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The Economics of State Emergence & Collapse

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Abstract: Rational choice work on state emergence and collapse has significant unrealized potential. This essay discusses how scholars using a law and economics approach might make useful contributions to theorization on various topics regarding the dynamics of sovereign statehood in public international law. It begins by introducing the rational choice framework and our approach to the topic. It proceeds to examine the possibilities for future research, probing state emergence and recognition and the revocation of legal personality from failed states. The topic areas include an illustrative game based upon an empirical case and recommendations about how law and economics might contribute. A rational choice approach helps to clarify the stakes surrounding fundamental decisions regarding membership in the international community. Some communal norms seem to conform to international law while others depart from it. The chapter closes by noting the potential, but usually surmountable, obstacles to employing rational choice to matters of fundamental system dynamics.

1. Introduction

Membership in the international community has always been dynamic, but it became much more so in the 20th century as state "dismemberment", "fusion", and "resurrection" increased.[1] In raw numbers, system membership quadrupled from 45 to 195 states.[2] There were 55 violent revolutions, 54 non-violent regime changes, and in the last 60 years alone 227 military coups occurred.[3] In every case, new leaders or governments replaced the regimes formerly in power. Additionally, by some metrics as many as 67 members, approximately a third of all states, can be classified as failed or failing, unable to provide effective governance.[4] In the contemporary world, states are being born, transforming and collapsing at a rapid pace.

Yet amidst this change, there is a remarkable amount of agreement and consistency within the international community when it comes to matters of statehood and state personality. That is to say, most countries agree about which actors are and are not states, and which regimes are and are not the rightful governments of those states, most of the time.[5] Traditionalist legal scholars might take this behavioral convergence as evidence of compliance with deeply held legal rules regarding statehood and legal personality or as a simple consequence of what is true, *de facto*. In contrast, a law and economics approach urges us to reconsider whether the force of legal obligation is the primary driver behind state behavior in these situations. It asserts that jurists too often neglect self-interested motives and that coordinated and cooperative, welfare improving outcomes can sometimes be achieved even when states are narrowly maximizing their own interests (G&P 2005). Perhaps the consensus regarding statehood and the rightful members of the international community rests upon a fundamentally different foundation than traditional legal scholars presume.

There is wide agreement that international law only arises from the explicit consent or commitment of states.[6] And there is further agreement that states are the only actors endowed with the ability to recognize and endow others with international personality, as

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[1] Kunz 1959, 69

[2] According to the Correlates of War System Membership Data (from 1911 through 2011) available at correlatesofwar.org.

[3] The time period surveyed for revolutions and regime changes was 1900-2006 and for military coups, 1950-2010. http://www.prio.no/CSCW/Datasets/; http://echenoweth.faculty.wesleyan.edu/wcrw/; http://www.systemicpeace.org/polity/polity4.htm

[4] Those states classified at an "alert" or "warning" level according to the Failed States Index for 2012 available at www.fundforpeace.org. Readers should note that this estimate probably errs quite high with reference to the more restrictive definition of state failure employed later in this essay.

[5] Clearly a riff on Louis Henkin's claim that, "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*" (1979 47).

[6] Vienna Convention on the Law of Treaties. 1969. Article 51. With the notable exception of *jus cogens* rules and (probably) customary international law (Bradley and Gulati 2010).

states or otherwise, in international law.[7] This chapter focuses on why states grant legal personality, or international legal sovereignty, to new states and on why they might revoke it when a state has collapsed. How, and under what conditions, are new states accepted into the international community? Given the proliferation of failing states, why do so few of them die or lose legitimacy among their peers? These situations are not so common as to be routine, but they occur frequently enough that there is substantial state practice to review. Community determinations on these fundamental issues of sovereignty are also pivotally important to understanding the nature and dynamics of the international system writ large.

Law and economics has made commendable inroads on questions of customary international law (hereafter CIL) based upon the parsimonious assumptions that states are unitary, self-interested and goal driven actors (usually interest maximizing, sometimes not). But scholars have, thus far, directed less attention toward the more foundational aspects of international society.[8] Given the paucity of analysis, we concentrate on developing ideas for future research. This chapter will incorporate theoretical insights from political science and law, but it will devote relatively more attention to political science because issues of state emergence and failure have generated more discussion in that field. The chapter will also limit its discussion to external legitimacy as an inter-state issue, fully appreciating that game theory and rational choice might also be useful tools for analyzing two-level bargaining between states and non-state actors on these topics. For example, concerning domestic secessionist movements, transnational advocacy networks, or multinational corporations with vested interests in failing states.[9]

In the pages that follow, we begin by presenting the important assumptions, definitions and theoretical priors guiding the rational choice approach that we employ.[10] The next two major sections are dedicated to state practice on the occasion of 1) new statehood and 2) state failure. Each section details the traditional legal view, proposes an alternative view based in rational choice and then provides an illustrative case analysis. The final substantive section considers the potential obstacles to applying a law and economics framework and the chapter concludes with our findings and recommendations for continued scholarly research.

2. Theoretical Approach & Definitions

Our analysis is informed by Goldsmith and Posner's (hereafter referred to as G&P) seminal work, *The Limits of International Law* (2005).[11] A provocative challenger to traditional accounts,

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[7] Portmann 2010, 80. States are not the only actors endowed with legal personality in international law. Under certain circumstances, and with lesser status than states, personality has also been granted to individuals, non-state actors, and international organizations.
[8] Consistent with Bull, we describe the state system as a nascent international society (1977).
[9] Some examples can be found in Evans, Jacobson and Putnam (Eds.) 1993; Fearon 2004; Walter 2009
[10] While recognizing that there are distinctions between the approaches, we will use the terms 'rational choice', 'game theory', and 'law and economics' interchangably.
[11] We also benefitted from other works including Trachtman and Norman (2005), Guzman (2002), Verdier (2002), and Verdier and Voeten (2012).

G&P employ the assumptions of rational choice, that states are rational, unitary, interest maximizing actors, to explain states' creation and compliance with customary international law. The authors submit that four strategic situations create convergence in state practice rather than *opino juris*.[12] First, states unilateral interests might lead to convergence; each would act similarly regardless of their peers. Second, behavioral convergence may result when powerful states pursue their interests and coerce weaker states into following suit. Third, convergence might be a cooperative solution to an iterated Prisoners' Dilemma (PD) when leaders opt to cooperate in the first round.[13] Fourth, convergence in state practice might be the resolution of a coordination problem like the Stag Hunt or Battle of the Sexes. These four rationalist explanations stand in contrast to traditional accounts where compliance with legal rules is predicated upon a sense of legal obligation, known as *opino juris*, or a deeply held moral belief.

Attempting to distinguish between the force of legal obligation and self-interest is a complicated business. Early on political scientists preferring rationalist explanations for state behavior often demanded that to effectively counter their arguments, critics would have to produce evidence of states routinely abiding by rules *contrary* to their own interests. And where states seemed to be abiding by rules despite their interests, that there was no heretofore unobserved evidence of powerful states manipulating their incentives (e.g. that the relationship between norms and behavior was not spurious). Proponents of norm-based arguments countered that the most significant evidence of norms persuasive force came in the 'editing phase' before the 'option selection' phase examined in most rational choice models. In other words, norms influenced whether or not a given decision-maker even considered certain options among his or her potential choices. Normative considerations could entirely foreclose illegal or unsavory options for an individual, for instance, or otherwise influence the nature of their choice or the structure of the game they faced.

G&P have been criticized on similar grounds, their detractors arguing that they have not seriously tested the traditionalist argument and have claimed any evidence of self-interested behavior as a victory. G&P are transparent about excluding "an interest in compliance" from their analysis and note the complexity that would be required to endogenize the normative pull of legal obligations in their models. Still, critics are right that the authors overstate their empirical findings given the limitations of their research design.[14] On the other hand, traditional legal scholars often do precisely the same thing, assuming that behavioral conformity with CIL follows from a state's sense of legal obligation. States' motives are inferred from their behavior and alternative explanations are generally not entertained. We are not so ambitious as to attempt to resolve this controversy within the pages of this

[12] Article 38(1)(b) of the Statute of the International Court of Justice, indicates among its accepted sources of international law "international custom, as evidence of a general practice accepted as law." Customary law then, is indicated by 1) the widespread and consistent practice of states and 2) practice premised upon a sense of legal obligation.

[13] Convergence is most likely to be achieved in bilateral PDs, it becomes more difficult to achieve and maintain in multilateral PDs.

[14] Trachtman and Norman argue persuasively, however, that models where norms are treated as exogenous may be a better route to advancing the debate between the two perspectives than endogenizing norms (2005 11).

chapter. It is eminently possible that each of the motives contribute significantly; that their influence varies according to issue area; or that they are at least partially endogenous. Further, we offer no theories or tests of our own. Yet this discussion contains important considerations for any future research in rational choice and CIL.

On the topic of evidence, the illustrative cases we offer here should be taken in the spirit in which they are offered - none has been thoroughly vetted - instead, these are ideas of how economic thinking can inform theory in this area of CIL. We recognize that game theory's greatest strength as an analytical tool is not in its application to empirical cases, but in its ability to generate novel hypotheses and predictions. In this chapter, we trade in economic metaphors rather than formal models.[15]

The recognition decisions under consideration here are usually in the hands of a small number of decision-makers if not vested in a single individual. In most countries the establishment or breaking of diplomatic relations is an executive level decision. Therefore on this subject, many of the typical rational unitary actor problems confronted by scaling up from individual persons to states are happily avoided.

All of the international legal obligations that we discuss here are without a formal enforcement or sanctioning mechanism; there is no reporting or dispute resolution mechanism as there is in some treaty bodies. This is important because no one other than existing states, in an ad hoc manner, has standing to enforce these rules. In part, this is because the laws are customary, but even where they have been codified, they have not included enforcement mechanisms. The practice of formal recognition is unlike many other commitments, however, because compliance is fully transparent. There is little opportunity to violate the rules without other states becoming immediately aware of it.[16]

Also unlike treaties, which often contain opt out clauses for states that want to make a reservation or clarification regarding their commitments or withdraw entirely from the treaty, compliance with CIL is compulsory except for those states that persistently object prior to the rule's acceptance as legal custom.[17] The only other widely accepted means of opting out of CIL is to violate it with the intent of changing the rule, gaining supporters and usurping the law's authority with some new alternative rule. This will be an important aspect of interpreting the traditional legal explanation when a divergence from custom occurs. The fact that a state violates a rule is not in and of itself evidence that a country has transgressed against a deeply held communal belief. Custom can become outdated or oppose evolving

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[15] Snidal 1985

[16] The issue of implicit recognition could make the issue of rule violation less transparent, but state leaders are often explicit about their intentions when they behave in a way that might seem to inadvertently imply diplomatic recognition. For example, witness Washington's handling of Taiwanese President Lee Teng Hui's 1995 visit to the US. The Clinton Administration made it very clear that the visit was not a formal diplomatic affair, but a private personal trip.

[17] For example, Montevideo (Article 15) permits High Contracting Parties to denounce thier committments with one year's advance notice to the other signatories (1933).

community norms and, if that happens, the only real means of effecting change is through rule breaking.

3. State Emergence & Legal Personality

Today, state emergence is fairly common. This has been especially true since the end of World War II as the withering of colonialism in Africa and Asia yielded dozens of new states, the collapses of the Soviet Union and Yugoslavia created nearly two dozen more and various non-self governing territories since then have transitioned to full independence. Though the pace of new statehood has slowed and no apparent wave of new independences waits on the horizon, states are still being born. Most recently, in 2011 the Republic of Southern Sudan successfully seceded from Sudan after decades of civil war. CIL and conventional law outline the defining characteristics of statehood and contain rules about when states may grant external recognition and enter into formal diplomatic relations with newcomers. Even skeptics of international law agree that there is widespread convergence in state behavior in line with these rules regarding legal sovereignty.[18] Further, the international community seems to be moving toward the codification of new rules regarding the succession of treaties, property, archives and debt manifested in the Vienna Conventions of 1978 and 1983.[19] This would create guidelines concomitant to the cession of people and territory from an old state to a new one.[20]

Because every new state entering the international community must separate - amicably or violently - from an existing member of the community, there is significant potential for self-interest to creep into decisions surrounding succession and recognition.[21] It may be helpful to imagine firms in an oligopolistic market being granted influence over who their new competitors will be and over how those new firms will affect the interests and capabilities of their existing peers.[22] Therefore law and economics might yield useful insights into a variety of issues surrounding recognition in addition to, or in spite of, the law. Given behavioral convergence, what other than law might explain it? When do states deviate from the law? If, as in succession, the codification of laws is in progress, what factors will determine whether, or the extent to which, they are widely ratified and adopted as laws?

For example, the Vienna Conventions regarding succession envision amicable breakups between home states and their successors. According to the Convention on Succession of

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[18] Kranser 1999

[19] Vienna Conventions 1978 1983

[20] Matters regarding succession are also important when a change in governments takes place as in a revolution or coup. However, it is generally agreed that regime change does not produce new statehood, regardless of how dramatic the change in the content of governance from one to the next.

[21] This was not always true, but once the inhabited territories of the world had all been claimed, the situation became zero sum: in order for a new state to be born, an old state had to lose territory (or die).

[22] The oligopoly characterizes very powerful states and applies less well to other, normal states in the international community.

States in respect of State Property, Archives and Debts, "the passing of the state debt of the predecessor state to the successor state is to be settled by agreement between them".[23] Unfortunately few transitions occur as smoothly as Czechoslovakia's 1993 'Velvet Divorce'. In those cases, and "in the absence of such an agreement, the state debt of the predecessor state shall pass to the successor state in an equitable proportion."[24] Who decides on the "equitable proportion" due when a succession is opposed by the predecessor state? How do states, the World Bank and private creditors decide whether there even *is* a successor state when a country disintegrates like the Soviet Union and Yugoslavia did?[25] And how is it decided? Does a newcomer's ability to make good on its predecessor's debts influence its acceptance as a new member? Or is the debt burden assessed upon a successor dependent upon politics rather than law?[26] Does the fact that the Vienna Conventions neglect these issues militate against their widespread acceptance? Or are states content without formal rules where an agreement would be too difficult to reach and states would have to adjust their behavior too much in order to comply?[27]

Another interesting area, which we will pursue in greater detail now, is new statehood and external recognition. When and why do existing states recognize and enter into diplomatic relations with new states? How might rational choice help to explain why state practice demonstrates (or at least appears to demonstrate) such a high degree of compliance with customary and conventional international law?

A. Customary Law, Conventional Law & the Recognition of States[28]

In international law there are two ways of thinking about the significance of external recognition in relation to statehood known as the declaratory and the constitutive theories. The dominant view is the declaratory theory. It argues that the external recognition of a state by the existing members of the international community is, and ought to be, a declaration of each state's intention to enter into diplomatic relations with newcomers whose statehood has already been established *de facto*. If domestic sovereignty has not been achieved, then recognition is considered 'premature' and without the force of law. According to this theory, external recognition is important because it influences the extent to which an actor is able to participate in international affairs, but it does not 'make the state.'

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[23] Vienna Convention on Succession of States in respect of State Property, Archives and Debts
[24] Ibid.
[25] In the former case, Russia was widely recognized as the successor to the USSR whereas in the latter case, although Serbia claimed it was Yugoslavia's successor, it was not accepted as such. For an overview of the FRY's position on being required to apply as a new member to the United Nations see Jovanovic 1997-8.
[26] Briefly discuss the Kosovo case. Kosovo wants to take on WB debt from Serbia, but Serbia won't let it because it implies recognition. It becomes apparent that Kosovo is going to get recognition and IO membership, so Serbia lets them have their portion of the debt. The US then pays most of the debt off for Kosovo.
[27] Downes Rocke and Barsoom 1995
[28] The analysis in this section draws heavily from Coggins 2011

The less popular view is the constitutive theory. This perspective contends that external recognition consecrates new statehood. Without it, regardless of how effective an aspiring member's internal (or *de facto*) sovereignty is, it is not a state. These scholars find it somewhat absurd to argue that a state is a state regardless of its recognition by others because, even if this is true, it is of trivial practical importance; its statehood cannot be wielded to any meaningful effect in international affairs without recognition. Unrecognized states cannot participate in international life as juridical equals with other states. Political scientists who conceive of the state as a social construct within a nascent international society likely find the constitutive theory intuitively correct. But most jurists reject the constitutive view on normative grounds, finding it too subject to considerations of *realpolitik*. While the two theories were once considered 'the great debate' in public international law, there is now overwhelming favor for the declaratory view.[29]

Most would point to the 1933 Convention on Rights and Duties of States as evidence of *opino juris* regarding the legal definition of statehood and the rules of recognition (hereafter referred to as Montevideo). Though it began as a formal treaty agreed to only by the members of the Organization of American States, Montevideo is widely considered CIL.[30] The treaty represents a formal codification of what had long been a customary practice among states. Montevideo says that a state "should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". The treaty also affirms the declaratory view of recognition stating that, "the political existence of the state is independent of recognition by the other states".[31] Although various criteria for statehood have been suggested in addition to the effectiveness criteria enumerated in Montevideo, including democracy, civil liberties and the protection of human rights, they have not been as widely accepted. Furthermore there is some question as to whether these qualities are evidence of statehood or simply additional political hurdles raised, idiosyncratic to the particular state (or states) contemplating recognition.[32]

Despite a near consensus in the legal community regarding the nature of statehood and the seeming convergence in state behavior when it comes to recognizing new states, we submit that the constitutive theory is more empirically valid than the declaratory. External recognition is pivotally important to aspiring states. Without widespread external acceptance, an aspiring member will not be able to join prestigious international organizations like the UN and World Trade Organization; it will not be able to take out development loans from the IMF and World Bank; it will be unable to pursue legal remedies against other states in the ICJ; it is unlikely to receive much foreign investment or foreign aid; it will have trouble exploiting and selling its natural resources; and it might not even be able to legally defend itself if its predecessor attempts to invade. If one adopts the declaratory view, finding that states' recognition practices are not dictated by law may be interesting, but it would have far less dramatic consequences regarding the nature of sovereign statehood. Somewhat

[29] Grant 1999
[30] Harris, David J. 2004. Cases and Materials on International Law, 3rd Edition. London: Sweet and Maxwell.
[31] Ibid.
[32] For example see Talmon 2005.

regardless of where one's sympathies lie regarding the 'great debate' though, it is clear that external recognition meaningfully affects an actor's exercise of the external benefits of statehood and that a clear customary norm and conventional rules exist regarding its assignation.

B. An Alternative Interpretation

An instrumental explanation for the widespread behavioral convergence regarding new statehood, as evidenced by recognition, suggests that compliance with CIL may actually be quite low. A few would be states achieve the criteria established by Montevideo, but go unrecognized, as in present day Somaliland, while many others that fall short of the standard are nevertheless welcomed into the international community as state persons, recently including Bosnia-Herzegovina, Croatia, East Timor and South Sudan. It is apparent that there is a fair degree of agreement regarding the new members of the international system, but it is not apparent that state leaders are using the Montevideo criteria to arrive at those determinations.

Our first task is establishing why self-interest might lead states to prefer mutual agreement regarding statehood - why states have an interest in coordinating their recognition. Knowing which actors are, and are not, endowed with the rights and responsibilities of states generates valuable gains in efficiency for the international community. Kontorovich notes, "the recognition of states...as the primary and often exclusive actors in international law facilitates bargaining by reducing the number of relevant parties [and] the territorial sovereignty of states clearly defines property rights and responsibilities" (2008 391). To illustrate what would happen without widespread agreement over membership, witness the problems attendant to international treaties open to accession by "states" versus those open to "UN member states"; these problems occur because the group constituting the latter category is immediately apparent, while the group constituting the former is not.[33] The Montevideo criteria, while not vague, are nevertheless open to interpretation. Widespread recognition serves a purpose analogous to membership within a club or institution like the UN; it is an unambiguous signal of social acceptance and belonging. There are no comparable litmus tests associated with Montevideo and efforts to further clarify the standards have not been successful.

Furthermore, because each new state is born by dividing the existing territory of one of the community's existing members, it is in all states' interests to ensure that the transition from one authority to the next occurs as smoothly as possible. When the states of the international community can coordinate their recognition, the process of succession of legal personality is relatively more stable. In contrast, imagine tens of multiple and overlapping recognized sovereignties in the years following a non-consensual break up as in the former Yugoslavia. Not only would the situation be highly unstable for the parties directly involved, it would likely foment conflict among outsiders as they attempted to engage diplomatically, strategically and economically with the competing authorities therein. All other things equal,

[33] Although the 'Vienna formula' has sometimes allowed for a more inclusive set of potential state parties, many states do not accept this implicit acknowledgement of statehood.

it makes sense that, in the name of stability and efficiency, states would prefer the coordinated recognition of mutually agreeable new states.[34]

On first glance, the task of securing the unified, formal recognition of nearly 200 members for each new state seems inordinately complex with high transaction costs. However, the strongest members of the international system, the Great Powers, are the principals when it comes to recognition. Their material power and their institutional authority give them both global interests and global influence. Great Power decisions serve as a focal point for the normal members of the system and - when they are unified in favor or against any new member - it initiates a cascade of new legitimacy or staunch adherence to the status quo.

Self-interests are a potentially important driver of Great Power preferences when it comes to recognition. Whether or not state leaders *act* upon their narrow self-interests depends upon the constellation of preferences among the Great Powers. Their choices are meaningfully interdependent because none of them can generate a recognition cascade alone and none of them wants to experience the reputational and other negative consequences attendant to unilateral recognition against the weight of the international community's consensus.[35] When the Great Powers' interests coincide in favor of a would be state or against it, whether because of a harmony of interests or not, they easily coordinate their recognition.[36] When their interest-based preferences are split, the situation is more akin to a PD; unilateral recognition is attractive in the short term, but the routine defection from the norm of mutually acceptable recognition would leave all of the Powers worse off due to the system-wide instability it would create. Achieving and maintaining agreement becomes more difficult when a greater number of the Powers choose to weigh in on the recognition of a potential new member and, conversely, will be easier to maintain when there are fewer Powers involved.

If this alternative interpretation is correct, then we should expect that the recognition of new states will depend upon the alignment of powerful states' interests and whether they are able to generate mutually agreeable outcomes given the strategic situation in which they find themselves. In some cases the situation resembles a coordination problem, and in others it resembles a PD. The situation changes depending upon which actor's membership is at stake and on the Great Powers' engagement. This rationalist account helps to explain the behavioral convergence in state practice when it comes to recognition. It illustrates why states usually agree about the rightful new members of the international community even though their consensus is routinely at odds with the dictates of customary international law enshrined in the Montevideo standards.[37]

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[34] This is not to say, however, that they seek stability alone or for its own sake.
[35] This is consistent with Guzman's (2002) explanation for compliance with CIL.
[36] Successful coordination among the Great Powers in these situations may also generate moral hazard. A new state member may be consistent with states' short-term interests, but because the issue of the new member's viability is not the primary determinnt behind state preferences for recognition, these newcomers may be more likely to undermine system stability and security over the long run.
[37] Another possible explanation for the divergence from the rule is that the interests that generated the standards agreed to in Montevideo have changed over time. Various factors

The recent breakdown in cooperative non-recognition, principally between the US and Russia, nicely demonstrates the rational choice dynamics involved in cases of new state personality even though it is a relatively rare example of non-coordinated Great Power recognition.

C. Case Study: Recognition for Kosovo, South Ossetia & Abkhazia 2008

A breakdown in compliance with the CIL of recognition, and a break in cooperative non-recognition among the Great Powers, occurred in 2008 when the US and many EU members formally recognized Kosovo's independence and Russia counter-recognized the independences of Georgian exclaves Abkhazia and South Ossetia.[38] All three would be state actors had been functionally independent of their predecessors (Serbia and Georgia) for years, but their positions were bolstered by a powerful external guarantor (the United States and Russia respectively). Though these powerful benefactors did not hold *de jure* authority over the secessionist regions, they maintained significant influence over the territories, making it difficult to argue that any of the three were effectively independent or met the Montevideo criteria.

Non-recognition had endured for years even though each patron state individually preferred recognition for its client(s) and preferred non-recognition for the other's client(s).[39] Neither predecessor would consent to their secessionists' independence.[40] The US and various European states were the first to change their policies, initially promoting, and then formally recognizing Kosovo's unilateral declaration of independence in February 2008. When the US explained its deviation from the law and the explicit agreements it made under UNSC Resolution 1244, Washington argued that the decision was necessitated by the exceptional circumstances in the Kosovo case.[41] Moscow countered that Kosovo's situation was "not

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might explain a shift in state preferences: power has shifted significantly, geopolitical alignments have changed, institutions like colonialism are now defunct, and tens of new states have entered the international community of states. Any or all of these changes might have contributed to changes in state preferences regarding the criteria for recognition. So the rules may be antiquated, but there are no readily available, mutually agreeable alternatives to Montevideo.

[38] Bearce (2002), in an earlier work on Yugoslavia, explains Germany's apparent unilateral recognition of Slovenia and Croatia as a defection from Europe's cooperative non-recognition.

[39] Russia opposed Kosovo's independence and the United States opposed independence for South Ossetia and Abkhazia.

[40] The acquiescence of the predecessor state is often cited as an additional criterion for formal recognition (as discussed above). If it is emergent CIL, the rule was not adhered to in these cases.

[41] Among various other statements and documents see US Department of State "Why Kosovo is Different" Available at http://www.state.gov. For a review of the arguments advanced and the legal issues at stake see Orakhelashvili, Alexander. 2008. Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in

unique", threatened to follow suit and recognize the secessionists on their border, and criticized the West's hypocrisy.[42] Indeed, they had recently offered a similar claim regarding exceptional circumstances regarding recognition for Bosnia-Herzegovina.

But Russia did not follow through on its saber-rattling. Instead, it chose to forego retribution for the US and EU in the short term. That decision was short lived. When Georgia tried to retake South Ossetia by force later that summer, the Russian military, ostensibly in the region as peacekeepers, countered the attack, defended the independence of the two breakaway enclaves and formally recognized them shortly thereafter. In response, the US and others condemned Russia's aggression, believing that Moscow had initiated the violence in order to break the stalemate. Further, they criticized recognition, arguing that there was no reasonable parallel to be drawn between the Georgian and Kosovo cases.

In the time since recognition, Kosovo has moved relatively more quickly toward widespread recognition as a legitimate member of the international community than South Ossetia or Abkhazia.[43] It has gained membership in a number of important intergovernmental organizations, has established political and economic ties with tens of other states and has generally become more embedded in the international community. South Ossetia and Abkhazia have not been widely embraced. Only a small handful of states recognize them in addition to Russia. Still, in neither case did the patrons' recognition effectively create full statehood and membership in the international community for their clients. Tellingly, none will be permitted to join the United Nations because both the US and Russia would almost certainly utilize the veto.

D. Analysis

The customary norm embodied in Montevideo has a more difficult time explaining the evolution of state behavior in these cases than the proposed self-interested alternative based in law and economics. On one hand, it is easy to see why non-recognition would be pursued as a policy based upon the facts of the cases. Non-recognition could be due to unlawful acts that resulted in the de facto sovereignty of the secessionists in accordance with article 41(2) of the International Law Commission's Articles on Responsibility of States of Internationally Wrongful Acts (2001). Or, in the case of Kosovo, possibly because the UNSC had reaffirmed the state's territorial integrity in Resolution 1244. The 2008 break from non-recognition is more perplexing, however, because the facts of the cases did not change substantially. Why did the states recognize when they did? Are these instances of premature, illegal recognition? It seems clear that the standard of independent governance was not met. In the Kosovo case, the government's agreement to adhere to the Ahtisaari plan, including a lengthy period of international supervision following its recognition, even formalized the

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Kosovo. in A. von Bogdandy and R. Wolfrum (Eds.). 2008. Max Planck Yearbook of United Nations Law, Vol. 12. p.1-44.

[42] Kommersant. February 21, 2008 "Russia Says Kosovo Not Unique". Available at htttp//www.kommersant.com/p-12092/Kosovo/; Lowe, Christian. March 11, 2008. "NATO risks Georgia rebels' secession: Russia" Reuters.

[43] As of this writing Kosovo is recognized by 91 states, 22 are members of the European Union.

regime's non-independence. In Georgia's breakaway regions, the extent of Russia's involvement, including the fact that many individuals had acquired Russian citizenship and that Russia established quasi-permanent military bases within each, provided good reason to doubt their independence from Moscow.

Also according to the traditional view, non-compliance with a customary law might result from a situation where the custom is ambiguous. But none of the formal statements from the US or Russia regarding recognition indicates that they were unclear as to what the legal and normative imperative would have been. One final possibility is that the break with CIL was born of a desire to change the customary rules regarding recognition. This interpretation is most plausible in the Kosovo case because the US frequently referred to the egregious human rights violations and crimes against humanity committed by Serbs and the Serbian government against Kosovo's Albanian Muslims. Again however in explaining its deviation from the law, the US emphasized that its recognition of Kosovo should not be considered a precedent setting act, but instead, a response to a situation that was entirely *sui generis*.

A law and economics approach might alternatively describe the situation between the Great Powers as a repeated bilateral PD with a coordination problem.[44] The coordination problem arose because the two sides could not agree as to what constituted cooperation versus defection. Western states saw Russian support of the secessionists through the issuance of passports, and the provision of economic and military aid as cheating. Russia saw the US/EU capacity building and later unprecedented and non-precedent setting recognition as cheating as well. This gradually whittled away at cooperative non-recognition between the two sides and helps to explain why cooperation broke down when it did.

Seen in this light, the content of the standards outlined in Montevideo do not dictate the practice of recognition. Instead, state leaders coordinate their recognition when they are able to in order to pursue their mutual interest in system stability and non-overlapping sovereignty. There is a norm regarding the process of the acceptance of new community members, the characteristics of whom change considerably, but it is not embodied in Montevideo's prerequisites nor is it complied with out of a sense of legal obligation. When powerful states preferences are aligned regarding a prospective new member, the strategic situation is pure coordination, when they are not it may resemble a PD. Rarely will there be no opportunity to cooperate whatsoever. What this process generally produces is mutually acceptable new states and widespread recognition as in most post-colonial states, the post-Soviet states, East Timor and South Sudan. Occasionally, it yields widespread non-recognition as in the South African Bantustans, Rhodesia, Manchukuo, and Somaliland.

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[44] Situations may, of course, be multilateral, but this situation is best characterized as a bilateral PD. Another interesting question, outside of the scope of this paper, is how the structure of this situation came to be; how the problem of recognition was constructed. Was Moscow opportunistic and disingenuous in its characterization of the two situations as analogous, linking the international status of one to the others? Or in linking South Ossetia to Abkhazia? In fact, we might aslo question whether the US and EU members saw the strategic situation similarly; there is evidence that they rejected Russia's linking of the cases as they repeatedly emphasized that Kosovo was *sui generis*. In that case, only examining Kosovo recognition, a multilateral PD might be more appropriate.

4. State Failure and Death

On the opposite end of the spectrum, states rarely 'die' or wholly cease to be international legal persons. This trend coincides with the widespread acceptance of the territorial sovereignty rule prohibiting the acquisition of territory by force.[45] CIL, formalized in the UN Charter and other documents, protects states from losing their legal personality when they are annexed or invaded by an outside force. Article 2(4) expressly prohibits the aggressive use of force. When an illegal act of force results in a government's loss of effective control, it does not lose its external sovereignty even though it no longer meets the requirements for statehood.[46] Montevideo also affirms this.[47] The illegality of the violence leading to the loss of effective control invalidates the authority of the occupying force.[48] Even in cases of state dissolution, there is often a core unit that survives the departures of the other constituent parts, inheriting the legal personality of its former, larger self.[49] As a result, matters of succession have received more attention than the fundamental collapse of states in international law.

Yet issues of state death provide fertile ground for research in the law and economics tradition. For example, we might ask why the strength of the customary norm against territorial aggrandizement has achieved such a high rate of compliance? That is, "why do states so infrequently die as a result of annexation and conquest?" [50] Political scientists have presented a number of potential interest-based explanations for the norm including the rise of two superpowers with an anti-colonial agenda, the decreasing value of territory relative to markets and state leaders' strong preference in favor of durable boundaries for post-colonial states.

Another area regarding state death ripe for examination is the empirical paradox inherent in the widespread maintenance of recognition and legal personality for failed or collapsed states.[51] Perhaps extending the state death metaphor too far, we will refer to this as 'posthumous' recognition. In contemporary politics, when a state loses control it is more often the result of an internal challenge and institutional entropy than a foreign annexation.

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[45] For a review of the patterns of state death and explanations for its relative decline from a political science perspective, see Fazal 2007.
[46] UN Charter 1945
[47] Montevideo 1933 Article 16
[48] Crawford 132; Montevideo 1933
[49] For example Russia succeeded the USSR in 1991.
[50] Norman and Trachtman briefly describe compliance with the rule as a cooperative equilibrium in a repeated multilateral prisoners dilemma (2005 34).
[51] We define state failure consistent with Helman and Ratner as those countries "utterly incapable of sustaining [themselves] as [members] of the international community" and "simply unable to function as independent entities" (1992). Following Rotberg, modern states most fundamental functions (in order of importance) are the provision of: security, law, civil and political rights, and public welfare including healthcare, infrastructure and education. The most extreme failure lies in the inability to provide security (2002).

Why do these actors maintain posthumous international legal personality as states? Why do their peers not revoke recognition from actors incapable of reliably enforcing order and providing governance? Perhaps it is not surprising that actors who temporarily lose control would be granted deference on the expectation that they might resurrect sovereign authority. But the posthumous recognition norm becomes significantly more puzzling in cases like Somalia where the externally manufactured Transitional Federal Government (TFG) holds the country's international legal personality even though it has never exercised anything close to authoritative control or provided much by way of governance to its population. Most parts of Somalia have not been governed by or received basic public goods from the recognized authorities since at least 1991.

What makes this practice perplexing for rational choice is that we might expect states would attempt to coordinate their behavior to address the negative externalities associated with the sustained lapse of effective sovereignty.[52] States depend upon their peers to maintain internal order within their territories and to possess the capability to make good on their promises. Failed states cannot be counted on for either of these things and therefore generate a burden for others. Because failed states lack the ability to enforce order, they also cannot be coerced or persuaded via the conventional tools of diplomacy and statecraft; the externalities do not result from a lack of will.[53] Moreover, states that cannot control their territories or populations may present non-traditional threats in the form of refugees, terrorism, illegal trafficking, crime and even environmental degradation and the spread of disease. All other things equal, community members should prefer capable states to failed states. Then why don't existing states move to reduce the inefficiency of posthumous recognition for non-viable members when no egregious violation of the territorial sovereignty rule has occurred? We examine this situation in further detail below.

A. Customary Law & Decertification

The traditional view of CIL and legal personality seems to obviate a discussion concerning the posthumous recognition of failed states. The dynamics of effectiveness, so pivotal to statehood, ought to take care of the problem. When a state ceases to meet the criteria required for statehood, it also ceases to exist as an international legal person and, according to the dominant declaratory theory, this is true regardless of external recognition to the contrary. In practice, this expectation cannot withstand scrutiny, however, because failed states simply do not die. In recent cases where the Montevideo criteria were unambiguously

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[52] Failed states' actions may produce positive externalities for their peers, but we assume that negative externalities are more common. We define 'externality' quite broadly as: a beneficial or detrimental effect on one state as a result of the behavior of another state.
[53] Identifying another state actor's 'type' is often important in determining whether cooperative agreements should be made in economic analysis. This, in part, explains why reputation is so significant in many models; states prefer to enter into agreement with those that will comply and reputation acts as a signal of a state's likely 'type'. State failure obviates the significance of type regarding the potential for cooperation. The information is not private; it is plainly apparent that a failed state cannot make good on its commitments even if its leaders have the will to do so.

not met for sustained periods, including Lebanon in the 1980s, Afghanistan, the Democratic Republic of Congo and Liberia in the 1990s, and Somalia in the two decades since the collapse of the Siad Barre regime, the states did not lose legal personality. They were consistently regarded as states and endowed with the rights and responsibilities of a state in international affairs. For example, the Rabbani government maintained Afghanistan's diplomatic missions abroad, and in the Somali case the international community has recognized various transitional authorities as Somalia's 'legitimate' government.

No legal doctrine specifically prescribes that sustained governmental collapse should result in decertification, or the revocation of the failed state's legal personality. Yet there is wide agreement that sustained internal anarchy does mean that the state legally ceases to exist. According to Kunz, "International law determines...that the disappearance of one of [the four Montevideo standards] has as a legal consequence the extinction of the sovereign state".[54] He continues, "territorial changes do not affect the identity of the state, except if they legally lead to the extinction of the state. But international law does not contain universally valid and obligatory criteria as to what must be the extent or the nature of territorial changes in order to lead to the extinction of the state".[55] The same problem arises with Montevideo's other three criteria. Nor is a time period specified for the lapse of the criteria before the state is extinct during which it might be "resurrected" and reclaim its international legal personality. Given the substantial ambiguity surrounding the rule's behavioral implications, Kunz determines that when states operate according to political considerations it is due to:

> the uncertainty of the law - the lack of the determination of exceptions to the general norm of identity in spite of territorial changes, and the lack of determination of the conditions under which the rule of identity works in spite of revolutionary changes, notwithstanding the extinction of the state under another norm of general international law - which is the ultimate reason for the lack of clarity and agreement in the doctrine".[56]

In short, greater specificity would induce greater compliance; current legal doctrine is an incomplete contract without apparent default rules.

Yet even without the formal codification of rules, the CIL directive in cases of state collapse seems clear according to the dominant, declaratory view of recognition. Actors without a defined territory, permanent population, government and the ability to participate in international relations, and those who remain unable to do so for an extended period, are not states and ought not be treated as such.[57] There is no option to maintain formal diplomatic relations because these actors are ineligible to participate and further, they are incapable of maintaining them. If recognition for those newborn states not yet meeting the Montevideo threshold is considered 'premature' and without legal effect, then the

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[54] 1955 71.
[55] Kunz 1955 73.
[56] 1955 76.
[57] For lack of a better descriptor, we will call these collapsed states 'actors' even though it is not clear that this suggestion of corporate, unitary character is true.

international community has a robust norm of posthumous, and similarly illegal, recognition after states have died. The absence of a codified behavioral directive might help to explain why states would break diplomatic relations in a disorganized fashion, or why they would delay the withdrawal of personality for some time following a state's collapse. It cannot explain why, without exception, the states of the international community do not allow states to become extinct or why they allow individuals to maintain the facade of leadership and agency in international forums when they, in fact, have none.

B. An Alternative View

Considering the topic of posthumous recognition and the potential cessation of legal personality from a rational choice perspective, we depart from one of G&P's major claims and manipulate their concept for our own use. G&P argue that, within the international community, so-called "rogue states" have high discount rates that make them more likely to defect from compliance with international law.[58] Unfortunately, this characterization of rogue states does not conform to political reality. Leaders of rogue states are not impulsive and, therefore, unable to maintain cooperative relations with other states. In fact, they are quite predictable and quite stable. If they were not, they would likely not be able to maintain authority and control for very long. Rogue state leaders - the Kim Jong Ils, Robert Mugabes, and Slobodan Milosevics of the world - are inscrutable because the content of their preferences departs so significantly from most other members of the international community. The leaders of rogue states are bad for their people, but they are reliably, predictably bad. Normatively disagreeing with their preferences and the rationale behind them is not equivalent to not being able to predict whether they can or will commit. Rogue states may have a reputation for a history of persistent objections to community norms and beliefs, but that is something different altogether.

Failed states, on the other hand, more precisely approximate the characteristics that G&P attribute to rogues including "unstable political systems", "irrational or impulsive leadership" and that their "citizens do not enjoy stable expectations". These are the states, or at least the leaders, with high discount rates. An actor's external recognition and widespread social acceptance as a state does not make that actor capable of unitary rational action, or even boundedly rational action.[59] One could still model the behavior of an individual failed state leader, but the state cannot be considered to behave in a unitary manner. Therefore, we will not attempt to model their behavior or the strategic situation they confront.

Political science has given greater consideration to state failure and recognition than the law, so it offers greater potential insights into state interests and the strategic situation. Why were states without domestic sovereignty initially welcomed into the system and why do they continue to persist without it? Decades ago, states with external legitimacy and little to no internal sovereignty were first dubbed "quasi-states" by Robert Jackson (1987). Along with Carl Rosberg, Jackson argued that quasi-statehood came about as the imperial powers rushed to withdraw from Africa in the middle of the twentieth century. Rising nationalist sentiment

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[58] Goldsmith and Posner 2005 31

[59] See Wendt (2004) on the inside and outside constitution of state personhood for greater detail (293).

and increasing popular disillusionment with imperialism at home combined to encourage hasty independence for colonies that were often not effectively sovereign. Herbst argues that post-colonial African leaders, recognizing their mutual domestic vulnerability, are now opposed to accepting any changes in their inherited borders, including state death.[60] Leaders therefore collude in favor of the status quo for everyone as a means of assuring that they individually maintain their authority. Off continent, states defer to the regional authorities, not wanting to be branded neo-colonialists and acutely concerned about a potential domino effect should Africa's external sovereignty begin to unravel. Together, these theories provide a potential explanation for why states without domestic sovereignty exist and why those states that have failed continue to enjoy posthumous recognition; especially where these states had been born into the system as quasi-states, never truly having achieved *de facto* authority during their tenures.

Political scientists would say that the failed state's neighbors usually have the most to gain from posthumous recognition because they simultaneously preserve their own external legitimacy. But these states are also the most at risk of suffering from failure's negative externalities. Then again, as they are often weak themselves, they may have a higher threat tolerance than stronger, more secure states. If accurate, this situation can usefully be described as a PD where cooperation is continued, posthumous recognition. Individually each state has an incentive to get rid of the collapsed state or states that menace them but, defensively, each state also wants to ensure that its peers don't have the option of getting rid of them one day. This situation is analogous to Norman and Trachtman's description of compliance with the territorial sovereignty norm except that, in this case, it explains why a formal rule has failed to emerge: why the international norm is contrary to the CIL implied by Montevideo.[61] In that model, the authors argue that either a "grim trigger" or a "penance" strategy would serve to maintain the cooperative equilibrium (in this case posthumous recognition). Presuming that the current situation regarding collapsed states is normatively undesirable though, we might find it more useful to determine the conditions that would increase state compliance with the CIL implied by Montevideo or the conditions under which a more formal rule of decertification might emerge.

C. Case Study: Somalia & Failed States Legal Personality

Somalia has been without a capable central government since at least 1991 when a military dictatorship collapsed in the throes of civil war. Since then, various changes in local authority have occurred. First, a secessionist state, Somaliland, emerged within the borders of the former British Somaliland colony in the country's northwest and has governed itself peacefully and independently, albeit at a low capacity, since the mid-1990s. Two other autonomous, non-secessionist territories in the northeastern and central regions, Puntland and Galmudug, have also emerged. Finally, various coalitions, some supported by the international community, others not, have secured and lost control in the south-central region where Mogadishu, the capital city, is located. Some, like the Islamic Courts Union (ICU) have sometimes asserted durable control, while others have only achieved fleeting authority. The Transitional Federal Government (TFG), constituted by and supported by the

[60] 1996/7; 2000

[61] 2005 34

international community, is the recognized government of the Somalia as of this writing.[62] However its control and authority are limited to small pockets in the south-central region and, even then, it is reliant upon local militias with uncertain allegiance to the authorities in Mogadishu. Contemporary Somalia is often described as the 'most failed failed state' in the world.

The Somali state's collapse, as is typical, generates negative externalities for its neighbors and states further afield. The TFG coalition's conflict with the Islamist Al Shabaab insurgency, active principally in the south-central, has generated destabilizing refugee problems for Kenya and Ethiopia and the conflict itself has spilled over borders into neighboring states. In the north, illegal immigration and illicit weapons trafficking generate problems for Yemen and Oman. The effects of the state's collapse have adversely affected more distant states as well. The rapid increase in maritime piracy off of the Somali coast beginning in 2008 generated economic costs both for those ships that were hijacked and for the shipping community writ large in the form of increased insurance and hazard pay for crews. Naval patrols in the area are also very costly. Additionally Somali nationals and members of the Somali Diaspora have been implicated in several incidents of international terrorism.

Despite the persistent collapse of central government and the negative externalities generated by Somalia in its current form, it has persisted as an actor endowed with legal personality for the last two decades (Chopra 1996). If the Somali state, embodied in the TFG, is considered a viable actor in the strategic situation, this may be a case of asymmetric cooperation wherein the international community has an interest in limiting the negative externalities of Somalia's failure, but the TFG is relatively indifferent as to whether piracy, for example, continues or stops.[63] This would resemble a so-called 'upstream-downstream' problem, so eliminating the problems attendant to state failure (cooperation) could be achieved by manipulating the TFG's incentives, perhaps through payoffs for policing its shores to ensure pirates do not take to the sea. But the TFG exercises so little actual authority that, despite its legal personality, it cannot really be considered capable of following through on any commitments it might make. There is no uncertainty, its commitments are not credible and the other members of the international community know it. Therefore the problem is more accurately cast as one among the members of the international community excluding Somalia.

D. Analysis

Is posthumous recognition for Somalia an example of a consistent violation of CIL? There is no particular rule that actors not meeting the Montevideo criteria cannot have external recognition, but that is the logical implication of the widely held declaratory theory. According to the traditional approach, adopting formal rules would help to increase compliance with the customary rule. Because it is already legitimate and believed to be law,

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[62] However, the interim government's mandate expires in August of 2012 when national elections are planned to replace it.

[63] If United Nations reports are accurate, the local Puntland government in Somalia may directly or indirectly gain from maritime piracy.

states simply need rules to better specify how they should behave in order to coordinate their behavior. But even in the most extraordinary case of contemporary state collapse, there has been little international discussion concerning the revocation of Somalia's legal personality or even discussion about allowing some of its territorial authority to devolve to its *de facto* successors in Somaliland, Puntland or Galmudug. The international community insists that Somalia retain its external sovereignty.

Alternatively, perhaps this is an example of cooperation within a multilateral PD where rules have not developed to the detriment of most states and the effective functioning of the international community. There is significant African opposition to changing Somalia's borders, even within Ethiopia and Kenya, the neighbors most threatened by its collapse. At first, the practice of posthumous recognition is perplexing because the number of weak and failed states has proliferated and the negative externalities have, presumably, also become more acute. But perhaps the proliferation of weak states works to perpetuate cooperation. As the number of weak states increases, the number of states that would be better off from a more precise, formal rule on revocation declines. And while all states may be threatened by failed states, only weak states would seriously imperil their own future claim to sovereignty by agreeing to conditions under which they will revoke external sovereignty. Should their claims to effective control and authority remain tenuous or take a precipitous turn for the worse, they would have sown the seeds of their own demise.

If the characterization above is accurate, then rational choice offers potential insight into what might break the cooperative pattern. If, out of deference to weak states, strong states are preventing the withdrawal of recognition from failed states, then perhaps, as on the occasion of the recognition of new statehood, strong states could also instigate a change. Among strong states only, the situation no longer resembles a PD, as they are relatively invulnerable to a revocation rule.[64] Instead, the strong would all be better off if they could collectively revoke recognition from states like Somalia that are unable to control their territories or make good on their commitments; the withdrawal of recognition is a coordination problem. Again Great Power decisions could serve as a focal point for other states.

At least one strong state appeared ready, for a time, to withdraw legitimacy from a failed state. In 2002, a controversial decision by the Bush Administration included the so-called "failed state doctrine," which asserted that the Geneva Conventions did not apply to the US conflict with Afghanistan. Although both countries were High Contracting Parties to the Conventions, Bush Administration advisors, noting that Afghanistan was a failed state, argued that members of the unrecognized Taliban regime were, therefore, not entitled to POW status.[65] For various reasons, non-application of the Geneva Conventions was a non-

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[64] Still, given their significant domestic challenges we would expect China and Russia to be relatively more hesitant to enact a revocation rule.
[65] The position was roundly criticized within and outside of the White House. According to Caron, a "failed state doctrine not only removes the rights of the failed state...it removes all of the obligations of the failed state..." In cases like Afghanistan where the Taliban did exercise de facto authority, Caron suggests that the potential for a 'clean slate' as a matter of doctrine would generate moral hazard (219).

starter, foremost among them that the laws apply to non-state actors as well as states, that they are CIL and that it contravened the longstanding US position on Afghanistan. Though President Bush later reversed his stance, it remains unclear whether the change was due to a repudiation of the argument that failed states should cease to exist according to the law or something else.[66] Should more occasions arise where strong states are unwilling to extend the basic privileges of community membership to collapsed states, and if they can coordinate that revocation, posthumous recognition may fall out of favor and compliance with CIL may increase.[67]

5. Potential Challenges for the Law & Economics Approach

Rational choice is not a panacea when it comes to understanding the dynamics of statehood in international law. Indeed, it is vulnerable to many of the same criticisms that law and economics scholars levy at more traditional legal scholarship. A rationalist framework, for example, can just as easily succumb to post hoc explanations based upon instrumentalism as traditional scholarship might succumb to explanations based in legal and normative reasoning. Still, many of these problems can be mitigated though careful attention to the nature of the problem or situation being examined and to the actors themselves; through empirical testing that examines all of the relevant alternatives; and by being scrupulous and transparent about the strengths and limitations of each method and model employed.

A. Equifinality & Causality

The difficulty of inferring motivations from behavior is one of the more enduring and inescapable problems of the social sciences. So far, law and economics has challenged traditional understandings of international law by putting forward alternative, interest-based explanations. These scholars have been less successful at teasing out the causal relationships and mechanisms, however. For example, given two potential explanations for state compliance with CIL - one traditional explanation rooted in *opino juris* and one rationalist explanation rooted in interest - the two are rarely examined simultaneously by either rational choice or traditional legal scholars.[68] Furthermore, the two motives are rarely mutually exclusive. Might normative, legal reasoning be limiting the set of choices a state considers, even if it seems not to factor into the final decision calculus? Might self-interested calculations which led to the creation of laws and institutions at time T later shape state preferences at time T+1? Even where rational choice seems to offer a more compelling explanation for state behavior, traditional explanations including the normative motivations

[66] Caron 220.
[67] Of course, there may also be other reasons why states are willing to sustain external legitimacy for collapsed states that have not been considered here.
[68] Indeed, this is the most common critique levied at G&P; it is difficult to argue that opino juris does not exist when one's research design explicitly excludes the possibility that it might.

suggested by managerial and procedural models are not often examined as competing hypotheses.[69] This challenge simply recommends careful and falsifiable empirical research.

B. States & Non-States as Rational Actors?

Many of the most interesting puzzles concerning the birth and deaths of states, other than those presented herein, must meaningfully incorporate non-state actors. Critics of the law and economics approach may question whether the assumptions of rational choice are appropriate for analyzing the behavior of non-state actors like secessionist movements, insurgent groups and indigenous peoples. To what extent can non-state actors be considered rational, unitary actors akin to states or state leaders? As G&P note, pre-state and non-state actors are the most likely to violate the assumptions underlying rational choice and law and economics.[70] Scholars using a law and economics framework should be especially careful about applying rational choice assumptions to actors that will almost certainly not approximate them. It is always the case that assumptions represent a simplification and do not reflect reality. But the break between the assumption and reality is not the real issue. The problem arises because, in circumstances where the actors cannot be rational or, more precisely, are not even actors (see the discussion above regarding failed states), the approach will not generate useful insights. However this is not a new problem, nor one that is unique to rational choice in political science.[71]

The greatest impediment to successfully utilizing a law and economics framework to analyze both state and non-state actors is the asymmetry of the situations they face. The deep structure of the international system is predicated upon the legitimate membership and juridical equality of states and the non-membership and inequality of non-state actors. Consequently, even in what ostensibly appear to be the same circumstances, the strategic situations between states and non-state actors are often fundamentally different. This is not necessarily a limitation. Indeed, careful modeling of the different incentives faced by states and non-state actors in superficially similar strategic circumstances will illuminate system dynamics that have heretofore been relatively neglected.

C. Behavioral Economics & Empirical Research

Another potential limitation has its roots in the behavioral critique of rational choice assumptions writ large. Cognitive psychologists and behavioral economists have demonstrated various systematic ways that human decision-makers violate the expectations of rational choice. Specifically, this research finds that humans are 'cognitive misers' and 'satisficers', controverting rational choice assumptions that actors are interest maximizers with fully ordered, ranked and transitive preferences over outcomes.

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[69] For example, theories of compliance offered by Chayes and Chayes (1995) and Franck (1995). Sandler (2008) is a notable exception in his analysis of treaty ratification and compliance.

[70] 2005 8.

[71] Recently see the forum on the "state as person" in international relations in *Review of International Studies* 2004 30:2

Empirical research has found that human information processing utilizes simplifying heuristics that, while very useful in day-to-day life, may sometimes lead to preferences and decisional outcomes contrary to rationalist models. For example, Daniel Kahneman and Amos Tversky's famous experiments on prospect theory show that humans' propensity for risk depends meaningfully upon whether a decision is framed as a potential loss or a potential gain.[72] Ultimately, much of the 'behavioral challenge' can be complementary to the law and economics project. By specifying the conditions under which systematic deviations from rational choice are likely, we can incorporate them into our models and generate hypotheses that are increasingly consistent with empirical reality. Some important work along these lines, including that by Jolls, Sunstein, and Thaler, provides a potential touchstone for approaching behavioral work in international law.[73]

Another technique for improving the external validity of rational choice research is to create models of greater complexity.[74] Empirical research where the simplifying assumptions of ideal form PDs are violated - allowing communication, repeated play, etc. - often finds greater cooperation than rational choice models would suggest.[75] Since these relaxations conform more to the reality of state interactions, these sorts of empirical tests provide important insights for developing more robust models and better specifying the conditions under which CIL is more likely to emerge and improve state welfare.

6. Conclusion

This chapter argues that rational choice approaches have great unrealized potential regarding the most fundamental dynamics of international law including Great Power recognition and the emergence of new states and posthumous recognition in cases of state collapse.
In this essay we have limited our discussion to these two research areas, but there are certainly others. The law and economics approach's greatest strength is its ability to elucidate the situational incentives facing actors and to generate novel, and perhaps counterintuitive, hypotheses based upon the structure and interdependence of actors' preferences. In the cases that we have touched upon here, G&P's framework has helped to show why states' recognition behavior has achieved such a high degree of convergence with rules other than - but often mistaken for - those prescribed by CIL. Rational self-interest also helps to explain why states do not typically withdraw recognition from failed states even when they might prefer to do so for a given failed state menace. Law and economics research also has the potential to advance normative work on statehood and sovereignty. For example, as suggested by Norman and Trachtman, it can help to identify the conditions under which the

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[72] Kahneman, Daniel and Amos Tversky. 1979. Prospect Theory: An analysis of Decision under Risk. *Econometrica* 47:2, 263-292.
[73] Jolls, Christine, Cass Sunstein and Richard Thaler. 1998. "A Behavioral Approach to Law and Economics" *Stanford Law Review* 50:5, 1471-1550. Also see van Aaken 2008 regarding international law in particular.
[74] van Aaken notes correctly, however, that "without abstraction there is...no academic knowledge"; parsimony is essential to good social science research (53 2008).
[75] Ostrom, Elinor. 2000. Collective Action and the Evolution of Social Norms. *The Journal of Economic Perspectives*. 14:3, 137-158.

continued operation or development of CIL is more normatively attractive than its formalization through treaties or other agreements or conversely, when formalization will yield greater state compliance or more normatively desirable results than CIL.[76] There are some hurdles to successfully utilizing a rational choice approach that are especially acute given the nature of the topics addressed here, but they are not insurmountable. Careful attention to the suitability of rational choice assumptions on a given topic, to the modeling decisions employed and to causal processes should suffice in most cases.

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[76] 2005 6.

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