I. INTRODUCTION

Philosophers and lawyers distinguish between justification and excuse: an action is justified if it is morally good or right; an action is excused if it is wrongful but the actor is not culpable for the wrongful action. This distinction is considerably influential in domestic criminal law, as many jurisdictions recognize excuses for wrongful acts.

International criminal law has distinguished between justifications and excuses for individuals. For example, the Rome Statute, which established the International Criminal Court, recognizes the following excuses: insanity, intoxication, necessary defense, duress, and mistake of law or fact. The

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1 See, e.g., J.L. Austin, A Plea for Excuses, 57 PROC. ARISTOTELIAN SOC’Y 1, 2 (1956) (“In the one defense [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don’t accept full, or even any, responsibility.”); Marcia Baron, Justifications and Excuses, 2 OHIO ST. J. CRIM. L. 387, 389–90 (2005); Mitchell N. Berman, Justification and Excuse, Law and Morality, 53 DUKE L.J. 1, 4 (2003); Joshua Dressler, Justifications and Excuses: A Brief Review of the Concepts and the Literature, 33 WAYNE L. REV. 1155, 1161–63 (1987). However, not all scholars believe that the distinction between justifications and excuses is clear. See, e.g., Michael Corrado, Notes on the Structure of a Theory of Excuses, 82 J. CRIM. L. & CRIMINOLOGY 465, 483 (1991) (“[S]eeing justification as a type of excuse is the better view. . . . [J]ustification fits into the scheme of excuses.”); Kent Greenawalt, Distinguishing Justifications from Excuses, 49 L. & CONTEMP. PROBS. 89, 90 (1986) (“[T]he law should not aim for comprehensive, precise distinctions between justification and excuse.”); Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897, 1898 (1984) (“Anglo-American criminal law should not attempt to distinguish between justification and excuse in a fully systematic way.”).


International Criminal Tribunal for the Former Yugoslavia has also considered the excuse doctrines, most prominently in the *Erdemovic* case.\(^4\)

However, international law does not clearly distinguish between justifications and excuses for states.\(^5\) Rather, under the Articles on Responsibility of States for Internationally Wrongful Acts, any wrongful act of a state entails international responsibility of that state.\(^6\) Thus, international law displays an asymmetry in its treatment of individuals and states: individuals may claim excuses under some circumstances, but state
wrongdoing is always inexcusable. Until now, this asymmetry has been largely unexamined and (rightfully) undefended.

This Article is a plea for excuses. International law should recognize excuses for the international wrongdoing of states. Part II explains the distinction between justifications and excuses, grounds this distinction in the choice and character theories of excuse, and provides an illustration of excuse doctrines. Part III explains why international law has not yet recognized excuse doctrines for states but argues that the choice and character theories of excuse entail that states deserve excuses to the same extent individuals do. Part III also defends the thesis against four possible objections. Parts IV, V, and VI explain and illustrate three potential excuse doctrines for states: mistake, duress, and diminished capacity. Part VII offers a conclusion.

II. ON EXCUSES

A. Excuses and Justifications

An action is justified if it is morally good or right; an action is excused if it is wrongful but the actor is not culpable for the wrongful action. As an illustration, consider Immanuel Kant’s example of “a man who, when shipwrecked and struggling in extreme danger for his life, and to save it, may thrust another from a plank on which he had saved himself.” Kant reasons that the fear of an uncertain death, i.e., death by judicial sentencing, would not overcome the fear of a nearly certain death, i.e., death by drowning. Because punishing the shipwrecked sailor would not deter such an act of self-preservation, it would be pointless to do so. Therefore, even though the sailor’s actions were wrongful, he should be excused from punishment.

7 See FLETCHER & OHLIN, supra note 3, at 58.
8 This is not to say that scholars have neglected the topic entirely. See FLETCHER & OHLIN, supra note 3, at 107–28 (discussing excuses for international aggression); see generally Lowe, supra note 5. Scholars have also discussed the necessity defense as a potential excuse in international law. See, e.g., Paul Weidenbaum, Necessity in International Law, 24 TRANSACTIONS OF GROTIUS SOC’Y 105, 110 (1962). Necessity, however, is a justification and not an excuse. See infra Part V.A.
9 See note 1 and accompanying text.
11 Id.
12 Id.
13 Id. See also ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 166 (1999) (“Kant’s claim is rather that even if punished, the sailor’s deed remains rational from the
Excuses are personal to the excused, but justifications are not personal to the justified. Thus, if an act is wrongful but excused, then the victim of the crime has a right to resist; but if an act is justified, the putative victim has no right to resist. Furthermore, although third parties may permissibly assist a justified action, they may not permissibly assist a wrongful but excused action.

In other words, justifications provide agent-neutral reasons for action, but excuses provide agent-relative reasons for action. A reason for action is agent-neutral if it gives all agents a common aim; a reason for action is agent-relative if it gives different aims to different agents. For example, Kant’s shipwrecked sailor example may seem inconsistent with Kant’s deontological ethics, as Kant’s reasons seem distinctly consequentialist; that is:

The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: “It is better that one man should die than that the whole people should perish.”

For if justice and righteousness perish, human life would no longer have any value in the world.

KANT, supra note 10, at 446. See also Stuart M. Brown, Has Kant a Philosophy of Law?, 71 PHIL. REV. 33, 33 (1962) (“[Kant’s philosophy of law] fails . . . because his principles have no application to positive law.”). However, this putative inconsistency is the result of a misreading of Kant, who sharply distinguished the doctrine of right (his political and legal philosophy, including his views on the criminal law) from his doctrine of virtue (his moral philosophy, including his views on the categorical imperative). See, e.g., Ernest J. Weinrib, Poverty and Property in Kant’s System of Rights, 78 NOTRE DAME L. REV. 795, 799 (2003) (“Kant’s adamantine boundary between right and ethics—the former dealing with externally coercible duties, the latter with incoercible duties done for their own sake—prevents recourse to appealing ideas found in Kant’s writings on ethics.”); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 11 (2009); George Fletcher, Law and Morality: A Kantian Perspective, 87 COLUM. L. REV. 533, 536 (1987).

15 Id.
16 See id. at 762. See also Michael S. Moore, Causation and the Excuses, 73 CAL. L. REV. 1091, 1095 (1985).
17 But see ALAN WERTHEIMER, COERCION 167–70 (1989) (arguing there are “agent-neutral” justifications and “agent-relative” justifications).
18 See DEREK PARFIT, REASONS AND PERSONS 27 (1984). An “agent-relative” reason might still give multiple agents, and potentially all agents, a reason for action, but their aims would differ. For example, if an event were in A’s interest but against B’s interest, A would
duress gives agent-relative reasons for action: if A coerces B to commit theft, then B may have a reason to steal, but A’s coercion of B does not give other parties a reason to aid in the theft. Yet, if B’s theft were the only means of preventing an imminent disaster, then B may be justified and all other agents would have the common aim of aiding B.

As an additional illustration of the distinction between justification and excuse, consider the rights of a shopkeeper when a woman enters a grocery store and steals a loaf of bread to feed her starving child. If the theft is justified, then the storekeeper has no right to resist the woman; if the theft is wrongful, then the storekeeper may use force to stop the woman, even if the theft is excused. Moreover, if the woman is justified, then third parties (for example, other customers in the store) may assist the woman in the theft; if the woman is excused, then nobody may permissibly assist the woman. In such situations, the distinction between justifications and excuses affects “a matrix of legal relationships.”

B. Theories of Excuse

Legal scholars have advocated various theories to explain and justify the doctrines of excuse. This section is a brief introduction to two such theories: the choice theory and the character theory.

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19 See Wertheimer, supra note 17, at 168. Although Wertheimer believes that duress gives agent-relative reasons for action, he also believes that duress is an agent-relative justification instead of an excuse. Id.

20 See Fletcher, supra note 14, at 760–62.

21 See id. at 760.

22 See id. at 762.

23 See id.

24 The full account of the choice theory and the character theory, however, is beyond the scope of this Article. The discussion of the choice and character theories focuses on a few illustrative examples. Furthermore, there are additional theories of excuse. For example, pursuant to the causal theory of excuse, agents are excused when a factor outside their control causes them to act. See Moore, supra note 16, at 1091. Such a theory is consistent with the intuition that one should excuse agents when one understands the causes of their behavior (known as tout comprendre c’est tout pardonner). See id. at 1092. Scholars have debated the merits of the causal theory, even though the choice and character theories remain more prominent. Compare id. at 1091 (“I shall urge that we must reject the causal theory of excuse. It neither describes accurately the accepted excuses of our criminal law nor provides a morally acceptable basis for deciding what conditions ought to qualify as excuses from criminal
Pursuant to H.L.A. Hart’s formulation of the choice theory of excuse, agents are excused for an act if, at the moment of the act’s performance, they did not have sufficient capacity or opportunity to do otherwise. 25 The choice theory is grounded in the proposition that agents are responsible for what they freely choose and are not responsible for what they do not freely choose. 26 Sir William Blackstone, for example, argued that “the concurrence of the will, when it has its choice either to do or avoid the fact in question, being the only thing that renders human actions praiseworthy or culpable.” 27


26 See Moore, supra note 25, at 548.
One may object that even an agent’s choices have prior causes, and these prior causes preclude an agent’s choice. Therefore, a choice theorist must either advocate excuses for all actions or embrace the “obscure and panicky metaphysics of libertarianism” by denying that all events, including choices, have prior causes. Michael Moore responds by arguing that prior causes do not preclude choice because the agent’s choice is an intervening cause that “intervene[s] between the factors that caused it and the action it caused.” The important question for Moore, then, is not whether choice is possible but rather whether choice “was not made very difficult by factors over which [the agent] had no control.” If an agent’s decision was made very difficult by these factors, then the agent is excused.

Yet, other scholars reject the choice theory in favor of the character theory, which maintains that agents are responsible for their character, not their actions, and agents are excused when a bad act does not reflect a bad character. George Fletcher, for example, argues that an “inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment” and excuses “preclude an inference from the act to the actor’s character.”

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28 See Moore, supra note 16, at 1112.
29 See id. at 1112–13.
31 See MOORE, supra note 25, at 552.
32 See id. at 553.
33 See id.
34 See id. 557; DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, § VIII, Part II, para. 6 (1748) ("[A]ctions are objects of our moral sentiment, so far only as they are indications of the internal character . . . ."); Claire O. Finkelstein, Duress: A Philosophical Account of the Defense in Law, 37 ARIZ. L. REV. 251, 283 (1995).

We have lost the ability to make sense of a defense like duress, then, because we have lost the concept of character judgment, and we have put in its place the less coherent notion of moral evaluation of an action, stemming from the idea that each action is the product of an independent exercise of choice.

Id.

35 FLETCHER, supra note 14, at 800.
36 See id. at 799. See also ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 383 (1981) ("An excuse shows that an action which appears to be an exercise of that serious a character defect is not.").
One may object that character theory is reducible to choice theory: agents are responsible for their choices insofar as these choices constitute their character.\textsuperscript{37} However, the character theorist may respond that agents are responsible for their characters because characters constitute agents, in part.\textsuperscript{38} George Sher notes “how difficult it would be to condemn a person’s bad traits \textit{without} also condemning him . . . . [T]here is no clear difference between condemning a person’s cruelty, manipulativeness, or unfairness, and simply condemning \textit{him}.”\textsuperscript{39} Thus, to fault an agent’s character is to fault the agent.\textsuperscript{40}

\textbf{C. Doctrines of Excuse}

Though jurisdictions have adopted different doctrines of excuse, this Article will divide excuse doctrines into three categories: mistake, duress, and diminished capacity.\textsuperscript{41}

First, mistake doctrines include mistake of fact and mistake of law.\textsuperscript{42} Legal codes often require a mistake of law or fact to negate an element of the offense to excuse.\textsuperscript{43} For example, if a larceny statute includes intent to steal property that the defendant knows belongs to another person as an element of the offense, then defendants may claim a mistake of fact defense if they take property they falsely believe is abandoned.\textsuperscript{44} Moreover, legal

\textsuperscript{37} See Moore, supra note 25, at 548.

\textsuperscript{38} See id. at 567–68.

\textsuperscript{39} GEORGE SHER, IN PRAISE OF BLAME 64–65 (2006).

\textsuperscript{40} See id. at 65.

\textsuperscript{41} This tripartite categorization is useful for the purposes of this Article, but it is not the sole plausible taxonomy of excuses. C.f. Sanford H. Kadish, \textit{Excusing Crime}, 75 CAL. L. REV. 257, 257–58 (1987) (“There are many equally defensible approaches [to categorizing the possible grounds of exculpation]; I offer mine only for its convenience in making the points I want to make.”). Other scholars have presented alternative means of categorizing excuses. See, e.g. \textit{id. at} 258, 259–63 (dividing excuses into instances of involuntary actions, deficient but reasonable actions, and nonresponsibility). \textit{See also} Moore, \textit{supra} note 16, at 1097–98 (dividing excuses into three categories: true excuses, e.g. mistake and compulsion excuses; defenses that disprove the case in chief, e.g. no mens rea, no voluntary action, or no proximate cause; and status excuses, e.g. insanity, infancy and intoxication). \textit{See generally} Fletcher, \textit{supra} note 14, at 683–877 (discussing mistake defenses separately from excuse defenses); PAUL H. ROBINSON, \textit{STRUCTURE AND FUNCTION IN CRIMINAL LAW} 83 (1997) (“Excuse defences are of two sorts: disability excuses and mistake excuses.”).

\textsuperscript{42} Moore, \textit{supra} note 16, at 1097.

\textsuperscript{43} See, e.g., MODEL PENAL CODE § 2.04(1) (AM. LAW INST., Official Draft 1962).

\textsuperscript{44} See, e.g., People v. Navarro, 99 Cal. App. 3d Supp. 1, 95–96 (Cal. App. Dep’t Super. Ct. 1979). The mistake doctrine may require that the defendant’s mistake be reasonable to
codes may allow a mistake of law defense if the mistake is the result of an official interpretation of law.45

Aside from these circumstances, however, ignorance of the law is not an excuse (ignorantia juris non excusat).46 Yet, legal codes often impose a further restriction on the mistake defense: if an actor’s conduct would constitute a legal wrong if the facts and law were as the actor thought, then the actor is guilty despite the mistake.47

Second, one may claim the defense of duress if one’s action is the result of compliance with the coercive demands of another actor.48 Different penal

excuse, but the element of reasonableness is controversial. Id. at 96; Richard Singer, The Resurgence of Mens Rea: II-Honest But Unreasonable Mistake of Fact in Self Defense, 28 B.C. L. Rev. 459, 467 (1987).

45 See, e.g., Model Penal Code § 2.04(3). Official interpretations of law include interpretations contained in a statute, a judicial decision, an administrative order, or an interpretation by a public officer or body charged with interpreting the law. Id. The Model Penal Code also provides an excuse for members of the armed services who execute an order of a superior who do not know the order to be unlawful. Id. § 2.10. Contra Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle IV (1950) (“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”). See also Rome Statute, supra note 3, at art. 33.

46 See, e.g., Model Penal Code § 2.02(9) (“Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.”).

47 See, e.g., id. § 2.04. The legal wrong doctrine is a modification of the traditional moral wrong doctrine: if an actor’s conduct would constitute a moral wrong if the facts and law were as the actor thought, then the actor is guilty despite the mistake. See Regina v. Prince, L.R. 2 Crim. Cas. Res. 154 (1875). An advantage of the legal wrong doctrine over the moral wrong doctrine is that an actor is on notice about legal wrongs, but an actor is not on notice about the court’s views of morality. Thus, the moral wrong doctrine may run afoul of the principle of legality, i.e., nulla poena sine lege (no punishment without law). See also H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 595–96 (1958) (explaining the principle of legality).

48 One of the underlying intuitions of the duress defense is that a coerced act is not truly voluntary, and one should only be punished for voluntary acts. See, e.g., Regina v. Hudson, [1971] 2 All E.R. 244, 246 (Crim. App.) (explaining that the accused may claim a duress defense “if the will of the accused [was] overborne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused.”); Hart, supra note 25, at 22–24 (arguing that only those who voluntarily break the law should be punished).
codes have adopted different variations on this standard. For example, under the Model Penal Code, the threat must be such that a person of reasonable firmness would have been unable to resist. Alternatively, some common law jurisdictions require a defendant claiming duress to prove that there was an immediate and well-grounded threat of death or serious bodily injury with no reasonable opportunity to escape the threatened harm. Other legal codes use a different standard; for example, under the Rome Statute, the threat must constitute an imminent threat of death or serious bodily injury, and a person must act necessarily and reasonably under the circumstances. Moreover, under the Rome Statute, one must not cause more harm than one seeks to avoid.

One may distinguish the duress defense, which is an excuse, from a necessity or choice of evils defense, which is a justification. First, a choice of evils or necessity defense often requires that the harm or evil avoided be greater than the harm sought to be prevented by the law defining the offense charged. However, the duress defense generally does not require that one choose the lesser of two evils in compliance with the threat. Second, the necessity or choice of evils defense is traditionally limited to “physical

49 Model Penal Code § 2.09.
50 See, e.g., United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984).
51 See Rome Statute, supra note 3, at art. 31.
52 See id. If one is causing less harm than one seeks to avoid, then it seems as though one’s actions are justified and not excused. Therefore, under the Rome Statute, duress appears to be more of a justification than an excuse, even though duress is featured as a ground for excluding criminal responsibility. See Fletcher & Ohlin, supra note 3, at 122 (“By contrast, the provision [of the Rome Statute] called ‘duress’ is an unfortunate mixture of both excuse and justification.”). Domestic law may also reflect confusion as to whether duress is a justification or excuse. See, e.g., United States v. Bailey, 585 F.2d 1087, 1111 (D.C. Cir. 1978) (Wilkey, J., dissenting).

[Although a defendant has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused or justified because he has thereby avoided a harm of greater magnitude. Thus, the defense of duress rests on the social utility of a defendant’s actions when faced with a choice of evils.

Id. (emphasis omitted). However, some scholars have offered principled reasons why duress is a justification and not an excuse. See, e.g., Wertheimer, supra note 17, at 165–70.

53 See Model Penal Code § 2.09.
54 See id. § 3.02.
55 See id.
56 See id. § 2.09.
forces of nature,” but the duress defense applies to “acts coerced by a human force.”

Third, this Article will use the term “diminished capacity” to refer to the excuse doctrines that concern the reduced cognitive or volitional capacity of the accused. For purposes of this Article, diminished capacity excuses include doctrines such as insanity or intoxication. For example, the Model Penal Code test for insanity includes both a cognitive and a volitional element: one may claim insanity as a defense if one “lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” Moreover, under the Model Penal Code, one may claim intoxication as a defense if, as a result of intoxication that is pathological or not self-imposed, one “lacks substantial capacity either to appreciate its criminality [wrongfulness] or to

57 United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984). Scholars have not always been impressed by the use of the distinction between a human source of a threat versus a non-human source to distinguish necessity and duress. See, e.g., Eugene R. Milhizer, Justification and Excuse: What They Were, What They Are, and What They Ought To Be, 78 St. John’s L. Rev. 725, 728 n.13 (2004).

Leaving aside the practical difficulties sometimes encountered in drawing such distinctions (i.e., whether the threat posed by a forest fire started by an inattentive smoker is of a natural or human origin), such limitations would inflexibly and irrationally exclude the possibility of a necessity or duress defense for reasons that are completely unrelated to whether an actor’s conduct ought to be justified or excused. For example, such a rigid distinction would categorically disallow the necessity defense for an actor who trespasses upon a chemical plant to save someone who is about to be killed by a synthetic solvent that was released by a worker, because the threat emanated from a human rather than a natural source.

Id. See also Robinson, supra note 24, at 235 (“Perhaps reflecting the weakness of the previous distinction—a natural versus a human source of the threat—it has frequently been replaced with what is essentially the justification-excuse distinction.”). But see Peter Westen & James Mangiafico, The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters, 6 Buff. Crim. L. Rev. 833, 835 (2003) (“The distinction between manmade threats and natural threats is not ‘spurious’ but rather is as valid as the rules that underlie conventional defenses of necessity and self-defense.”).

58 See, e.g., Moore, supra note 24, at 1098.

59 The category of diminished capacity excuses is analogous to the excuses that Michael Moore categorizes as excuses pertaining to status: insanity, intoxication, and infancy. See id.

conform his conduct to the requirements of law.”61 Furthermore, the Model Penal Code allows evidence of mental disease or defect if it is relevant to an element of the offense.62

This section has provided an illustrative but not exhaustive overview of prominent excuse doctrines.63 Although these excuses have traditionally been reserved for individuals, they may apply to nations as well in the context of international law.64

III. **Why International Law Should Recognize Excuses for States**

A. **Why International Law Has Neglected Excuses for States**

The neglect of excuses for states is part and parcel of more general conceptual confusion about defenses to violations of international law.65 Domestic penal codes tend to be clearer about the status of defenses within

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61 Id. § 2.08(4).
62 See id. § 4.02.
63 There are other potential doctrines of excuse, but they are beyond the scope of this Article. For example, scholars have debated whether provocation may function as an excuse, or at least a partial excuse. See, e.g., Austin, supra note 1, at 3.

[W]hen we plead, say, provocation, there is genuine uncertainty or ambiguity as to what we mean—is he partly responsible, because he roused a violent impulse or passion in me, so that it wasn’t truly or merely me acting “of my own accord” (excuse)? Or is it rather that, he having done me such injury, I was entitled to retaliate (justification)?


64 See FLETCHER & OHLIN, supra note 3, at 125.
65 See id. at 126.
the law. 66 First, domestic penal codes include defenses as a part of the
criminal law, not as an exemption from law itself. 67 Second, domestic penal
codes include defenses as separate from violations of the law, not as
modifications of the initial legal obligation. 68 Third, and most importantly
for purposes of this Article, domestic criminal penal codes distinguish
between two categories of defenses: justifications and excuses. 69

First, international lawyers and diplomats have not explained whether a
defense to a violation of international law is an exemption from the law itself
or whether defenses are a feature of international law. As an illustration,
consider Germany’s controversial invocation of necessity during World War
I. In 1839, Prussia (Germany’s predecessor state) signed the Treaty of
London, which recognized the existence of Belgium as an “independent and
perpetually neutral state.” 70 Yet, in 1914 at the outbreak of World War I,
Germany invaded Belgium in violation of the treaty, which German
Chancellor Theobald von Bethmann-Hollweg infamously dismissed as a
“scrap of paper.” 71 In a speech to the Reichstag, Bethmann-Hollweg
admitted that Germany’s invasion of Belgium violated international law, and
he even referred to Germany’s behavior as an injustice (unrecht). 72

Bethmann-Hollweg asserted “necessity knows no law” and claimed
Germany was acting in self-defense. 73 Scholars of international law have
long recognized self-defense and necessity as legitimate defenses within
international law, not as exemptions from law itself. 74 Yet, during World
War I, Germany invoked necessity as a “virtually law-obliterating principle”

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67 See id.
68 See id.
69 See id. §§ 2.01, 3.01.
70 See Treaty of London, art. 7, Apr. 19, 1839, 88 Consol. T.S. 445, 449 (Fr.).
71 ISABEL V. HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW
DURING THE GREAT WAR 42 (1914).
72 See id. at 48.
73 See id.
74 See id. at 26. Scholars have connected the notion of self-defense to a broader notion
of necessity. For example, the 1905 edition of Oppenheim’s International Law, a prominent
international law text, contends self-preservation is appropriate as a defense to violations of
international law “in cases of necessity only . . . because otherwise the acting state would
have to suffer or have to continue to suffer a violation against itself.” 1 OPPENHEIM,
INTERNATIONAL LAW 178, ¶ 130 (1905). See also Maria Agius, The Invocation of Necessity
CUSHING RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW (1928).
used not only to achieve self-preservation but also victory and even military convenience.\footnote{75 See Hull, supra note 71, at 27.} Under this conception of necessity, it is not a defense within the law or a modification of legal obligations but an exemption from law itself.\footnote{76 Accordingly, despite some initial half-hearted legal defenses of German actions, Germany never published an official defense of its invasion during the war. See id. at 48.} Although Bethmann-Hollweg later retracted his words from the speech to the Reichstag, his expansive view of necessity and disregard of international law provoked a strong backlash.\footnote{77 See id. As a result of comments such as Bethmann-Hollweg’s, the Allies portrayed Germany as a kind of modern Thrasymachus, who argued that justice is the “advantage of the stronger.” See Plato, The Republic I, in Plato: Complete Works 339 (John M. Cooper trans.) (1997). Louis Renault, a prominent French international lawyer, declared that the goal of Allied efforts in World War I was to “affirm the sanctity of treaties, the destruction of the German theory that necessity justifies the violation of all the laws of war, the guarantee of the existence of small states, the development of arbitration.” Hull, supra note 71, at 1–2. Moreover, although many factors caused the United Kingdom to enter World War I, the invasion of Belgium played a role in the public justification for British involvement and in convincing a majority of the Liberal cabinet to support the war. Id. at 33–41.}

Second, when international lawyers and diplomats invoke defenses to violations of international law, they do not explain whether defenses are modifications of obligations under international law or rather a separate defense to a violation of international law. The Portuguese government’s stance during the 1832 Anglo-Portuguese dispute illustrates this ambiguity. In this dispute, Portugal appropriated British property to provide provisions for Portuguese armed forces that were quelling an internal disturbance.\footnote{78 2 International Law Opinions 231–33 (Lord McNair ed., 1956).}

Portugal’s appropriation of British property ostensibly violated a treaty obligating Portugal to respect the property of British subjects in Portugal.\footnote{79 See id.} However, the British government’s attorneys advised, “[T]he Treaties between this Country and Portugal are not of so stubborn and unbending a nature as to be incapable of modification under any circumstances whatever.”\footnote{80 Id. at 232 (emphasis added).} This language of modification appears to be an outlier, as international lawyers frequently speak of defenses as leaving the initial obligation intact, yet precluding the wrongfulness or culpability of a breach of the obligation.\footnote{81 See id. at 231–33.}
Third, international lawyers and states have not distinguished between two categories of defenses to international law: justifications and excuses. As an illustration, consider the 1837 Caroline Affair, in which British forces entered U.S. territory to destroy an American ship that was supplying Canadian rebels during the Upper Canada Rebellion. In response, U.S. Secretary of State Daniel Webster argued that the British failed to meet the standard of self-defense, which requires a case of necessity to be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

This definition combines elements of excuse and justification. The requirement that an exercise of self-defense is necessary suggests that self-defense is a justification because jurisdictions generally recognize that a necessary action is justified. George Fletcher and Jens Ohlin argue that the language of the Caroline test is reminiscent of self-preservation excuse. Like Kant’s shipwrecked sailor, whose homicide of another sailor for self-preservation would be excused, a nation will use force when no other means to resist an overwhelming force is evident. The Caroline test’s requirement that the attack be instant and leave no moment of deliberation is also reminiscent of the provocation defense, which applies to actions taken during the “heat of passion.”

Yet, the aftermath of World War I featured a shift from excuse to justification and a shift in emphasis from the culpability of a state to the wrongfulness of conduct in international affairs. The Treaty of Versailles, signed after the war, contained harsh terms for Germany; Germany lost a substantial amount of territory and had to pay extensive reparations to the

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82 See Letter from Henry Stephen Fox to Daniel Webster (Mar. 12, 1841), reprinted in BRITISH AND FOREIGN STATE PAPERS 1126 (1857).
83 See Letter from Daniel Webster to Henry Stephen Fox (Apr. 28, 1841), reprinted in BRITISH AND FOREIGN STATE PAPERS, supra note 82, at 1137–38.
84 Id. at 1138.
85 See, e.g., MODEL PENAL CODE § 3.02 (AM. LAW INST., Official Draft 1962).
86 See FLETCHER & OHLIN, supra note 3, at 82.
87 See KANT, supra note 10, at 400.
89 The shift from excuse to justification, and the shift from moral to amoral language in international law, are two different trends, with both motivated by the desire to avoid blaming states for wrongful actions. Nonetheless, justification is an intrinsically moral concept. See Gabriella Blum, The Crime and Punishment of States, 38 YALE J. INT’L L. 57, 67–68 (2013).
victorious Allies.\textsuperscript{90} Moreover, the Treaty of Versailles also contained a “war guilt clause” blaming Germany for the outbreak of World War I.\textsuperscript{91} The Treaty of Versailles also contained articles on penalties, which included the arraignment of former German Emperor Wilhelm II “for a supreme offence against international morality and the sanctity of treaties” and included German recognition of the right of the Allied governments to set up military tribunals to try “persons accused of having committed acts in violation of the laws and customs of war.”\textsuperscript{92} The terms of the Treaty of Versailles not only established peace but also punished Germany for its role in the war.\textsuperscript{93}

Both contemporary and subsequent commentators have criticized the terms of the Treaty of Versailles as excessively punitive. Shortly after the war, economist John Maynard Keynes gave an account of the deleterious economic impact of the aftermath of World War I.\textsuperscript{94} A few decades later, historian A.J.P. Taylor claimed that the reparations “created resentment, suspicion, and international hostility [and] cleared the way for the Second World War.”\textsuperscript{95} In light of the criticism of the Treaty of Versailles, the aftermath of World War II featured a shift in emphasis from the blame and punishment of states to the rightfulness or wrongfulness of certain conduct.\textsuperscript{96} Moreover, as Gabriella Blum has argued, the aftermath of World War II saw a shift from a focus on justice to a focus on peace as the goal of international relations.\textsuperscript{97}

As part of this shift in emphasis from justice to peace, international law shifted away from conceptualizing self-defense as an excuse and toward conceptualizing self-defense as a justification.\textsuperscript{98} For example, the U.N.

\textsuperscript{90} See The Treaty of Peace Between the Allied and Associated Powers and Germany arts. 231–47, June 28, 1919, 3 U.S.T. 3714 [hereinafter Treaty of Versailles].
\textsuperscript{91} See id. at art. 231.
\textsuperscript{92} See id. at arts. 227–28.
\textsuperscript{96} See FLETCHER & OHLIN, supra note 3, at 82.
\textsuperscript{97} See id. See also David Luban, War as Punishment, 39 PHIL. & PUB. AFF. 299, 300 (2011) (“Arguably, international law did not decisively reject the punishment theory until the end of World War II.”).
\textsuperscript{98} See FLETCHER & OHLIN, supra note 3, at 82 (“No one talks about excusing nations anymore. We talk about justifications for going to war . . . .”).
Charter includes a prohibition on the use of force but includes two exceptions. First, the U.N. Security Council may authorize the use of force to “maintain or restore international peace and security.” Second, the U.N. Charter does not impair the “inherent right of individual or collective self-defense” in case of an armed attack. The Charter does not use language reminiscent of excuses, and it only acknowledges the possibility of justified and unjustified uses of forces. By avoiding the issue of excuses, the Charter may regulate the use of force without reference to the culpability of the wrongdoer.

The shift in emphasis from the culpability of the wrongdoer to the wrongfulness of the action is also apparent in the discussions of defenses to breaches of international obligations. The Articles on Responsibility of States for Internationally Wrongful Acts features circumstances precluding wrongfulness (i.e., justifications) but not circumstances precluding culpability (i.e., excuses). Moreover, in cases such as Gabčíkovo-Nagymaros Project and Rainbow Warrior, courts have focused on the defense of necessity, a paradigmatic justification, to breaches of international obligations.

Because of the neglect of the language of blame and punishment, when states punish other states, they do not admit to doing so. In addition, because states do not admit to punishing each other, they do not speak in terms of excusing culpability: after all, if states allegedly do not punish each other, there would be no need to have excuses.

100 Id. at art. 39.
101 Id. at art. 51. The International Court of Justice has interpreted the right of self-defense to allow a necessary and proportionate response to an armed attack. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).
102 U.N. Charter art. 51.
107 See Blum, supra note 89, at 158–59.
Having described the reasons for international law’s neglect of excuses, this Article will now examine whether states deserve excuses under two prominent theories of excuse: the choice theory and the character theory.

B. Why States Deserve Excuses

1. Choice Theory and States

Under the choice theory, an agent deserves an excuse if, at the time of the agent’s action, the agent did not have sufficient capacity or opportunity to do otherwise. This section applies H.L.A. Hart’s choice theory to states and concludes that there is no reason the choice theory applies to individuals but not to states.108

Consider H.L.A. Hart’s formulation of the choice theory. His initial argument is that allowing agents to claim excuses such as duress maximizes “the efficacy of the individual’s informed and considered choice,” because individuals are only punished for their informed and considered choices.109 In this view, excusing conditions are “of moral importance because they provide for all individuals alike the satisfactions of a costing system.”110 Despite Hart’s use of the word “individual” in explaining this argument, this justification applies to states as well.111

The actions of states are supervenient on the actions of individuals in the government of states.112 If Hart is correct, then excuses maximize the satisfaction of preferences, and individuals value the satisfaction of their

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109 See id. at 98.
110 Id. at 100. See also T.M. Scanlon, The Significance of Choice, in Equal Freedom: Selected Tanner Lectures on Human Values 66 (Stephen Darwall ed., 1995).
111 See infra Part III.C.1.
112 This claim does not mean that group decision-making is reducible to the aggregation of the judgments of individuals in groups, which may lead to paradoxes. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Calif. L. Rev. 1, 1 (1993). Nor does this claim deny the moral agency of groups, such as states. See infra Part III.C.1.
preferences;\textsuperscript{113} there is no reason to believe that individuals stop valuing the satisfaction of their preferences as soon as they enter government.\textsuperscript{114} Therefore, recognizing excuses for states maximizes the preferences of individuals in government.

It may be that individuals gain less satisfaction from the fulfillment of their preferences when they act in a collective context because they identify more strongly with their individual preferences, which are not identical with that of a state. However, there is little evidence that individuals gain less satisfaction from satisfying their preferences in a state context.\textsuperscript{115} Moreover, given the role of states as group agents, it may be logical to speak of state preferences as well.\textsuperscript{116} Insofar as states are motivated to maximize their preferences in international affairs, the law should grant excuses to states as well as to individuals.\textsuperscript{117}

Hart later elaborated upon his choice theory by adding a non-consequentialist argument for excuses: excuses provide side-constraints against consequentialist goals, such as crime-prevention or even choice-maximization, to prevent punishment of the innocent.\textsuperscript{118} One such side constraint is that the government should only punish those with a “normal capacity and fair opportunity to obey.”\textsuperscript{119} This argument for excuses applies to states as well as to individuals: if a state does not have the normal capacity and fair opportunity to obey a law, then it is no more deserving of punishment than excused individuals are.

\textsuperscript{113} See Hart, supra note 108, at 101.
\textsuperscript{114} See HANS J. MORGENTHAU, POLITICS AMONG NATIONS 393 (1948).
\textsuperscript{115} See id.
\textsuperscript{116} See infra Part III.C.1.
\textsuperscript{117} Scholars of international relations, especially realists, emphasize the importance that states place in maximizing their preferences in international affairs. See, e.g., MORGENTHAU, supra note 114, at 391; KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 196–98 (1979).
\textsuperscript{118} See HART, supra note 25, at 80. These side constraints arise from Hart’s distinction between two kinds of questions within the criminal law: questions pertaining to the justification of the general practice of punishment and questions pertaining to applying punishment to a particular individual. See id. Hart gives a utilitarian answer to the first set of questions about the general practice of punishment, but gives a non-consequentialist answer to the latter set of questions about applying punishment to a particular individual. See id.
\textsuperscript{119} See id. at 201.
First, consider the normal capacity component of Hart’s later choice theory of excuses. The normal capacity requirement explains why criminal law grants excuses to those whose criminal actions are the result of mental disease or defect. Some insanity doctrines even require that the wrongdoers lack the “substantial capacity” to appreciate the criminality or wrongfulness of their conduct or conform their conduct to the requirements of law. Insofar as insanity impedes one’s capacity to follow the law, Hart’s theory requires an excuse to ensure fairness to the defendant. The normal capacity component may also require excuses in other cases, such as intoxication, where wrongdoers lack normal capacity to conform their conduct to that of the law.

Like individuals, states may lack the normal capacity to conform their conduct to the requirements of law. A state’s leadership may use the government to advance the private interests of certain individuals, such as those in leadership, regardless of the interests of the state or its legal obligations. In such circumstances, a state would merely aim to further the private interests of certain individuals, regardless of international law or the national interest. In such circumstances, states would lack the capacity to conform their conduct to the requirements of law just as insane or intoxicated individuals lack such capacity.

Second, consider the fair opportunity component of Hart’s theory of excuse. The fair opportunity component explains why criminal law provides an excuse to those who act under duress, for example. In such situations, agents may still be fully responsive to reason and may still have the normal capacity to conform their conduct to the requirements of law, but external circumstances may deny them the opportunity to exercise that capacity.

To fully explicate this principle, consider George Fletcher’s distinction between normative and physical involuntariness. Physical involuntariness is grounded in a physical description of the situation.
example, if someone were to place a knife into an actor’s hand and force it on a victim’s chest, it would be an instance of physical involuntariness.\textsuperscript{131}

However, to determine normative involuntariness, one must weigh the costs and benefits of a coerced action.\textsuperscript{132} If the benefits of the coerced action exceed the costs, then the action is justified; if the costs exceed the benefits, then the action is excused as a case of normative involuntariness.\textsuperscript{133} For example, if an actor kills someone because a third party threatens mutilation of the actor’s body, he or she could claim that such action was normatively involuntary.\textsuperscript{134} Fletcher’s distinction between normative and physical involuntariness reconciles the intuition that coerced actions are in some sense involuntary with the fact that even coerced acts are the result of deliberation about the advantages and disadvantages of compliance with the threat.\textsuperscript{135}

The distinction between normative and physical involuntariness explicates the fair opportunity component of the choice theory of excuse: agents are not culpable for physically or normatively involuntarily actions because, in such situations, agents did not have the fair opportunity to conform their conduct to the law. There is no reason to limit this elaboration of the fair opportunity component of Hart’s choice theory to individuals. States may also engage in coercive behavior in which they threaten another state with the use of force for noncompliance with a demand.\textsuperscript{136} The coerced state must then decide whether to comply with the threat, perhaps breaching international law, or jeopardize the lives and wellbeing of its citizens by resisting.\textsuperscript{137} These are cases of normative involuntariness and, therefore, are cases where the state lacks a fair opportunity to conform its conduct to that of the law.\textsuperscript{138}

Thus, both Hart’s earlier and later arguments for the choice theory of excuses apply to states as well as to individuals. Other choice theorists may disagree with Hart’s canonical interpretation of the choice theory of excuse, but it is unclear how any conception of the choice theory would justify the international law’s recognition of excuses for individuals but not for

\textsuperscript{131} Id.
\textsuperscript{132} See id.
\textsuperscript{133} Id.
\textsuperscript{134} See id. at 803–04.
\textsuperscript{135} See id. at 804, 806.
\textsuperscript{136} See infra Part V. Assume for the sake of this example that the initial threat of the use of force does not constitute a use of force under the United Nations Charter.
\textsuperscript{137} See infra Part V.A.
\textsuperscript{138} See supra Part III.B.
Moreover, as the next section explains, the character theory does not justify this asymmetry.

2. Character Theory and States

Under the character theory of excuse, agents are responsible for their character, not their actions, and agents are excused when a bad act does not reflect a bad character. This section applies this theory to states and determines that there is no reason why the character theory would apply to individuals but not to states.

Consider George Fletcher’s elaboration of the character theory of excuses. According to Fletcher, punishing wrongful conduct is just only if the desert of the offender determines the punishment. The character of the offender determines the desert of the offender. “[T]herefore, a judgment about character is essential to the just distribution of punishment.” When determining whether to punish an offender, the question is whether a particular wrongful action is attributable to the agent’s character or to the circumstances that overwhelmed the agent.

There is no reason why this inquiry would arise for individuals but not for states. Circumstances may overwhelm a state as well as an individual and may prevent an inference from a wrongful act to a bad character. For example, consider duress. As an illustration of individual duress, consider a situation in which a robber seeks an accomplice for a bank robbery. The robber finds a bystander and threatens to kill him and his family if he does not aid in the bank robbery. Assuming necessity is unavailable in this case, the bystander could claim duress if charged with an offense. In this situation, we can infer that the bank robber has a culpable character because he wanted to rob the bank, and he even coerced a bystander into helping him. Yet, we cannot make a similar inference to the bystander’s character; we can

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139 See Hart, supra note 108, at 28–53.
140 See supra text accompanying note 34.
141 See FLETCHER, supra note 14, at 800.
142 See id.
143 See id.
144 Id. This version of the character theory may seem to make the actus reus requirement unnecessary: if the criminal law punishes characters and not acts, then there is no reason to require an act at all. See id. Fletcher’s response is that we use the act as evidence of character to maintain the suspect’s privacy. See id. at 800–01. However, this limitation arises from the principle of legality, not the character theory of punishment. See id. at 800.
145 See id.
146 C.f. text accompanying supra notes 50 and 57.
only infer that the bystander values his life and the lives of his family more than he values the consequences of helping the bank robber. Thus, the bank robber has a culpable character, but the bystander’s character is either not culpable or substantially less culpable than that of the bank robber.

Analogously, consider a situation where an aggressor state seeks to invade a resource-rich but militarily-weak neighbor and threatens a third-party state to aid in the invasion or else the aggressor will invade the third-party state. Suppose the third-party state complies with the threat and aids in the invasion. In this scenario, one may infer that the initial aggressor state has a culpable character: it is invading a neighbor in violation of international law and even coercing another state to aid in the invasion. Yet, one may not infer such culpability for the coerced state. The coerced state may value the lives and wellbeing of its citizens above compliance with international law or the interest of the resource-rich but militarily-weak state. Yet, assuming it would not have assisted in the invasion without a threat, one may not infer that the state has a culpable character, as does the aggressor state. These two examples have the same structure: one agent coerces another agent to commit a wrongful action. It is unclear why the coercion would block an inference to the individual’s character in one example but not the state’s character in another example.

One may argue that the character theory is inapplicable to states because individuals have characters, but states do not. Rather, states are aggregations of individuals with individual characters, and the state does not have a distinct character of its own. Thus, to speak of inferring a state’s character from its actions is to commit a category mistake.

However, there is no reason to conclude that only individuals have characters. Initially, one must define the concept of a character. A character is a “relatively long-term stable disposition to act in distinctive ways.” The relevant dispositions are habits, not only skills: an agent with the relevant character trait has a long-term disposition to use skills in certain ways. One uses the concept of a character to explain persistent deviations in behavior among agents. If one person consistently acts in an honest manner, such as by returning a lost wallet with all of its contents to the

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148 See generally GILBERT RYLE, THE CONCEPT OF MIND (1949) (explaining the concept of a category mistake and applying it to the philosophy of mind).
150 Id.
151 Id.
owner, and another person consistently acts in a dishonest manner, such as taking the contents of a lost wallet and discarding it afterward, perhaps the former has the character trait of honesty, and the latter has the character trait of dishonesty.\textsuperscript{152} However, regular disparities in behavior do not establish disparities in character traits because the disparities may be the result of different circumstances.\textsuperscript{153} Rather, to have different character traits, agents “must be disposed to act differently in the same circumstances,” as they perceive them.\textsuperscript{154}

Scholars have challenged the conceptual coherence of character traits, as well as their consistency, with empirical research into moral psychology.\textsuperscript{155} Yet, insofar as the concept of character is coherent, there is no reason to limit the concept to individuals. The actions of states are causally reducible to the actions of individuals, and individuals retain their character traits in government.\textsuperscript{156} If individuals with aggressive character traits regularly control the government of a state, then the state would be disposed to act in an aggressive manner.\textsuperscript{157} Yet, if individuals with less-aggressive character traits regularly control the government of a state, then the state would be disposed to act in a less aggressive manner.\textsuperscript{158}

\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} See, e.g., id. at 329.

We very confidently attribute character traits to other people in order to explain their behaviour. But our attributions tend to be wildly incorrect and, in fact, there is no evidence that people differ in character traits. They differ in their situations and in their perceptions of their situations. They differ in their goals, strategies, neuroses [sic], optimism, etc. But character traits do not explain what differences there are.

\textsuperscript{157} Id.

\textsuperscript{158} There is a connection between the notion of character of a state and constructivism in international relations. See Alexander Wendt, \textit{Constructing International Politics}, 20 INT’L SECURITY 71, 74 (1995). See generally Hongju Koh, \textit{supra} note 156. Nonetheless, the claim is consistent with the realist principle that states are unitary actors that pursue their self-interest. See, e.g., Morgenthau, \textit{supra} note 114, at 245; \textit{Waltz supra} note 117, at 196. Even if all states pursue self-interest, they may perceive this self-interest differently depending on the character traits of those in government.
However, there is an even more fundamental challenge to the application of the character theory of excuses to states. One may argue that states are not moral agents and, thus, cannot possess morally relevant character traits. Perhaps states are not truly group agents, or perhaps they are group agents but are not moral agents. If states are not moral agents, then they cannot make morally relevant choices; thus, the choice theory would not justify granting excuses to agents either. The next section addresses this objection.

C. Responses to Four Objections

1. Objection: States Cannot Be Blamed or Excused Because States Are Not Group Agents

One reason to deny that states deserve excuses is that excuses are only for agents, and states are not agents. Pursuant to this objection, language invoking state agency is a mere figure of speech or convenient shorthand for a more extensive and metaphysically austere description of the coordinated behavior of individuals. To resolve this issue, one must provide an

159 See Finkelstein, supra note 24, at 343.
160 C.f. Trial of the Major War Criminals (Nuremberg Trials), at 223 (Int’l Mil. Trib. Nov. 14, 1945–Oct.1, 1946) (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”).

Whether or not the state exists as any more than a legal fiction, when the acts of individuals are conventionally attributable to it in cases where fault does not require the intent to violate the law, it seems that at least delictual responsibility is tenable. This still does not support taking the next step unless a great deal more is stipulated.

Id. See also HARRY D. GOULD, THE LEGACY OF PUNISHMENT IN INTERNATIONAL RELATIONS 113–14 (2010); MALEKIAN, supra note 93, at 177–78 (“There is no reason whatsoever to believe that a nation or state has a sort of consciousness of its own over and above the consciousness of its individual members, and therefore it cannot, properly speaking, be punished. All we can do is punish its individual members.”). But see Anthony F. Lang Jr., Crime and Punishment: Holding States Accountable, 21 ETHICS & INT’L AFF. 239, 243 (2007) (describing the criteria for state criminality); Alain Pellet, Can a State Commit a Crime? Definitely, Yes!, 10 EUR. J. INT’L L. 425, 433 (1999) (“It can certainly be sustained that states can be held ‘criminal’ in a sense which is close to the penal meaning of the term: Nazi Germany and Saddam Hussein’s Iraq can be called ‘criminal states’ and have been treated as such by the international community.”).
account of agency and consider whether this account applies to group agents such as states.

Christian List and Philip Pettit provide three conditions for agency. First, agents have representational states that depict how things are in the environment. Second, agents have motivational states that specify how they require things to be in the environment. Third, agents have the capacity to process their representational and motivational states, leading them to intervene suitably in the environment where the environment does not match a motivating specification. These conditions may apply to groups as well as to individuals.

A group is a collection of individuals whose identity persists despite a change in membership of the group. A group differs from a mere collection of individuals, as the identity of a mere collection changes when the composition of its members changes. When a group satisfies the three conditions of agency, a group constitutes a group agent. As an agent, a group may possess beliefs just as individuals can.

162 See CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 20 (2011). Other scholars have presented alternate accounts of group agency and moral responsibility. See generally TRACY ISAACS, MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS (2012). These accounts of group agency may differ from the conceptions of agency and personhood implicit in domestic criminal law. See MICHAEL MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 616 (1997).

Rationality, autonomy, emotionality, unified character, and unified consciousness do exhaust the criminal law’s metaphysical presupposition of what persons must be like, but only at what I shall now call one level of analysis. That is, possession of these attributes in turn may presuppose that a being has other attributes, calling for an even deeper metaphysical analysis.

Id. A full treatment of group agency and its relationship to ethics, philosophy of action, and domestic criminal law is beyond the scope of this Article.

163 See LIST & PETTIT, supra note 162, at 20.

164 See id.

165 See id.

166 See id. at 31–32.

167 See id.

168 See id. The set of people in a room is an example of a mere collection; a nation is an example of a group. Id.

169 See id. at 33.

170 See id. at 32.
The beliefs of a group agent “supervene” on the beliefs of the individuals that constitute a group agent. A set of properties supervenes on another set of properties if there cannot be difference in the first set of properties without difference in the second set of properties. This supervenience relationship allows for “robust group rationality,” which means that the supervenience relation determines consistent and complete group attitudes on the relevant propositions for any possible profile of consistent and complete member attitudes on these propositions.

The beliefs of a group can supervene on the beliefs of its members in two ways: in a “proposition-wise” way or a “holistic” way. Pursuant to proposition-wise supervenience, the group’s views about a certain proposition are determined by individual attitudes of group members on that proposition. However, pursuant to holistic supervenience, the set of group attitudes across propositions is determined by the individual sets of attitudes across these propositions.

Only holistic supervenience is consistent with robust group rationality because proposition-wise supervenience allows for a discursive dilemma, as the following example illustrates. For example, consider a group of three people who are evaluating the truth-value of the following propositions: p, q, and p → q.

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171 See id. at 64.
172 See id. at 65. See also Donald Davidson, Mental Events (1970), in DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 214 (1980).

[M]ental characteristics are in some sense dependent, or supervenient, on physical characteristics. Such supervenience might be taken to mean that there cannot be two events alike in all physical respects but differing in some mental respect, or that an object cannot alter in some mental respect without altering in some physical respect.

Id.

173 See List & Pettit, supra note 162, at 67.
174 Id. at 59.
175 See id. at 68.
176 See id. at 69.
177 See id. at 67. See also Kornhauser & Sager, supra note 112, at 3–4.
178 See List & Pettit, supra note 162, at 44–45.
In this example, the beliefs of each individual in the group pertaining to the propositions p, q, and p → q are valid. Yet, whether the beliefs of the group as a whole are valid depends on whether the beliefs of the group supervene on the beliefs of the individual in a proposition-wise or holistic way.

If the beliefs of a group are determined in a proposition-wise manner, one would aggregate the beliefs of each individual and attribute the majority beliefs to the group as a whole. Pursuant to this methodology, the group in the aforementioned example would hold the following beliefs: p, p → q, and ~q. However, this argument is invalid: if p is true and p → q, then q must be true as well. If the beliefs of groups are determined in a proposition-wise manner, then the beliefs of groups would be invalid and, assuming it is irrational to hold invalid beliefs, the group would be irrational. Thus, proposition-wise supervenience is inconsistent with robust group rationality.

However, holistic supervenience is consistent with robust group rationality. Holistic supervenience allows for a premise-based voting procedure, pursuant to which one determines the beliefs of the group by aggregating the beliefs of the individuals of the group on each premise but not each conclusion. Then, one attributes to the group the aggregated beliefs of a majority of the group members for each premise and attributes to the group the conclusion that the premises entail. In the aforementioned

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179 See id. at 45 tbl.2.2.
180 See id. at 59.
181 See id. at 68.
182 See id. at 67.
183 See id.
184 Id.
185 Id. at 69.
186 See id. at 62.
187 See id.
example, pursuant to holistic supervenience, one would attribute to the
group the following beliefs: \( p, p \rightarrow q, \) and \( q \).188 The majority of the group
holds that \( p \) and \( p \rightarrow q \) are true, and if \( p \) and \( p \rightarrow q \) are true then \( q \) must be
true as well.189 Thus, holistic supervenience is consistent with robust group
rationality.190

Thus, one faces a choice in explaining the relationship between groups
and members of the group: one can assert proposition-wise supervenience
and deny robust group rationality, or one can assert holistic supervenience
and maintain robust group rationality.191

Donald Davidson’s Principle of Charity provides a reason to assert
holistic supervenience, rather than proposition-wise supervenience, because
only holistic supervenience maintains robust group rationality.192 The
Principle of Charity demands that one should posit more rationality (\( ceteris
paribus \)), rather than less, when one interprets the behavior of others and has
ambiguous evidence.193

Davidson justifies the Principle of Charity by noting “the fact that
disagreement and agreement alike are intelligible only against a background
of massive agreement.”194 The more one accepts or rejects certain sentences,
the better one understands the rest of possible sentences.195 This
presumption of rationality is rebuttable: if one cannot find a way to interpret
an agent’s beliefs as true or consistent, one has no reason to count this agent
as rational.196 Yet, in the group agency scenario, holistic supervenience
provides a way of finding that groups are rational.197 Pursuant to the
Principle of Charity, one should therefore endorse holistic supervenience.198

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188 See id. at 62–63.
189 See id.
190 See id. at 69.
191 See id. at 69–70.
192 See Donald Davidson, On the Very Idea of a Conceptual Scheme, 47 PROC. ADDRESSES
A. PHIL. SOC’Y 5, 19 (1973). See generally Carol Rovane, Charity and Identity, in WOLFGANG
R. KOHLER, DONALD DAVIDSONS PHILOSOPHIE DES MENTALEN (1998) (applying the principle
of charity to groups).
193 See generally Rovane, supra note 192.
194 DONALD DAVIDSON, Radical Interpretation, in INQUIRIES INTO TRUTH AND
INTERPRETATION 137 (2001).
195 Id.
196 Id.
197 See LIST & PETTIT, supra note 162, at 69.
198 See DAVIDSON, supra note 192, at 19.
Endorsing holistic supervenience allows for the robust rationality of group agents, such as states. Thus, one should hold that states are group agents. However, one could claim that even if states are group agents, they are not moral agents and therefore cannot be blamed or excused. The next section addresses this objection.

2. Objection: States Cannot Be Blamed or Excused Because States Are Not Moral Agents

The second objection contends that even if states are group agents, they do not fulfill the conditions necessary for moral agency. To respond to this objection, one may evaluate the conditions of moral agency generally. List and Pettit provide three conditions of responsibility: an agent faces a normatively significant choice; an agent has a judgmental capacity, meaning understanding and access to evidence, for making normative judgments about the options; and the agent has the required control for choosing among the options.199 States meet all three conditions of responsibility.200

First, states face normatively significant decisions and do so on a consistent basis.201 States often face the prospect of interstate and intrastate warfare, and the result of a decision to go to war is normatively significant given the impact of warfare on the lives of both military personnel and civilians.202 Yet, aside from warfare, states face questions of distributive justice when formulating economic policy, and they face questions of corrective justice when formulating the criminal law.203 These examples alone suffice to demonstrate the normative significance of state action.

Second, states have the judgmental capacity for normative judgments about the options available in a particular scenario.204 States, or more precisely their governments, can deliberate and arrive at uniform courses of action.205 This is not to deny the plurality of interests within a state; governments must choose among divergent and competing values, desires, and interests when formulating governmental policy.206

199 List & Pettit, supra note 162, at 155–56.
200 For an argument in favor of these three conditions as the proper conditions of responsibility, see id. at 153–58.
202 See id. at 26, 35.
203 See id. at 26.
204 Id. at 27.
205 Id.
206 See id.
individuals also must choose among competing values, desires, and interests when making decisions.\footnote{Id.} Given these limitations, there is no reason to believe states lack the judgmental capacity for normative choices.

Third, states have the control required for choosing among options. This condition, however, may be the most controversial, as any decision made by the group must be made by one or more individuals within the group.\footnote{See List \& Pettit, supra note 162, at 160.} Therefore, one could attribute a decision to the group as a whole or to the individuals who made that decision.\footnote{Id.} For example, if a state goes to war, one could attribute the decision to go to war to the state as a whole or to the individual members of the government who decided to go to war.

This is the problem of multi-level causality: it is unclear how control can be exercised at different levels.\footnote{See id. at 161.} This problem presents itself at the state level: it is unclear how both a government and the members of a government may exercise control over a state.\footnote{See id.} Yet, this problem also presents itself at an individual level: it is unclear how both an individual and neurons within an individual may exercise control over the individual.\footnote{See id. This issue is also related to causal over-determination, but causal over-determination is beyond the scope of this Article.} Thus, if the problem of multi-level causality entails that groups are not responsible for their actions, then it follows that individuals are not responsible for their actions, either. This is a high price to pay for denying states can be group agents.

Yet, one may object that even though states are group agents and moral agents, they cannot be held responsible because of sovereign equality. The next section will consider this objection.

3. Objection: States Cannot Be Excused or Blamed Because of Sovereign Equality

The third objection to recognizing excuses for states is that there is no proper authority to blame or excuse states because of sovereign equality. This objection is analogous to Kant’s argument that “between states no punitive war (\textit{bellum punitivum}) is conceivable, because there is no relation
between them of master and servant.” Similarity, between states there can
be no blame or excuse for wrongdoing because all states are sovereign
equals in international law. Because states are formally equal, there is no
higher moral authority to blame, excuse, or punish states. Thus, given the
sovereign equality of states, it is impossible to truly blame or excuse a
state. This objection may even undercut any inter-sovereign norm in
international law because states could always claim sovereign equality bars
any attempt to bind states to international obligations.

Yet, states have used their formal sovereign equality to establish
international law, including international courts that adjudicate disputes
among states. The International Court of Justice (ICJ), for example, is the
United Nations’ principal judicial organ and adjudicates disputes among
states. To the extent that states submit to the ICJ’s jurisdiction and treat
its judgments as binding, the ICJ has the authority not only to adjudicate
disputes but also apportion reparations for breaches of international law.
In response, one may argue that the ICJ does not truly have authority to
blame or excuse states for breaches of international law. Even if states treat
ICJ judgments as binding, the ICJ lacks the authority of a sovereign to blame
or punish states.

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213 Immanuel Kant, Perpetual Peace: A Philosophical Sketch § I.6 (1795).
214 See id. See also U.N. Charter art. 2, ¶ 1 (“The Organization is based on the principle
of the sovereign equality of all its Members.”).
215 See Oppenheim’s International Law § 156 (1925) (“The nature of the Law of
Nations as a law between, not above, sovereign States, excludes the possibility of punishing
a State for an international delinquency and of considering the latter in the light of a crime.”).
Analogously, the old Latin legal maxim par in parem non habet imperium (equals have no
dominion over equals) expressed the idea that no state’s court has jurisdiction over acts or
officials in other states. See Luban, supra note 97, at 300 (analogizing par in parem non
habet imperium to the sovereignty objection to state punishment).
217 Thank you to Michael Dorf for this point.
218 However, scholars have debated the extent it is rational for states to establish
international law. Compare Jens David Ohlin, The Assault on International Law
(2015), with Jack L. Goldsmith & Eric A. Posner, The Limits of International Law
(2005).
219 See Statute of the International Court of Justice art. 1 (1945).
220 See id. at art. 36; Blum, supra note 89, at 103.
221 See Blum, supra note 89, at 103.
However, this objection conflates sovereignty equality with sovereign immunity from moral evaluation. The equality of sovereign states entails that all states have the same capacity for rights and duties. States may exercise this equality to acquire different rights and duties, for example, by signing different international conventions. Differences in power, wealth, or territory among states do not interfere with the ability of a state to become a party to an international convention.

The equal capacity to obtain rights and duties does not require that states use this capacity in a morally permissible manner, however. For example, states may break treaties or breach customs of international law. If states are moral agents, then they may be accountable for wrongdoing. Yet, one may object that even if there is no conceptual problem with holding states accountable, doing so would lead to deleterious consequences.

4. Objection: Blaming and Excusing States Leads to Revenge, Not Justice

The fourth objection is that recognizing excuses may resurrect notions of blaming and punishing states, and notions of the blame and punishment of states lead to revenge and excessive punishment rather than justice. Historical evidence, such as the aftermath of World War I, appears to substantiate this objection: victorious nations often impose “victor’s justice” and impose harsh peace terms on the defeated nations. Worse, nations may spiral into a cycle of revenge and counter-revenge, further perpetuating conflict. By using the amoral language of preventing breaches of the

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222 See id. See also CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 26 (1999) (“My interest here is in the suggestion that the absence of a common judge provides a reason for skepticism about international morality.”).


224 Id.

225 See id.

226 See, e.g., Blum, supra note 98, at 92–93.

227 See id. at 94 (“[T]he historical experience of the nineteenth and early twentieth centuries lends support to the fear of punishment-as-revenge and counter-revenge.”).

228 See id. For example, in the aftermath of the Franco-Prussian War, the Prussian-led alliance of German states united to form the German Empire and annexed Alsace-Lorraine from France. Id. The loss of Alsace-Lorraine led to French “revanchism,” as France fixated on regaining its lost provinces until finally, France re-annexed Alsace-Lorraine after World War I. Id. Though Germany annexed Alsace-Lorraine again during World War II, France has retained the provinces to the present day. Id.
peace, international law discourages states from blaming and punishing each other. Yet, allowing excuses entails that states are culpable when not excused, and resurrecting the idea of blaming and punishing states may resurrect victor’s justice along with it.

To a limited extent, this objection is correct: if international law recognizes that some states are excused, then it must recognize that states that commit unexcused wrongdoing are culpable. And if a state is culpable, then it should be punished.

However, the contention that punishing a state would lead to excessive punishment conflates retribution with revenge. Retributivism grounds punishment of a wrongdoer in the desert of the wrongdoer. Retributivists are not committed to any specific penalty scheme; retributivists may support a wide range of punishment, including lenient and harsh punishments. For example, retributivists are not necessarily committed to the principle of lex talionis, pursuant to which the wrongdoer should be punished in proportion to the wrongdoing to the victim. Moreover, retributivists often criticize punishments that are out of proportion to the desert of the wrongdoer, and retributivism can provide principled reasons for condemning excessive punishment.

Although much retributivist literature focuses on domestic law, scholars have recently applied retributivism to international criminal law as well. Yet, just war theory has traditionally featured an implicit commitment to retributivism. For example, Francisco Suarez believed the only reason for war is “that an act of punitive justice is indispensable to mankind.”

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229 Id. at 96–97.
230 See Luban, supra note 97, at 318–19.
232 See Moore, supra note 162, at 88 (“[Retributivists] are not committed to any particular penalty scheme nor to any particular penalty as being deserved.”).
233 Id.
war theorists also condemned acts of vengeance and excessive punishment. St. Augustine believed that “often, so that such things might also be justly punished, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.” 237 Yet, he also believed that war is sinful if waged with the “desire for harming, the cruelty of revenge, the restless and implacable mind, the savagery of revolting, the lust for dominating and similar things.” 238 This Article builds upon St. Augustine’s distinction between just punishment of states and wars fought solely for revenge and a lust for domination. Resurrecting the language of excusing and blaming states should lead to the just punishment of states and not punishment solely for revenge and lust for domination.

Having considered and rejected four objections to recognizing excuses for states, this Article will provide an illustrative but not exhaustive account of potential excuse doctrines for states.

IV. MISTAKE IN INTERNATIONAL LAW

A. Elements of Mistake

The mistake defense provides an excuse for agents who commit an unlawful act because of a mistake as to the facts or to the law. 239 A mistake defense in international law may have the following elements:

(1) A state made a mistake of fact or a mistake of law;

(2) This mistake negates an element of a breach of international law;

(3) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the state would be guilty of another breach of international law had the situation been as the state supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the breach of international law arguments for punishing states. See 2 HUGO GROTIUS, THE LAW OF WAR AND PEACE ch. 1 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625). For example, Grotius believed punitive wars have a deterrent effect, as they deter nations from unjust conduct. See id.


238 See id.

239 See infra Part II.C.
to those of the breach of international law it would have committed had the situation been as the state supposed.\textsuperscript{240}

(4) A state may only claim a mistake as to law if it acts in reliance on:\textsuperscript{241}

(a) An international convention; or

(b) An opinion issued by the International Court of Justice, the International Criminal Court, or another judicial body recognized by the United Nations as an international court.

As an illustration of the mistake defense to a breach of international law, consider the following thought experiment. State A believes State B will imminently attack State A. Thus, State A launches a pre-emptive attack on State B.\textsuperscript{242} However, it turns out State B did not plan to attack State A before State A launched its pre-emptive attack. There are three possible legal resolutions of this thought experiment.\textsuperscript{243}

This is a case of what George Fletcher calls “putative self-defense”; cases of putative self-defense feature someone who reasonably but falsely believes he is being attacked and uses force against someone who is not

\textsuperscript{240} This element incorporates the legal wrong doctrine into the defense. \textit{See infra} Part II.C.

\textsuperscript{241} This element is meant to express the notion of reasonable reliance on an official statement of law. \textit{C.f.} \textit{MODEL PENAL CODE} § 2.04(3)(b) (\textit{AM. LAW INST.,} Official Draft 1962).

\textsuperscript{242} Assume states have the right to engage in pre-emptive strikes if they have the right of self-defense. Yet, the legal status of pre-emptive war has been controversial—the U.N. Charter declares that it does not impair the “inherent right of individual or collective self-defense” of its member states. \textit{See U.N. Charter} art. 51. However, it is unclear whether the inherent right of self-defense includes the right to engage in pre-emptive war. \textit{Compare} OSCAR SCHACHTER, \textit{INTERNATIONAL LAW IN THEORY AND PRACTICE} 144 (1991) (“Nearly all the cases [including cases of pre-emptive war] have been discussed in U.N. bodies and, although opinions have been divided, it is clear that most governments have been reluctant to legitimize expanded self-defense beyond the paradigmatic case.”), \textit{with} \textit{THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA} 15 (Sept. 2002) (“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”).

actually an aggressor. Fletcher considers cases of putative self-defense to be excused.

First, mistakes cannot justify homicide. Mistaken conduct may be the result of good intentions, but if good intentions are sufficient to justify conduct, then even unreasonable but well-intentioned mistakes would justify conduct. Second, although the mistaken actor may rely on his mistake to avoid punishment, the putative aggressor may justify his actions as actual self-defense. It would be incoherent to recognize that both parties are justified in their use of force, so both parties may not claim actual self-defense.

Other scholars claim that cases of putative self-defense, if reasonable, are justified rather than excused. Dressler provides several arguments in response to Fletcher, including: a utilitarian argument; an argument from the character of those who act reasonably; an argument from the non-consequentialist moral reasons behind specific justification doctrines; and intuitions about similar cases. Consider how these various arguments apply to the aforementioned thought experiment.

Under one solution, State A is justified in using force against State B because a belief about an imminent attack is sufficient to justify the use of force. The solution uses a standard analogous to the Model Penal Code standard for justified self-defense: the use of force is justified when the actor believes the use of force is immediately necessary for protection against unlawful force. This standard appears to justify even unreasonable beliefs that result in the use of force; one may also require that a mistake of force must be reasonable to justify an act of putative self-defense.

However, this solution is problematic because the law should not hold that mistaken belief justifies conduct. A justification arises from features

244 See id. at 972.
245 See id. at 973.
246 Id.
247 See id. at 975.
248 Id. at 973.
249 Id. at 975.
251 See Dressler, supra note 250, at 92–95.
253 See Fletcher, supra note 243, at 973.
of the world independent from the actor’s perception of the world; a mistake, or misperception of the world, cannot adequately ground a justification. At most, a mistake—or at least a reasonable mistake—gives the person engaged in putative self-defense a right to rely on his mistake to avoid actual culpability for the use of force.

If justification can arise from an actor’s perception of the world rather than the features of the world itself, then both parties could successfully claim that their actions are justified in a case of self-defense. Thus, both parties can justifiably use force against each other, and third parties would be justified in aiding either person. The law would then be unable to condemn either side or attempt to minimize the use of force. Fletcher believes this solution is illogical; at the very least, it is undesirable. And just as a mistake should not justify the use of force in domestic law, a mistake should not justify the use of force in international law.

Pursuant to another possible solution to the aforementioned thought experiment, State A is wrongful and culpable in attacking State B because State B was not going to attack State A. However, this solution is problematic because it holds State A culpable for a matter of moral luck. Specifically, this is an instance of resultant luck, or luck “in the way one’s actions and projects turn out.”

254 See id. at 972.
255 See id.
256 See id. at 975. Note that the putative aggressor, who is in fact innocent, should never lose his right of self-defense just because of a mistake on behalf of the person engaged in putative self-defense.
257 See id. at 975–76.
258 See id. at 971–72.
259 See Immanuel Kant, Groundwork of the Metaphysics of Morals 62 (H.J. Paton trans., 1964). Kant believed will to be good or bad regardless of whether it achieves its purposes. In other words, moral luck should be irrelevant to moral judgments. However, Bernard Williams argued that moral luck is far more pervasive in our moral judgments than it first appears to be. See also Bernard Williams, Moral Luck: Philosophical Papers 1973–1980 22–39 (1981). Nonetheless, as Thomas Nagel has argued, “It seems irrational to take or dispense credit or blame for matters over which a person has no control.” Thomas Nagel, Mortal Questions 28 (1979).
260 See Nagel, supra note 259, at 28–29. As an illustration of resultant luck, consider a truck driver who drives with a minor degree of negligence and accidentally runs over a child who runs into his path. Compare this example with situation where the truck driver is negligent to the same extent, but does not run over anyone because nobody runs into his path. In both cases, the driver’s negligence is the same, and the driver has no control over whether a child runs into his path. See id.
Compare the above thought experiment, in which State A falsely believes that State B is about to attack, with a variant case in which State A correctly believes that State B is about to attack. In either case, State A forms a belief that State B is about to attack because of State B’s actions, which are beyond State A’s control. Thus, this is a case of moral luck, and ideally the law should minimize the influence of moral luck on ascriptions of culpability.

Instead, international law could hold that State A was wrongful but not culpable in attacking State B. This middle ground solution minimizes the role of moral luck on ascriptions of culpability while recognizing that mistakes should not excuse actions. The aforementioned mistake of fact defense is an appropriate doctrinal framework for implementing this solution to the above thought experiment.

This thought experiment illustrates a mistake of fact, not a mistake of law. To claim mistake of law as a defense, a state must have relied on an official interpretation of the law from a treaty or an international court. Because of this additional requirement, the mistake defense would protect mistakes of fact more than it would protect mistakes of law. The additional burdens to claims of mistake of law are grounded in the principle *ignorantia juris non excusat* (ignorance of the law does not excuse). If ignorance of the law did excuse, then any state could attempt to claim that it was unaware of the law when it breached an international obligation.

Yet, the law balances the idea that ignorance of the law does not excuse with the idea that one should not be held culpable for following an official interpretation of the law. The law should encourage states and individuals

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261 See Williams, supra note 259, at 22–39.
262 See Muñoz Conde, supra note 250, at 592–93.

[One may claim mistake of law as a defense when one] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Id.

264 See supra note 46 and accompanying text. See also Glanville Williams, Textbook of Criminal Law 405 (1978).
265 Id. at 409.
to rely on official interpretations of law, such as interpretations by the ICJ,\footnote{Advisory Jurisdiction, INT’L CT. JUST., http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 (last visited Feb. 2, 2016).} by providing an excuse to those who rely on an official interpretation that turns out to be incorrect.

One may object that international law only makes states culpable for 
egregious conduct, so a mistake of law in which a state believes that some conduct is on the legal side of the line should not be protected because even conduct that is barely legal will typically be very bad.\footnote{Thank you to Michael Dorf for this objection.} Indeed, conduct that is barely legal under international law will likely be morally wrong.

However, to hold states accountable for conduct because of the immorality of the conduct is to embrace the discredited moral wrong doctrine, which holds that if an actor’s conduct would constitute a moral wrong if the facts and law were as the actor thought, then the actor is guilty despite the mistake.\footnote{See, e.g., Regina v. Prince, L.R. 2 Crim. Cas. Res. 154 (1875). In this case, the defendant took possession of a sixteen year old girl after she had led him to believe she was eighteen. \textit{Id.} The court interpreted the absence of the word “knowingly” from the statute to mean that the legislature’s intent was to leave out any requirement of criminal mens rea. \textit{Id.}} The problem with the moral wrong doctrine, whether applied to individuals or to states, is that it punishes agents without putting them on notice about the legal standards they must obey.\footnote{See \textit{id}.} Given widespread moral disagreement, it is impossible for either individuals or states to determine exactly what immoral conduct a court will prohibit.\footnote{See \textit{id.} at 9.} Such lack of notice violates the principle of legality, \textit{nulla poena sine lege} (no punishment without law).\footnote{See \textit{Hart, supra} note 25, at 81.} There is no reason to apply this principle to individuals but not to states.

Yet, there is an important difference between the mistake doctrine in domestic law and in international law. Courts face an epistemic difficulty in applying the mistake doctrines: they must determine that the party claiming mistake actually made a mistake of law or fact.\footnote{See, e.g., People v. Navarro, 99 Cal. App. 3d Supp. 1, 10 (Cal. App. Dep’t Super. Ct. 1979).} Judges and juries may consider, \textit{inter alia}, the statements and behavior of the accused as well as the reasonableness of the mistake in determining whether the accused made a mistake in good faith.\footnote{See \textit{id}. at 9.} International courts judging states may use

\footnote{See, e.g., \textit{id}.}
similar considerations when determining whether a mistake was made in
good faith, yet they face an additional difficulty when attributing belief to a
state, as it is unclear exactly when a belief is that of the state or that of an
individual within the government of the state.274 Thus, a court must consider
the internal attributes of a government when attributing beliefs to that
government.

However, there is one prominent asymmetry between applying the
mistake doctrine to individuals and applying it to states: it is far easier for
individuals to hide their decision-making process from others than it is for a
government to hide its decision-making process.275 Most modern
governments conduct decision-making processes through various internal
actors in a public or quasi-public manner.276 Thus, it is more difficult for
them to insincerely claim mistake than it is for individuals to insincerely
claim a mistake.277 Moreover, those states with the most secretive
deliberations, such as North Korea, are states that are least likely to claim
adherence to international law.278

This problem is analogous to difficulties in statutory interpretation.
Insofar as courts consider legislative intent in interpreting statutes, they must
decide whether the legislative intent is a coherent concept,279 or whether a
legislature is a “they, not an it.”280 This decision will determine whether
courts will interpret the behavior of individuals within the legislature as
evidence of collective intent of the legislature. Moreover, if courts believe
that legislative intent is coherent, they may use legislative history to discover
this intent, although the use of legislative history is controversial.281 In
international law, courts may encounter similar debates and use similar
methodologies to ascertain a state’s beliefs as to the law or to the facts when
considering a mistake defense.

B. 1967 Arab-Israeli War: A Case Study

As an illustration of the mistake defense, consider the 1967 Arab-Israeli
War. The purpose of this section is not necessarily to contend that Israel

274 See List & Pettit, supra note 162, at 161.
275 See Ohlin, supra note 218, at 106.
276 Id.
277 See id.
278 Id. at 106–07.
281 See, e.g., In re Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989).
would have been able to successfully claim the mistake defense; rather, it is to illustrate the analysis of the claim of a mistake defense.

The relationship between Israel and its Arab neighbors has always been hostile; Israel’s inception as a state quickly led to the 1948 Arab–Israeli War, in which Israel was victorious. Tensions continued to rise for the next two decades over a series of crises between Israel and its Arab neighbors, most notably the Suez Crisis.

The crisis leading up to the war began with a major border clash between Israel and Syria, in which Egypt’s President Nasser vocally supported Syria. Shortly thereafter, reports circulated that Israeli forces were massing on the Syrian border. Although United Nations observers quickly disproved these reports, Egypt began a massive military build-up in the Sinai and put its armed forces on “maximum alert.” On May 18, President Nasser demanded that the U.N. Emergency Force (UNEF) leave his country, and on May 22, Nasser declared that the Straits of Tiran would henceforth be closed to Israeli shipping.

However, after the Suez Crisis, the Straits of Tiran were understood as an international waterway, and Israel repeatedly asserted that closing the Straits constituted a casus belli. Moreover, on May 29, Nasser announced that, should war break out, he would seek the destruction of Israel. On May 30, Egypt signed agreements with Jordan, Syria, and Iraq that placed their militaries under Egyptian command in case of war. On June 5, Israel finally began its first attack of the war and overwhelmingly defeated its

\[\text{282 John G. Stoessinger, Why Nations Go to War 180–87 (1974).} \]
\[\text{283 See id. at 187–96.} \]
\[\text{284 Id. at 197.} \]
\[\text{285 The origins of these reports are unclear, however. Compare Michael Walzer,} \]
\[\text{Just and Unjust Wars 82 (1977) (asserting that Soviet officials circulated the reports of the} \]
\[\text{Israeli military buildup), with Stoessinger, supra note 282, at 197 (asserting that Syrian} \]
\[\text{officials circulated the reports of the Israeli military buildup).} \]
\[\text{286 Walzer, supra note 285, at 82–83.} \]
\[\text{287 Stoessinger, supra note 282, at 197–98.} \]
\[\text{288 Walzer, supra note 285, at 83.} \]
\[\text{289 See id.} \]
\[\text{290 See id.} \]
\[\text{291 Id.} \]
opponents.292 Later that year, the U.N. Security Council tacitly approved the Israeli use of force.293

If international law had recognized a doctrine of mistake, Israel may have been able to successfully claim mistake as a defense if Egypt and its allies had not in fact planned to attack Israel.294 Specifically, Israel could claim mistake of fact: it had believed that Egypt and its allies were about to attack Israel. It would have three arguments to support its claim of mistake of fact.

First, Egypt maintained Israel’s inception was unjust, and, thus, Israel had no right to exist.295 Michael Walzer reasons that if Egypt believed Israel had no right to exist, then Egypt must have believed Israel had no legitimate right to self-defense.296 Thus, at a minimum, Egypt would not have a moral objection to attacking Israel, even if it used a first strike.297

Second, Israel and its Arab neighbors had been involved in a number of conflicts preceding the Six Day War. The inception of Israel led to the 1948 Arab–Israeli War, and the Israeli victory in this war led to even more resentment and opposition from its neighbors.298 As John Stoessinger explains, “the bloody birth of Israel set the stage for a mortal conflict between two nationalisms—one Arab, the other Jewish—both equally desperate and equally determined to secure what to each was holy ground.”299 The subsequent Suez Crisis further illustrated the tensions between Israel and its neighbors, and it provided further evidence of ongoing tensions.

292 Id.
294 For purposes of this Article, set aside the argument that Egypt’s closing of the Straits of Tiran constituted an “armed attack” under Article 51 of the United Nations Charter. See U.N. Charter art. 51. Also assume that the United Nations did not retroactively authorize the Israeli military action.
295 See Walzer, supra note 285, at 82.
296 Id. at 83.
297 Because states act to pursue their self-interest, moral reasons may not play an independent causal role in foreign policy decision-making. See generally Morgenthau, supra note 114; Waltz, supra note 117. Yet, even if moral objections do not play an independent causal role in foreign policy decision-making, states may consider ethical reasons for action for public relations purposes. See Morgenthau, supra note 114, at 62.
299 Id. at 187.
This background of conflict gave Israel reason to believe there would be additional Arab–Israeli conflict. However, this justification also applies to Egypt and its allies: given the history of conflict between Israel and its Arab neighbors, both sides had reason to believe there would be a further conflict.

Third, the events immediately preceding the Israeli strike on June 5, 1967, gave Israel reason to believe the neighboring Arab states planned to attack Israel. Even assuming the border clash with Syria did not rise to the level of an “armed attack” under the U.N. Charter, the clash did constitute an armed clash between the armed forces of Israel and Syria. That Syria subsequently put its armed forces under Egyptian command in the event of war further increased the likelihood that Egypt and Syria were preparing for war.

Furthermore, Egyptian behavior in the weeks preceding June 5 gave Israel increasing evidence that an attack was imminent. The UNEF had patrolled the Israeli–Egyptian border since the Suez Crisis and ensured a buffer between Israeli and Egyptian armed forces. Once Egypt demanded that the UNEF leave Egyptian territory, it removed this buffer between Egypt and Israel. Especially given the circumstances, there is no plausible purpose for demanding the removal of the UNEF other than preparation for war.

Egyptian rhetoric further confirmed the state’s hostility toward Israel. On May 16, the Palestinian Service of Radio Cairo declared that an “end must be put to the challenge of Israel and to its very existence.” The message also declared, “[T]his is the hour of battle” between Israel and its Arab neighbors.

The aforementioned reasons all support an Israeli claim to mistake of fact. However, Israel does face a potentially serious obstacle to a claim of

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300 See id. at 186–88.
301 See id. at 188.
302 See U.N. Charter art. 51 (The Charter implies that an “armed attack” is a condition allowing exercise of “the inherent right of individual or collective self-defense.”).
303 See STOESSINGER, supra note 282, at 197.
304 See id.
305 See id. at 197–99.
306 See id. at 198.
307 Id. Note that the UNEF only patrolled the Egyptian, not the Israeli, side of the border.
308 See id. at 197.
309 Id.
mistake: it is unclear whether the June 5 strike was an instance of preemptive war, which is arguably a form of self-defense, or preventative war, which is not part of self-defense. Michael Walzer, for example, describes the Israeli first strike as “a clear case of legitimate anticipation.” However, he describes the first strike as legitimate by expanding the definition of self-defense; under his formula, under a threat of war, a state may use military force if not doing so would seriously risk the state’s “territorial integrity of political independence.” This doctrine may be normatively desirable, but it is unclear whether it is consistent with the U.N. Charter’s conception of self-defense. Regardless of whether Israel would have succeeded in its hypothetical claim of mistake, this section illustrates how one may analyze a claim of mistake as a defense.

V. DURESS IN INTERNATIONAL LAW

A. Elements of Duress

The duress defense provides an excuse for agents who comply with the coercive demands of another agent. Similarly, international law should recognize a duress defense for states pursuant to which a state may claim duress if its breach of international law is the result of the coercive demand of another state or another entity. The duress defense may have the following elements:

1. A state breaches international law;
2. The breach of international is caused by a threat;
3. The threat is issued by another state;
4. The threat puts the state’s essential interest in grave and imminent peril;

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310 See WALZER, supra note 285, at 74–75.
311 See id. at 76.
312 Id. at 85.
313 Id.
314 U.N. Charter art. 51.
315 See supra Part II.C.
(5) The state claiming duress did not contribute to the situation of duress.

The Vienna Convention on the Law of Treaties already acknowledges that coercion of a state or its representative may void consent to a treaty. The proposed duress defense would broaden this defense to any breach of international law. This defense would borrow the language of “essential interest” and “grave and imminent peril” from the necessity defense from the Articles on Responsibility of States for Internationally Wrongful Acts. Under the Articles, a state could claim the necessity defense if not acting in conformity with international law is the only way to safeguard an essential state interest against grave and imminent peril. The Articles’ provision on necessity does not explicitly require that the state’s choice be the lesser of two evils, but does deny a necessity defense when a state’s breach of international law threatens an essential interest of another state or the international community. Appropriately, the Articles explain that the necessity defense precludes the wrongfulness of the breach of international law; in other words, necessity is a justification and not an excuse.

The necessity defense is well-suited to environmental threats to the essential interests of a state, such as threats grounded in economic or ecological issues, as opposed to coercive demands from other agents. For example, in the Gabčíkovo Case, the ICJ considered but rejected Hungary’s necessity defense when it breached an international agreement because of

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318 See Report of the International Law Commission, supra note 316.
319 See id.
321 See Report of the International Law Commission, supra note 316.
Ecological risks. Environmental threats require a state to balance the costs and benefits of compliance with an international obligation with an economic or ecological risk to the state’s interest. Yet, fulfilling international obligations often involves exposure to economic or ecological threats, and these threats should neither excuse nor justify a state’s breach of its obligation if such threats do not threaten an essential interest. Moreover, the necessity defense is appropriate for situations where a state complies with another state’s coercive threat, but does not harm the essential interest of any other state or the international community.

However, the Articles’ necessity defense is ill-suited to cases where a state coerces another state to impair the essential interests of third-party states. For example, in World War II, Germany and its allies coerced states into collaborating with the Axis Powers to the detriment of the essential interests, e.g., security interests, of the Allied Powers. Such scenarios are analogous to cases of duress in domestic law when one party complies with the demands of a third party and may claim a duress defense.

Yet, international law does not currently allow states to claim a duress defense in such scenarios, because compliance with a threat often impairs the essential interest of other states. International law should fill this gap by recognizing a duress defense for states, allowing them an excuse when they comply with the threats of another state. Because an excused action is still wrongful, compliance with duress may still be wrongful, and other states

324 See Heathcote, supra note 322, at 496, 498.
325 See id. at 494, 496. If the presence of an unsubstantial economic or ecological threat could excuse or justify the breach of an international obligation, states could use necessity as a defense to the breach of virtually any international obligation. Id.
327 See id. at cmt. 1.
328 See infra Part V.B.
329 See, e.g., MODEL PENAL CODE § 2.09 (AM. LAW INST., Official Draft 1962). In domestic law, the duress defense does not require the party acting under duress to have chosen the lesser of two evils, because duress is an excuse, and excused actions are still wrongful. Id.
would be in the right to resist such state action. However, the excuse would preclude state responsibility.

Yet, duress in domestic law is not completely analogous to duress in international law. States often impose “puppet” governments to ensure the state’s compliance with coercive demands. Coercive states exploit the distinction between a state and a government by establishing these puppet governments that nominally represent the state but are really instruments of a foreign power. Yet, ostensibly, each state acts independently as a sovereign, even if it is acting under the coercive threat of a foreign state. In these situations, threats to a government are an imperfect proxy for threats to a state, because the puppet government is implicit in the coercive threat of force.

There is no analogue to a puppet state in domestic law for cases of duress because there is no individual analogue to the distinction between a state and its government. Thus, the inquiry in international law is more complex than it is in domestic law; one must consider the context of the relations between states to determine whether the coercive state is imposing its will upon another state, either directly or through a puppet state. Nonetheless, this is a task well within the competency of international law, and recognition of a duress defense would bridge a gap in the law created by the current doctrine of necessity.

B. Vichy France: A Case Study

As an illustration of the duress defense, consider France’s situation during the German occupation in World War II. The purpose of this section is not to argue that France would have been able to claim the duress defense successfully had it existed; but rather, the purpose is to illustrate how one would analyze a claim of duress. For purposes of this example, assume that Vichy France’s persecution of Jews and other groups constituted a violation of a then-existing jus cogens norm pertaining to human rights.

331 C.f. supra Part II.A.
332 C.f. supra Part II.A.
333 JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 63 (2d ed. 2007).
334 See id.
335 See id. at 63–64.
336 See id.
In 1940, Germany invaded and defeated France, securing an armistice that resulted in German occupation of Paris and much of France.\textsuperscript{338} The unoccupied portion of France was then-governed by a collaborationist regime based in Vichy.\textsuperscript{339} The collaborators, led by Phillippe Pétain, argued that if they could not be France’s sword, they would be France’s shield.\textsuperscript{340} In other words, they would passively acquiesce to Germany’s demands for French collaboration during World War II to protect France from further harm at the hands of Germany.\textsuperscript{341} Thus, the Vichy regime acquiesced in a number of hardships imposed upon France, including but not limited to: the loss of territory,\textsuperscript{342} the persecution of Jews and political opponents of Nazism,\textsuperscript{343} forced labor,\textsuperscript{344} rising inflation,\textsuperscript{345} declining real wages,\textsuperscript{346} and rampant corruption.\textsuperscript{347}

To claim duress, Vichy France would first have to identify an essential interest that another state, Germany, was threatening.\textsuperscript{348} Here, France could successfully claim that Germany placed its essential interest in national security in grave and imminent peril.\textsuperscript{349} Germany had already defeated France and its allies in a mere month and a half, and it had placed the majority of metropolitan France under occupation.\textsuperscript{350} Thus, France could not use its military to protect its interest from Germany. Furthermore, Germany could easily retaliate against Vichy France for its non-cooperation by harming French citizens and property in the occupied zone, including in Paris.

However, France may have difficulty proving that the German threat caused its breaches of international law during World War II. Historians such as Robert Paxton have questioned the extent to which Vichy

\textsuperscript{339} Id. at 4.
\textsuperscript{340} Id. at 358.
\textsuperscript{341} Id.
\textsuperscript{342} See id. at 362–64.
\textsuperscript{343} See id. at 364–74.
\textsuperscript{344} See id. at 364–74.
\textsuperscript{345} See id. at 361–62.
\textsuperscript{346} See id. at 374–80.
\textsuperscript{347} See id. at 380–83.
\textsuperscript{348} See supra Part V.A.
\textsuperscript{349} See PAXTON, supra note 338, at 3.
\textsuperscript{350} See id.
collaborators passively acquiesced to German demands. Rather, according to Paxton, collaborators actively sought to collaborate with Germany to implement drastic reforms in France, including the persecution of Jews and other groups.

Yet, German occupying authorities were largely indifferent to the attempted construction of a new French civic and political order, as Germany largely wanted “maximum booty at minimal cost” and had little preference regarding France’s internal reforms or persecution of Jews and other groups. If Paxton’s interpretation is correct, then threats from Germany may not have caused the violation of human rights norms in France; rather the collaborators would have exploited the French defeat to persecute Jews and other groups even without implicit or explicit German threats.

Thus, it is unclear whether France would have been able to successfully claim duress. However, the purpose of the section is merely to illustrate how one would analyze a potential claim to duress under international law.

VI. DIMINISHED CAPACITY IN INTERNATIONAL LAW

A. Elements of Diminished Capacity

The doctrine of diminished capacity would excuse a state whose ability to advance its interests is impaired. The elements of the proposed doctrine of diminished capacity may be as follows:

1. A state breached international law;
2. The breach of international law occurred without the consent of the people;
3. The breach of international law was not for the benefit of the people;
4. Only a successor to the government that breached international law may claim a diminished capacity defense.

351 See generally id.
352 See id. at xviii.
353 Id.
355 C.f. LIENAU, supra note 354 at 9–10.
The proposed doctrine of diminished capacity is analogous to the doctrine of “odious debt,” pursuant to which a “fallen regime’s debt need not be repaid if it was not authorized by and did not benefit the underlying population.” One central idea behind the doctrine of odious debt is that people should not have to pay back debt if they did not authorize it and derived no benefit from the debt.

The classical legal doctrine of odious debt, formalized by Alexander Sack, holds that debt is not transferrable to successors if the debt was incurred without consent of the people and not for their benefit. Sack distinguished between national debt and personal debt of those in power, arguing that a nation should only have to repay the former. For purposes of this Article, one of the crucial insights of odious debt doctrine is that not all of a state’s actions are for the good of the people, and the people should not necessarily pay the price—financial or otherwise—for actions not in their best interest.

Just as the doctrine of odious debt only applies to successors, only a successor would be able to claim the defense of diminished capacity. For purposes of the doctrine, a “successor” includes not only a successor state but also a successor government. A government constitutes a successor government when it acts as a new agent in representing the interests of the people. The successor government retains the basic form of sovereignty as the previous government but undergoes significant change in political structure and associated practice. When a state suffers from diminished capacity, the government’s wrongdoing becomes the personal wrongdoing of the members of the government and not the wrongdoing of the state or its people.

The fiduciary theory of the state provides one means of conceptualizing the diminished capacity defense, as well as the odious debt doctrine. The fiduciary theory of the state holds that the state functions as a fiduciary of its subjects, and this fiduciary relationship gives the subjects a reason to obey

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356 See id. at 4.
357 Id. at 9.
358 Id. at 8.
359 Id. at 9.
360 Id. at 9–10.
361 Id. at 9.
362 Id. at 10.
363 Id.
364 C.f. id. at 9–10 (discussing Alexander Sack’s distinction between personal and national debt).
states that live up to those fiduciary obligations. This fiduciary relationship is built on a foundation of trust, rather than explicit consent. This relationship is designed, at least in part, to protect the interests of the beneficiary. Should the fiduciary breach these fiduciary obligations, the fiduciary is liable to the beneficiary.

Obligations to third parties complicate this relationship. Imagine that the fiduciary enters into a transaction with a third party on behalf of the fiduciary, but in breach of the beneficiary’s trust. On one hand, it seems unjust to penalize a third party for a fiduciary’s breach if the third party is acting in good faith. On the other hand, it seems unjust to require the beneficiary to be liable to the third party because of the fiduciary’s breach of its duties. The odious debt doctrine and the proposed diminished capacity defense balance these concerns in favor of the interest of the beneficiary who is discharged of obligations to pay debts back to third parties.

Furthermore, there is some overlap between the diminished capacity defense and the duress defense. In both cases, a state is breaching international law. However, the breach is not for the interests of the people, and in both cases the state may claim an excuse for the breaches of


366 See SOVEREIGNTY’S PROMISE, supra note 365, at 105.
367 Id. at 106.
368 Id.

Yet, if the fiduciary is breaching its duties, then perhaps third parties should be on notice of the wrongdoing. Therefore, sometimes it appears unlikely that a third party is acting in good faith if it enters into a transaction with a fiduciary that is breaching its duties to the beneficiaries.

370 See supra Part IV.B.
international law. Yet, a state must be able to identify a threat to claim duress, and a state does not have to identify any threat or external influence to claim diminished capacity. Thus, a diminished capacity defense would be appropriate in two circumstances where the duress defense would be inapplicable. First, the diminished capacity defense would apply when the successor of a puppet state cannot identify an external threat, but can prove that the previous government acting with the consent of the people and without their benefit. Second, the diminished capacity defense would apply when a government rules as a “kleptocracy” that abuses national power and influence for the personal benefit of the leadership, rather than for the national interest.371

However, the analogy between diminished capacity in domestic and international law is imperfect. In domestic law, the defenses classified here as diminished capacity defenses—such as intoxication and insanity—entail some psychophysical impairment of normal cognitive or volitional states.372 In a sense, one who is drunk or insane is not properly serving anyone’s interests, but fails to act in a coherent or purposive manner. Although some use the language of madness in international relations (e.g., “Saddam Hussein was a madman”), leaders are rarely insane under the standards of domestic law of insanity.373

Yet, in cases of diminished capacity for states, the members of a government are purposively advancing some interests—they are just not advancing the interests of the people. However, in either case, the individual or the state fails to act coherently in advancing their interest.

B. Second Mexican Empire: A Case Study

As an illustration of the diminished capacity defense, consider the Second Mexican Empire. In 1861, President Benito Juárez of Mexico

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371 Of course not all states that may fall within the latter category are clear cases. In fact, there are various governments that enjoy some popular support and are clearly not puppet regimes yet still may qualify for the diminished capacity defense in some circumstances. See Steven Levitsky & Lucan Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52 (2002). For example, some political scientists have recognized “competitive authoritarian regimes” as regimes that are a “hybrid” between a fully democratic government and a fully authoritarian government. See id. It is unclear whether competitive authoritarian regimes would qualify for the diminished capacity defense, and the status of such a claim would vary based on the particular case. See id. at 53.


373 Id.
declared all previous agreements with foreign states to be null and void. 374 He also suspended all payments on capital or interest on foreign loans for two years. 375 Shortly thereafter, France intervened to install a new government under Ferdinand Maximilian of the Habsburg family and create the Second Mexican Empire. 376 Assume for the purposes of this section that the Second Mexican Empire breached international law, and a successor is claiming diminished capacity as a defense. 377

To successfully claim diminished capacity, the successor must claim that the breach of international law occurred without the consent of the people and was not for the benefit of the people. 378 Mexico would probably be able to successfully claim that Maximilian did not claim power with consent of the people. Maximilian acknowledged that the majority of the country still recognized Juárez, the previous President of Mexico, when Maximilian took power, and only a small portion of the country had expressed support for his rule. 379

Maximilian then withdrew his earlier requirement that he would only accede to the throne if a “great majority of the nation” declared support for him. 380 Instead, he would accept the throne if he received declarations of support from the larger towns as the French army gained control over more territory. 381 Accordingly, French forces began to set up polling places and obtained the “freely exercised vote” of passersby. 382 Thus, any claim that the Second Mexican Empire received the consent of the people is dubious, and its successors could probably meet this requirement of a diminished capacity defense.

375 See id. This was an instance of the odious debt doctrine, as the new government repudiated the debt as “contracted for the purpose of combating the constitutional government.” See LIENAU, supra note 354, at 35.
376 See Blumberg, supra note 374, at 5–6.
377 The details of a hypothetical violation of international law are complicated because the Second Mexican Empire existed from 1864 to 1867, when international law was significantly less developed than it is now. Imagine the Second Mexican Empire violated a jus cogens norm, such as pacta sunt servanda. See supra note 365.
378 See supra Part VI.A.
379 See Blumberg, supra note 374, at 10.
380 Id.
381 Id.
382 Id.
Mexico may also prevail if it claims the breach of international law was not for the benefit of the people. However, the prospects of this defense are less clear. France’s intervention was largely motivated by financial considerations: Juárez had suspended all payments on capital or interest on foreign loans for two years, so Mexico’s creditors had a strong interest in implementing a Mexican regime that would pay its debts.\(^{383}\) France initially sought an agreement whereby the Mexican government would pay for France’s military occupation, and Mexico would settle the debt to French civilian nations in a later agreement.\(^{384}\) To secure this debt, France would have the right to establish a de facto protectorate in Sonora.\(^{385}\) Had the Second Mexican Empire agreed to this treaty, it would have been acting more to the benefit of France than Mexico, and Mexico could have easily claimed diminished capacity.

Instead, the Second Mexican Empire rejected this proposal and accepted a new agreement that did not contain territorial concessions in Sonora or elsewhere.\(^{386}\) France and the Second Mexican Empire did agree that Mexico would pay for some costs of the French occupation and made arrangements that Mexico would obtain a loan to pay these costs.\(^{387}\) Moreover, France and Mexico agreed that France would occupy the country for three years, as opposed to the initial proposal of a fifteen-year occupation.\(^{388}\) Overall, it is debatable whether Mexico’s actions were for the benefit of the Mexican people or not. Nevertheless, the successors to the Second Mexican Empire may have had a claim of diminished capacity.

VII. CONCLUSION

International law should recognize excuses for the international wrongdoing of states. When considering wrongdoing by individuals, both domestic and international law allow the wrongdoer to explain why special circumstances, such as mistake or duress, mitigate the culpability of the wrongdoing.\(^{389}\) Yet, international law has denied this opportunity to states, creating an asymmetry.\(^{390}\) Given the lack of significant differences in applying the choice theory and character theory to individuals and states, \(^{383}\) Id. at 5.

\(^{384}\) Id. at 12 (roughly $210,000,000).

\(^{385}\) Id.

\(^{386}\) Id. at 12–13.

\(^{387}\) Id. France would not guarantee this loan, however. Id.

\(^{388}\) Id.

\(^{389}\) See supra Part III.

\(^{390}\) See supra Part III.A.
this asymmetry is unsupportable. Thus, international law should recognize
excuses for states as well as for individuals.

This Article has also provided explanations and illustrations of three
potential excuse doctrines: mistake,391 duress,392 and diminished capacity.393
Each doctrine has an analogue in excuse doctrines of individuals. However,
the differences between individuals and states entail differences in the
application of these doctrines.394 Whenever feasible, this Article has
borrowed from existing domestic and international law in constructing these
doctrines, partly to illustrate how recognizing excuses for nations is not a
radical departure from current positive law, but mostly to show it is the
natural result of ending the asymmetry in international law’s treatment of
individuals and states.395 However, the explanations of prospective excuse
doctrines are merely illustrative; there are enumerable potential excuse
doctrines and elements, both for individuals and for states.

Ultimately, this Article is part of two larger projects. First, it is part of
the project of grounding international law in moral philosophy, yet without
sanctimony: governments will make mistakes, but do not always deserve
condemnation. Second, it is part of the project of analyzing the moral
similarities between group agents and individuals: both individuals and
states face difficult decisions with high stakes and do not always deserve
blame for their mistakes. Ending this asymmetry between international
law’s treatment of individuals and states advances both worthy goals.

391 See supra Part IV.
392 See supra Part V.
393 See supra Part VI.
394 See supra Part III.
395 See supra Part III.