the same version of the system) or to prefer one version or vision of the system and its boundary to another. It is then difficult to be absolutely certain of the position of the boundaries of law and politics systems in world society. Importantly, there are no objective boundaries – the act of framing involves the making of choices – and it is impossible for the observer to avoid the responsibility of choosing, i.e. deciding which norms are inside the system and which norms are outside the system. Once we recognize that law and politics are complex systems, we must reject (as an observed reality) the argument that a political entity (understood as the coevolved and coexistent systems of law and politics) capable of establishing its independence with the will to be a State *is* a State. *State* is not a fact of the world simpliciter: it is fact of the world *observed* through the cognitive frame of international law.

In the identification of new States, the following insights from complexity theory emerge. First, there must be *patterned communications*. Complex systems are not merely a function of observation. We must be able to *see* co-emergent and coexistent systems of law and politics. Second, there must be an *observer* to distinguish the patterned communications of the law and politics systems from the background noise of world society. This is done through the framing of communications of the same type, that is by framing the pattern of law communications coded lawful/ unlawful (or law/ non-law) issued by authorities to subjects and the pattern of communications issued by the government to the governed on collective biding decisions that will be coercively enforced. It follows that the 'existence' of the complex systems of law and politics is both a function of the system (reflected in patterned communications) and the act of observation. Third, given the inherent indeterminacy in the modelling and observation of complex systems, there may be multiple perspectives on the system and its boundary, and no reason to privilege the perspective of one observer over any other.

State, following the logic of complexity, is the *observation of the patterned communications of the coevolved and coexistent law and politics systems*. Where the law system and politics system are *observed* to be coexistent, then, according to the Montevideo formula, the territory subject to

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the normative communications of the law and politics systems has a *prima facie* claim to be a State. Where they are not observed to be co-existent, the political entity is not a State. Given the incompressibility and open nature of the complex systems of law and politics, different actors may come to different conclusions, depending on their cognitive frame and interpretation of the observed patterned communications, i.e. as to whether an emergent 'Sovereign' entity can be seen. The approach from complexity leads, then, inevitably to a defence of the constitutive position on statehood: the legal status of State is constructed by way of recognition by already existing States.[45] State is the *observation* of the law and politics systems 'coupled' under a Constitution.

Legitimate political authority and democratic secession

We have, then, our abstract model of State: the *observation of the emergent patterned communications of coevolved and coexistent law and politics systems*. To observe a State, international lawyers must be able to 'see' coevolved and coexistent systems of law and politics against the background noise of world society. This is achieved through the identification of communications systems by observing their function and binary coding. The law system is the pattern of normative communications coded lawful/not-lawful, which are promulgated by recognized authorities and applied to subjects. This definition is clearly contestable, but, for the most part, controversies in relation to the international status of a political entity do not concern the question as to whether it has a system of 'law' – although this point has been central to arguments before the European Court of Human Rights as to whether the de facto regime of Turkish Republic of Northern Cyprus is a sovereign political entity.[46] The focus, then, is on the politics system – as observed by State and non-state actors in the international community.

From the time of Hugo Grotius, it has been accepted that the overall approach of the international law system to the regulation of world society emerges through the exercise of Sovereigns' wills, i.e. there is no guiding hand (international law is the paradigmatic complex law system). In the period since the adoption of the United Nations Charter, that emergent

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[45] See Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605.
[46] See, for example, *Protopapa* v *Turkey*, App. No. 16084/90, judgment 24 February 2009.

teleology has undergone a process of transformation, in part through the recognition of the right of peoples to political self-determination, but also in the adoption of numerous international human rights law instruments, indicating a move away from the Hobbesian notion of the politics system as coercively binding decisions, to politics as a system of legitimate authority accepted by subjects. Legitimate political authority is manifested in the adoption of positive laws accepted (unthinkingly) by subjects. To be accepted by subjects, authority systems must develop, and act in a manner consistent with, a legitimation narrative. Without this, government is nothing more that the exercise of naked power.

The idea of practical authority developed by Joseph Raz explains the way in which the legitimating narratives of political authorities function. This account of practical authority relies on four inter-related theses: the dependence thesis, which provides that authority is legitimate where undertaken in accordance with the reasons that already apply to subjects; pre-emption thesis – the directives of legitimate authorities establish content-independent reasons for action; normal justification thesis, which establishes that the exercise of normative power is only legitimate where the authority is better placed than subjects to establish regulatory directives; and independence thesis – on some issues it will be more important for individuals to decide for themselves than to decide correctly. The key is the normal justification thesis. Raz argues that the normal way of establishing authority is to demonstrate to the subjects of authority directives accept that they would better conform to the reasons that (already) apply to them by following the directives of the authority than by acting independently.[47] The reasons for accepting the authority of another include that the authority is more knowledgeable; is more likely to make a correct decision; and accepting the authority of another allows for effective co-ordination. Once established, the directives of a legitimate authority are binding on those subjects within its jurisdiction.

The requirement for practical authority is a consequence of the identification of co-ordination and collective action problems by a number of individuals. It follows that before an actor, institution or system can satisfy the normal justification criterion (i.e. regulate in the interests of subjects), it must be recognized or accepted as an authority by a large number of persons who do actually accept that the relevant actor, institution or system satisfies the

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[47] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 53.

normal justification criterion in cases of co-ordination over matters of common concern. The exercise of normative power by the State is, then, legitimate where the State is more likely than the individual to establish a social norm or convention that regulates the behaviour of the individual and others in accordance with the background reasons that already apply to the subjects of authority directives taken individually. Where the individual subjects accept the authority of the politics system of the State, the system is an authority for them.[48]

Raz' account of the justification for authority establishes a significant break with the social contract tradition that has dominated the discourse around legitimate political power. Authority is not established at some hypothetical foundational moment of agreement that binds subsequent generations. According to Raz' account, subjects will only accept the authority of the regime where it governs, or at least claims to govern, in their interests at *this* point in time. The only reasons that an authority may take into account in determining the content of authority directives are those that already apply to actually existing subjects, including the requirement for co-operation on a wide range of issues – and that subjects recognize this is the case. Raz' idea of practical authority allows us to develop a model a democratic secession in three related steps:[49] first, the rejection of the sovereign authority of the territorial State by certain subjects; second, the acceptance of the authority of the emergent, undirected, systems of law and politics coupled under the constitution of a new political entity; and, finally, the observation (or 'recognition') of the political entity as possessing legitimate political authority in relation to its 'subjects'.

(1) The rejection of the authority of the State

Legitimate political authority depends on the development of a narrative by the politics system – and the acceptance of that narrative by the subjects of the regime taken

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[48] In the case of the political authorities of the State, Raz concludes that the requirement to solve co-ordination problems means that they should be in a position of 'real power', i.e. *de jure* political authorities should also be *de facto* authorities, and that this will require the use of coercive force to ensure compliance with authority directives: Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, 1036.

[49] Compare, however, Raz' well known position recognizing a collective right to self-determination for those (ethno-cultural) groups that provide secure identity and belonging to members. The objective is to secure the necessary conditions for the prosperity and self-respect of the group. The right to self-determination is limited only by the requirement that the encompassing group commit itself to the protection of basic human rights and exercises its right to self-determination in a manner that limits any damage to already existing States: Avishai Margalit and Joseph Raz, 'National self-determination' (1990) 87 *The Journal of Philosophy* 439.

individually. There are two parts to the equation, and both can provide the grounds for secession: the State can repudiate the bonds of authority by failing to govern in the interests of some or all of the subjects of the regime; or some or all of the subjects can reject the authority of the State. In relation to the first possibility (government *not* in the interests of subjects), self-evidently where the exercise of power makes no pretence to be in the interests of those targeted by the regulatory regime (tyranny, occupation, etc.), 'subjects' are released from the bonds of authority by the simple reason that the political institutions are not an authority for them. This is explained in legal doctrine and political theory in terms of a right of revolution, or right of rebellion, etc.

The idea that 'subjects' are released from the bonds of authority where the State manifestly makes no attempt to govern in their interests resonates with the 'remedial right' of secession outlined by Allen Buchanan, which concludes that such a right exists in cases of persistent and grave injustice, defined in terms of genocide or massive violations of basic human rights.[50] Buchanan later supplements these criteria with that of the persistent violation of intrastate autonomy agreements, which he links to serious ethnic conflict.[51] In a similar vein, Alan Patten's 'failure of recognition' criterion concludes that a claim to secede should be accepted where the State has failed to introduce constitutional arrangements that accommodate the distinctive ethno-cultural identity of the relevant group.[52] In both cases (and in the language of practical authority), the State cannot claim authority in relation to certain persons with the State, for the reason that the legitimation narrative established by the politics system makes no attempt to govern in their interests or to accommodate the distinctive identity of those persons – distinguished from the majority on national, ethnic, religious and linguistic grounds.

The second possibility is to recognize a right of the subjects of the State (taken individually) to reject the authority of the State. Secession can then be understood in terms of the repudiation of the political authority of the territorial State by certain subjects of the regime, i.e. it is challenge to the boundaries of its authority. (This explains why the constituency in

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[50] Allen Buchanan, 'Theories of Secession' (1997) 26 *Philosophy & Public Affairs* 31.
[51] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford, Oxford University Press, 2004), pp. 351-2.
[52] Alan Patten, 'Democratic secession from a multinational state' (2002) 112 *Ethics* 558, 563.

any self-determination referendum comprises those persons in the self-determination unit only, and not the population of the territorial State as a whole.) Buchanan and Patten both reject the idea of a choice-based or democratic right of secession, which is triggered by the decision of a group to leave the State, with nothing more required. This stance is common in the literature, and few writers argue for the recognition of what Susanna Mancini refers to as a political–territorial right to secession 'legitimated by aggregated individual choices.'[53] Harry Beran, for example, concludes that liberal political philosophy permits secession where it is desired by a territorially concentrated group, provided that the secession 'is morally and practically possible.'[54] Practical considerations might include the size of the group and whether the group is located on the periphery of the territorial State. Moral considerations are often grounded in empirical, risk-based considerations: the dangers to peace and security; the possibility of unjust terms of separation; and the unpredictable and possibly deleterious consequences of establishing a precedent for non-voluntary secession. Where justice is a relevant criterion, it often concerns the obligations that flow from the secessionist unit to the remainder of the territorial State,[55] including the obligations from social justice to other citizens where the separatist territory is wealthier than the rest of the State. The logic of secession is also said to point to a prohibition on secession from liberal States by illiberal groups.

Whilst it would be naïve not to recognize the potential dangers to peace and human security in accepting a democratic right of secession (and likewise in the repression of separatist movements – the opposing empirical, risk-based consideration), the burden of proof, as Kai Nielsen observes, is on those arguing that the moral right of democratic secession should be overridden.[56] To put it another way: the burden rests with those seeking to justify the imposition of coercive governmental authority on unwilling subjects. By way of contradistinction, the argument here follows the logic of *legitimate* political authority: the State must govern in the interests of subjects and develop a legitimation narrative to explain how it is governing in their interests – and the subjects of the politics system must recognize

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[53] Susanna Mancini, 'Secession and Self-Determination', in Michel Rosenfeld and Andras Sajo (eds.), *The Oxford Handbook Of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 481, 484-5.

[54] Harry Beran, 'A Liberal Theory of Secession' (1984) 32 *Political Studies* 21, 23. See also Daniel Philpott, 'In Defense of Self-Determination' (1995) 105 *Ethics* 352, 382.

[55] See, for example, Christopher H. Wellman, 'A Defense of Secession and Political Self-Determination' (1995) 24 *Philosophy & Public Affairs* 142, 161-2: 'any group may secede as long as it and its remainder state are large, wealthy, cohesive, and geographically contiguous enough to form a government that effectively performs the functions necessary to create a secure political environment.'

[56] Kai Nielsen, 'Liberal Nationalism, Liberal Democracies, and Secession' (1998) 48 *University of Toronto Law Journal* 253, 253.

that this is the case. Where the subjects of the politics system do not accept that this is the case, then the State is not an authority for them. The decision to accept or reject the authority of the State is one for each individual targeted by the authority directives of the State. The choice cannot be made by others, especially not by a majority of the subjects of the regime. This ability to accept or reject the authority of the State operates on a simple binary divide. Where a subject accepts the authority of the coevolved and coexistent systems of law and politics, the State is an authority for them. Where they do not, the State is not an authority.[57] It is, then, possible for a number of subjects to reject the authority of a government that enjoys legitimate authority in relation to other parts of the population. The basis for this lies in the rejection of the legitimation narrative developed by the constitutional State: nothing more is required.

(2) The establishment of a new de facto authorities

There are three circumstances in which the idea of legitimate authority allows for the subjects of the State to be released from the bonds of authority. First, where the State has undergone a process of dissolution, for example in the case of the Socialist Federal Republic of Yugoslavia. In these exceptional circumstances, there is factually no politics system claiming authority over the subjects of the State – in other words, there is an authority vacuum that can be filled by other systems of authority. Second, where the State make no pretence to govern in the interests of some or all of the population, the government is not an authority for the relevant subjects. Third, any subject of an authority regime can reject the legitimation narrative of the politics system as it is applied to them – subjects can create an authority vacuum in relation to themselves.

Within the unoccupied governance space created by the loss of authority of the territorial State, it is possible for subjects to recognize and accept emergent systems of law and politics under a new constitution: this is the way in which constituent power is exercised by subjects. Whilst the acceptance (or rejection) of authority is a question for the individual, the establishment of authorities must be seen as a collective endeavour, as the requirement for

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[57] The argument applies both to the fact of authority and the scope of authority. For the implications of this, see Steven Wheatley, 'Conceptualizing the Authority of the Sovereign State over Indigenous Peoples' (2014) 27 *Leiden Journal of International Law* 371.

practical authorities follows the identification of co-ordination and collective action problems by a group of individuals. Given that Raz' conception of practical authority concerns the exercise of normative power in relation to individuals capable of deciding whether, and on what grounds, they should accept a claim to authority (i.e. it concerns subjects capable of understanding and responding to arguments supported by reasons), the collective determination to accept a new authority must logically be undertaken on the basis of reasoned deliberation. This applies both as between the authority and subjects, and between subjects themselves: the determination to establish or recognize an authority follows a collective act of political will-formation grounded in reasoned public deliberations in which all voices count equally.

In practical politics, the determination by a group of persons to establish an authority regime will normally be made by way of an independence referendum, although other proxy measures may be permitted in exceptional circumstances – a declaration of independence by a representative body with popular support, or the results of a general election showing popular support for autonomy or independence. In relation to the standards required of the referendum, the international law on elections can be taken as establishing the basic principles and procedures.[58] There are, though, particular requirements in relation to referendums.[59] The question on the ballot paper must be sufficiently clear to establish the will of the people. The process should specify in advance what majority of the vote will be required and the required turnout of voters. There should also be international observation on the vote and the period of democratic debate preceding the vote. In the period leading up to the vote on independence there is a need for inclusive, informed, and effective public debate, requiring a free media; the neutrality of political institutions; the participation of as many citizens as possible; limited involvement of external forces; and a long timescale leading up to the vote.[60] This period of time may also allow for the territorial State to revise

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[58] Yves Beigbeder, 'Referendum', *Max Planck Encyclopedia of Public International Law*, para. 46.

[59] On the conditions for independence referendums, see The Venice Commission's Guidelines for Constitutional Referendums at National Level CDL-INF (2001)10; and Guidelines on the Holding of Referendums (CDL-AD(2007)008.

[60] See Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: OUP Oxford, 2012), chapter 10. Whilst Tierney is primarily concerned with referendums in democratic States, the conclusions can also be applied more generally to the conduct of independence referendums.

its constitutional narrative of political legitimacy in a way that is able to accommodate the aspirations of the members of the group making the decision on separation.[61]

(3) International recognition

An emergent political entity in world politics can be modelled in terms of a constitutional order that represents the coevolved and coexistent systems of law and politics, with coercive institutions of government. A political entity has a *prima facie* claim to be recognized as a State where its law and politics systems are observed to be coexistent. An absence of controversy concerning statehood reflects a consensus between the political entity, the territorial State and other already existing States, and wider international community on the observation of coexistent law and politics systems. Divergent positions reflect different conclusions on the claims of the law and politics systems to autonomy and authority.

The identification of new States requires that we distinguish the patterned communications of law and politics (coupled under a constitution) from the background noise of world society. The analysis developed from complexity demonstrates the importance of the third party observer in the 'recognition' of the systems of law and politics – and consequently in the recognition of new States. In the identification of new States, the requirement to distinguish the patterned communications of the law and politics systems from the background noise of world society requires a conception of how international law understands the politics system. The traditional doctrine and practice of international law has understood the political system in terms of the coercive enforcement of binding decisions. This is no longer the case. The period of the United Nations has seen the reconceptualization by international law of the politics system in terms of legitimate political power, reflected inter alia in the development of international laws on the self-determination of peoples and human rights of individuals.

The emergence of the right of peoples to self-determination signalled an ethical turn in international law, from 'statehood as effectiveness' to 'statehood as legitimate political

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[61] Consider, for example, the promises of greater autonomy and devolution of powers made by the leaders of the main political parties in the United Kingdom in the run-up to the vote on independence in Scotland: Severin Carrell, 'Scotland promised extra tax and legal powers for referendum no vote', *The Guardian* (London) 5 August 2014.

authority'. Politics is observed as a system of communications with an underlying legitimation narrative framed in terms of government in the interests of the subjects of the regime. (Where this is not the case, international law speaks in terms of occupation forces, illegal regimes, etc.) Where politics is understood in terms of a legitimate authority accepted by subjects, certain regimes will simply not count as politics systems – the racist political regime in Southern Rhodesia following its Unilateral Declaration of Independence in 1965 is the paradigm case. The international community (or at least a majority of the members of the international community) does not *see* a pattern of *political* communications between government and governed, i.e. a politics systems (properly understood) – and consequently cannot *see* a State, even if it can see the exercise of coercive power and an effective legal regime.

State is the observed fact of emergent systems of law and politics, coupled under a Constitution. International law no longer understands the politics system only in terms of the coercive enforcement of governmental power, but also legitimate political authority. Whilst the international law system does not impose substantive requirements on the politics systems of the government of new States (with the possible exception of regimes underpinned by a racist ideology, for example Southern Rhodesia and the South African 'Bantustans'), it does require that new States emerge with the consent of the population to be governed by the new regime. It follows, then, that in order to be recognized as a new State, a political entity must demonstrate that its politics system enjoys the support of the relevant population taken individually. The only way in which this can be definitively established is through the holding of an independence referendum, or its functional equivalent. In other words, the international law system restricts the possibility for the establishment of sovereign independence to political communities established in accordance with the popular or 'democratic' will of the people: 'We the people' being defined by reference to a political community of deliberative equals, and not the ethnic, religious and linguistic ties that bind human societies. That being the case, the conclusion raises the question as to the salience of nationalism in the structuring of political power in world society, beyond that of an organizing principle of domestic politics – albeit a highly effective organizing principle.

A choice-based or democratic right of secession

The arguments developed in the previous sections lead inevitably to the conclusion that the emergent international law teleology, focused increasingly on the idea of legitimate political authority, can accommodate a right of democratic secession. First, the authority of the territorial State can be 'removed' by way of an independence referendum held in conditions of considered, open and free democratic debate. The requirement is straightforwardly applied in the normal conditions of democratic politics. In situations of violence and civil war, and only where the authority vacuum is created by the collapse of the central authorities or operation of the remedial 'saving clause' (when political institutions make no attempt to function as legitimate authorities), proxy measures to determine the will of the people may be relied upon, including the results of previous elections and decisions of representative bodies with popular support.

Second, a positive vote in the independence referendum can be taken as expressing the desire of a majority of the population of the territory to establish a sovereign and independent State – and to accept the authority of law and politics systems of the new State. This new political entity must not only demonstrate that it has the support of a majority of the population of the relevant territorial group, but also that its legitimating narrative can be accepted by all those that are to be subjected to its regulatory directives (hence the importance of minority guarantees when new States are established). Where the proposed legitimating narrative of the new State does not seek to accommodate the interests of all putative subjects, there is a strong argument for the holding of a fragmentary plebiscite, in which different parts of the self-determination unit can opt for different outcomes,[62] mindful of the requirement of territorial contiguousness and cohesion for the territorial State and any new State. The possibilities of 'fragmenting' the separatist territory should be clearly outlined in advance of any vote on independence.[63]

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[62] See, for example, the 'separation' of the canton of Jura from that of Bern in Switzerland in 1979: Mancini (n 16) 580-1.
[63] At a late stage in the independence referendum campaign in Scotland, it was suggested that Shetland might be treated differently from the rest of the territory: Esther Addley, 'Shetland may reconsider its place in Scotland after yes vote, says minister', *The Guardian* (London), 17 September 2014.

The international law right of peoples to political self-determination is a fundamental norm of the international community. The scope and content of the norm remain opaque, however, when applied beyond the colonial context remain. The argument here is that the decision to hold a referendum on independence gives concrete meaning to the content of the right *in the particular context*, i.e. it cannot be read across to other situations. A positive vote for independence signals the rejection of the authority of the State by one part of the population, and the determination to establish a new State. That population – or 'people' – has an international law right to political self-determination *now* understood as a presumptive claim to statehood, opposable to the territorial State, which must engage with the separatist territory, in a meaningful way, in order to facilitate its right to political self-determination, understood as sovereign independence, or some other status acceptable to a majority of the population. The obligation on the State to facilitate the right of peoples to political self-determination is owed both to the relevant population and to all other States in international community, *erga omnes*.[64]

The international law obligation of the State to engage with the separatist territory cannot be understood as according a right to statehood. *State* is the observed fact of coexistent law and politics systems, where the politics system is framed in terms of communications on collectively binding decisions *that will be coercively enforced*. In the absence of de facto coercive power over the subjects of the politics system, an entity does not have a claim to statehood. The right of a people that has voted for independence is the right to a process leading to the establishment of a sovereign and independent State. Where the territorial State rejects the possibility of independence or imposes unreasonable conditions or restrictions on the establishment of sovereign independence, it is in breach of its international law obligations to engage in good faith with the separatist entity. This cannot be understood as authorizing the use of force by outside States to facilitate the sovereignty and independence of the territory, except in the exceptional circumstances envisaged by the 'saving clause' doctrine. The use of military force under the Charter of the United Nations is regulated by its own *lex specialis*, and with the exception of an application of the (related and contested) 'saving clause' and humanitarian intervention doctrines, the right to use military force is not triggered by a

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[64] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion ICJ Rep. 2004, p. 136, para. 88.

violation of the international law right of peoples to self-determination. A violation of the right, through a failure to engage in the process leading to independence, will, however, engage the responsibility of the territorial State, and allow other States to introduce non-forcible measures ('sanctions') in support of the establishment of the independence of the territory.

Conclusion

The focus of this chapter has been the possibility of developing a model of democratic secession consistent with the emergent teleology of an international law system increasingly focused on the idea of legitimate political authority. In order to develop an argument for recognizing a such a right, the work outlined an abstract conceptual model of world society to explain the emergence of new States. Drawing on developments in the natural sciences through an application of the third wave of systems theory thinking know as complexity, it outlined a model of State as the framing of the emergent patterned communications of coevolved and coexistent law and politics systems. In contradistinction to much of the systems theory literature, law and politics were understood to be complex systems: the patterned communications of the systems is a consequence of the actions of constituent agents; their interactions with each other; and interactions with other actors and systems in the external environment. A focus on the nature of the politics systems – understood through the cognitive frame of international law – allowed us to develop an argument that supports the right of democratic secession in three related steps: the rejection of the sovereign authority of the territorial State by certain subjects; the acceptance of the authority of emergent systems of law and politics of the new political entity; and observation (or 'recognition') of the political entity as possessing legitimate political authority.

At the time of writing, [65] three self-determination events focused on the idea of democratic separation or secession are dominating the media: the referendum on Scottish independence has produced a vote in favour of Scotland remaining part of the United Kingdom;[66] Crimea has seemingly become a federal subject within the Russian Federation, following a

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[65] September 2014.
[66] 'Scottish referendum: Scotland votes "No" to independence', BBC News Website, 19 September 2014. Available http://www.bbc.co.uk/news/uk-scotland-29270441 (last visited 25 September 2014).

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referendum, although this possibility has been rejected by the international community;[67] and the Donetsk People's Republic and Luhansk People's Republic in eastern Ukraine have declared their independence (again following hastily arranged and badly organized referendums), although neither not been recognized by any State, including Russia.[68] Had Scotland voted for independence, it would not seem implausible to argue that the people of Scotland would enjoy a right to statehood opposable to the United Kingdom. Yet, no serious academic argues that the Ukrainian regions of Crimea, Donetsk or Luhansk have a right to statehood, and (subsequently and consequently) the right to determine their own status, including by way of union with Russia. This is the case notwithstanding the fact that the regions have voted for independence.[69] How, then, do we evaluate the claims of the Crimea, Donetsk or Luhansk regions: deny any right of democratic secession; reject the idea of remedial right of secession in case it is misused (as seems the case here);[70] or simply ask whether the regions have 'safely and permanently' managed to exclude the authority of Ukraine, without the level of external support prohibited by international law?[71]

An application of the model developed in this chapter would recognize a general right of democratic secessions for the populations ('peoples') of Crimea, Donetsk or Luhansk, but reject the claims to independence by the Ukrainian regions by way of democratic secession in the particular circumstances – not because those populations do not have a right to self-determination or must subject themselves to the authority of the Ukrainian State, but as a consequence of the failure of the authorities and the populations to engage in reasoned, democratic deliberations concerning the allocation of political authority in the region. Simply put: the situation in the Crimea, Donetsk or Luhansk regions cannot be understood as an

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[67] See GA Res. A/68/L39 of 27 March 2014, 'Territorial Integrity of Ukraine', at para. 5, which asserted that the independence referendum for Crimea, 'having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea': also, Council of Europe's Venice Commission's Opinion on "Whether the decision taken by the supreme council of the autonomous republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian federation or restoring Crimea's 1992 constitution is compatible with constitutional principles" CDL-AD(2014)002.

[68] It is not clear that the electorate voted for independence, as the referendum question used a Russian word, *samostoyatelnost*, that could mean independence or greater autonomy: Shaun Walker, 'East Ukraine goes to the polls for independence referendum', *The Observer* (London) 11 May 2014.

[69] The position in Crimea is complicated by the question asked in the 16 March referendum, which provided voters with two choices: (1) reuniting Crimea with Russia as a subject of the Russian Federation; or (2) retaining the status of Crimea as part of Ukraine. The case of Crimea may then be an example of association rather than secession. In either case, the same principles would apply in relation to the requirement to deliberate on the future of the territory over a period of time.

[70] A UK parliamentary committee has accused Russia of using 'ambiguous warfare' tactics in Ukraine: Defence Committee, 'Towards the Next Defence and Security Review: Part Two – NATO', HC 358, 31 July 2014.

[71] Under the rules of general international law, a State is responsible for the actions of a non-State actor outside of its territory where the relationship is 'one of [complete] dependence on the one side and control on the other': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v* Serbia and Montenegro), Judgment, ICJ Reports 2007 43 at para 391. Such a finding will be exceptional.

example of choice-based or democratic secession, as the only force permitted in the context of the democratic right of secession is the force of the better argument – and that is certainly not the case here.