STATE INTENT UNDER INTERNATIONAL LAW

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ABSTRACT

The question of legislative intent has long been a topic of intense scholarly focus in the United States. There has also been a recent uptick in discussion of executive branch intent with the filing of high-profile lawsuits predicated upon allegations of improper motives. However, there has been no corollary effort to unpack the concept of state intent at the international level, where it arises with respect to such varied questions as how to understand the scope of a state's consent, whether a state should be deemed to be negotiating in good faith, and whether a state has engaged in genocide. This Article seeks to fill this gap, offering a taxonomy of state intent under international law. It also offers a potential explanation for why one might wish to apply different models of state intent, distinguishing, for instance, between the use of intent to rule out "excluded reasons" for acting (as is the case under U.S. law with respect to discrimination) and the use of intent to better understand what is being communicated (as is sometimes the case with respect to statutory interpretation). Finally, the Article draws an analogy to inquiries into corporate intent under U.S. domestic law to chart a tentative path forward toward better understanding the intent of states.

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I. INTRODUCTION

The question of Executive Branch intent has been front-page news in the United States. It has arisen with respect to the Trump Administration's travel ban.[1] More recently, it has been litigated in the context of the proposed addition of a citizenship question to the 2020 U.S. census[2]—a case in which a federal district court ultimately concluded that the "decision [to add a question] was pretextual [and]

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1 Trump v. Hawaii, 585 U.S. ____, slip op. at 27, 29 (2018) ("At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. . . . Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements."); *see also* Katherine Shaw, *Speech, Intent and the President*, 104 CORNELL L. REV. 1337, 1339 (2018) ("President Trump's novel rhetorical strategies have opened up a host of new questions regarding intent and the President."); William D. Araiza, *Animus and Its Discontents*, 71 FLORIDA L. REV. 155, 168-70 (2019); Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. (forthcoming 2020) (discussing reasons for a textual approach to interpreting Presidential "laws"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338466; *cf.* Camilo Montoya-Galvez, *Trump Administration Expands Travel Ban to Include Nigeria and 5 Other Countries*, CBS NEWS (Jan. 31, 2020), https://www.cbsnews.com/news/trump-travel-ban-expands-nigeria-5-other-countries/.

2 *See* New York v. Dep't of Commerce, No. 18-CV-2921, slip op. at 1 (JMF) (S.D.N.Y. Sept. 21, 2018) ("Secretary Ross must sit for a deposition because, among other things, his intent and credibility are directly at issue in these cases.").

that the rationale provided was not [the] real rationale"[3]—a finding upheld by the U.S. Supreme Court.[4]

Such inquiries are not limited to the domestic sphere. For instance, some have argued that the U.S. invocation of national security to justify tariffs on steel was an act of bad faith.[5] (And, indeed, World Trade Organization ("WTO") tribunals have on occasion suggested that the treaty "prohibits the abusive exercise of a state's rights.").[6]

Even further afield, in the midst of a 2017 war-of-words with North Korea, some legal scholars analyzed whether United States comments amounted to "threats"[7] within the meaning of Article 2(4) of the UN Charter,[8] which prohibits the "threat or use of force," and pursuant to which the identification of a "threat" may turn on the underlying intent of the "threatening" state.[9] Additionally, the

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3 New York v. Dep't of Commerce, No. 18-CV-2921, slip op. at 206 (JMF) (S.D.N.Y. Jan. 15, 2019).

4 Dep't of Commerce v. New York, 588 U.S. ____, slip op. at 26, 28 (2019) ("[V]iewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided. . . . Here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.").

5 *Given How Trump is Treating U.S. Allies, America Could Soon Find Itself Short of Friends*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/opinions/trump-coerces-americas-friends/2018/05/31/e1131ab0-64f6-11e8-99d2-0d678ec08c2f_story.html?noredirect=on; John Brinkley, *Trump's National Security Tariffs Have Nothing to Do with National Security*, FORBES (Mar. 12, 2018), https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/#58ace298706c ("A foreign government could reasonably argue in a WTO tribunal that the tariffs are purely protectionist measures disguised as an effort to protect national security.").

6 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, AB-1998-4 (Oct. 12, 1998) [hereinafter "Shrimp Turtle Case"]; *see also* Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 368-70 (2006).

7 Mohamed Helal, *Of Fire and Fury: The Threat of Force and the Korean Missile Crisis*, OPINIO JURIS (Aug. 30, 2017), http://opiniojuris.org/2017/08/30/of-fire-and-fury-the-threat-of-force-and-the-korean-missile-crisis/.

8 U.N. Charter art. 2(4).

9 Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT'L L. REV. 229, 234, 241 (2007) (collecting sources). This is distinct from the question of whether the "coerciveness" of a threat should be deemed to turn on the threatening state's intent or the effect of the threat upon the threatened state. *Cf.* Stephen Townley, *Intervention's Idiosyncracies*, 42 FORD. INT'L L.J. 1167, 1189 & n.108 (2019).

question of intent has been raised obliquely in the context of debate regarding U.S. support for Saudi Arabia in the conflict in Yemen.[10]

This search for intent is not unique to the United States. Issues of state intent have come to the fore in connection with analyzing whether the government of Myanmar is committing genocide against the Rohingya.[11] Earlier, these same types of questions were raised with respect to whether Bashar al-Assad had "intentionally" sought to starve civilians in rebel-held areas of Syria in violation of international humanitarian law.[12] Intent has likewise been put at issue by states claiming that they have the right to nuclear technology for "peaceful purposes."[13] And state intent has recently been litigated before the

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10 *See, e.g.*, Oona Hathaway et al., *State Responsibility for U.S. Support of the Saudi-led Coalition in Yemen*, JUST SECURITY (Apr. 25, 2018), https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/.

11 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order I.C.J., at ¶ 30 (Jan. 23, 2020), https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf (noting that "whether any violations of Myanmar's obligations under the Genocide Convention have occurred . . . . notably depends on the assessment of the existence of an intent to destroy"); Rep. of the Independent Int'l Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/50, ¶ 90 (Aug. 8, 2019) ("[T]he mission also has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State."); *see also* Nahal Toosi, *Leaked Pompeo Statement Shows Debate over 'Genocide' Label for Myanmar*, POLITICO (Aug. 13, 2018), https://www.politico.com/story/2018/08/13/mike-pompeo-state-department-genocide-myanmar-775270; Priya Pillai, *Renewed Impetus for Accountability: Implications of the Myanmar Fact-Finding Mission Report*, OPINIO JURIS (Sept. 18, 2018), http://opiniojuris.org/2018/09/25/renewed-impetus-for-accountability-implications-of-the-myanmar-fact-finding-mission-report/ ("To be clear, while the FFM is not saying that the crime of genocide has definitively occurred – it is however saying that such intent very likely exists, with substantial evidence to back up this assertion."); Beth Van Schaack, *Why What's Happening to the Rohingya is Genocide*, JUST SECURITY (Oct. 1, 2018), https://www.justsecurity.org/60912/happening-rohingya-genocide/ ("It is difficult to imagine a set of facts that would better support such an inference of genocidal intent.").

12 *See* Stephen Townley, *Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law*, 50 VAND. J. TRANSNAT'L L. 1223, 1262–63 (2017) [hereinafter Townley, *Indiscriminate Attacks*]; *cf.* Jane Ferguson, *Is Intentional Starvation the Future of War?*, NEW YORKER (July 11, 2018), https://www.newyorker.com/news/news-desk/is-yemen-intentional-starvation-the-future-of-war ("The situation in Yemen goes to the heart of the major legal dispute regarding economic warfare: intent. Military and political figures can claim that they never intended to starve a population, and argue that hunger is an unintended side-effect of war for which they do not bear legal responsibility.").

13 Treaty on the Non-Proliferation of Nuclear Weapons art. 4(1), July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 ("Nothing in this Treaty shall be interpreted as

International Court of Justice ("ICJ") by Bolivia and Chile in relation to Chile's putative obligation to negotiate access to the sea with Bolivia.[14] More broadly, state intent is fundamental to understanding a variety of core international law concepts, such as consent,[15] good faith,[16] and the formation of customary international law.[17]

Of course, "intention" can have a variety of meanings. This Article uses the term to mean the reason a person (or, in this case, a state) has for taking (or not taking) an action.[18] Intent understood in this way can include, but is not limited to, what is sometimes described as subjective motivation.[19] That is, for purposes of this Article, both a state's near or medium-term aim and its potential values-driven reasons for seeking to achieve that aim are included within the definition of intent.

So defined, state intent is hard to identify. Indeed, as one author has recently concluded, "the whole concept of a state having well-defined intentions is problematic."[20] While one might be tempted to

affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes . . . ."); David E. Sanger & William J. Broad, *Saudis Want a U.S. Nuclear Deal. Can They Be Trusted Not to Build a Bomb?*, N.Y. TIMES (Nov. 22, 2018), https://www.nytimes.com/2018/11/22/world/middleeast/saudi-arabia-nuclear.html; *cf.* S.C. Res. 2231, pmbl. (July 20, 2015) ("Affirming that full implementation of the JCPOA will contribute to building confidence in the exclusively peaceful nature of Iran's nuclear programme[.]").

14 *Cf.* Obligation to Negotiate Access to the Pacific Ocean (Chile v. Bol.), Judgment, 2018 I.C.J. Rep. 507, ¶ 91 (Oct. 1) ("In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations *must demonstrate an intention of the parties* to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.") (emphasis added).

15 Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177, ¶ 62 (June 4) ("[W]hatever the basis of consent, the attitude of the respondent State must 'be capable of being regarded as "an unequivocal indication" of the desire of that State . . . .'").

16 *See infra* notes 95-113 and accompanying text.

17 *See infra* notes 53-67 and accompanying text.

18 *Cf*. Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* NOMOS LXI: POLITICAL LEGITIMACY 201, 205 (Jack Knight & Melissa Schwartzberg eds., 2010).

19 Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 535 n.43 (2016).

20 James M. Acton, *The Problem with Nuclear Mind Reading*, 51 SURVIVAL 119, 126 (2009); *see also* Case of Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 34, 54 (July 6) (separate opinion by Lauterpacht, J.) ("Any attempt to embark upon the examination of the question whether a Government has acted in bad faith . . . may involve an exacting enquiry into the merits of the dispute—an enquiry so

conclude that it should be easier to discern a state's intent than, for instance, the intent of a legislature, because the latter is comprised of numerous individuals each of whom may have an intent different from others, the underlying premise—that a state is significantly less polycentric than a legislature[21]—may no longer obtain. Indeed, there is a significant and rich literature on the ways in which constituent elements of a state's decision-making apparatus may each have their own views[22] and their own networks[23] and, ultimately, make their own international decisions.[24] At the same time, a state's international

exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith."); Edward T. Swaine, *Rational Custom*, 52 DUKE L. J. 559, 568 (2002) ("Assuming that states have a coherent and discernible intent when they act is obviously problematic, as is trying to evidence that intent.").

21 *See, e.g.*, Swaine, *supra* note 20, at 561 ("[I]nternational law typically presumes unitary and sovereign states."); *cf.* André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L.Q. 615, 620–21 (2003) (quoting Fitzmaurice to the effect that "[i]t is only by treating the State as one indivisible entity, and the discharge of the international obligations concerned as being incumbent on that entity as such, and not merely on particular individuals or organs, that the supremacy of international law can be assured.").

22 Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 101, 109-10 (2018) ("While conventional international law scholarship often treated states as though they were individual, rational actors, imbued with anthropomorphized thoughts and self-interests, many modern scholars have moved beyond this treatment. They have opened up those states to examine how the many institutions within affect the state's actions and legal positioning."); *see also* Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an It*, 96 MINN. L. REV. 194, 229 (2011) ("[P]ublic choice insights suggest that international law compliance results, at least in part, from the negotiation and competition between different stakeholders in the executive branch, rather than from a unitary interest or purpose.").

23 *See, e.g.*, Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1047 (1996-97) ("[T]ax treaties establish a 'competent authority' procedure, authorising tax administrators to reach agreement, both in respect to the liability of a specific taxpayer and on the interpretation of the treaty's provisions.").

24 Consider for instance the ways in which domestic courts may contribute to the development of customary international law. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, at ¶¶ 55, 77, 83, 85 (Feb. 3); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L COMP. L.Q. 57, 62 (2011) ("[N]ational court decisions on matters of international law are evidence of the practice of the forum State."); *cf.* Ingrid Wuerth, *National Court Decisions and* Opinio Juris, Conference Paper for Conference on the Role of *Opinio Juris* in Customary International Law, Duke – Geneva Institute in Transnational Law, University of Geneva, at *8 (2013) (discussing the potential normative benefit of "[i]nternally conflicting state practice"), *available at*

decision-making may be becoming more opaque[25]—and of course there are many fewer sources of "legislative history" regarding a state's decisions.

Despite these difficulties, this Article seeks to unpack the concept of state intent under international law. While there has been robust debate in the U.S. regarding how to understand, for instance, legislative intent[26]—and there is a burgeoning discussion of executive intent[27]—no comparable cross-cutting effort has been undertaken with respect to state intent at the international level.[28] This Article aims to fill this gap, albeit in the sense of starting a conversation as, given the breadth of the topic, this Article's approach is necessarily impressionistic.

Upon cursory inspection, one potentially unsurprising conclusion is that different areas of international law—and even different provisions of the same treaty—treat state intent differently. That is, as Tara Leigh Grove has recently argued, attention should be paid to the "institutional setting" in seeking to understand the rules for divining state intent.[29] Indeed, in that sense, state intent may be little different from the various forms of intent under domestic law. Consider for instance two rules in Additional Protocol I to the Geneva Conventions.[30] The first is the prohibition of "[a]cts or threats of violence the *primary purpose* of which is to spread terror among the civilian population,"[31] and the second is the prohibition on attacking objects indispensable to the survival of the civilian population "for the *specific purpose* of denying them for their sustenance value to the

https://law.duke.edu/cicl/pdf/opiniojuris/panel_3-wuerth-national_court_decisions_and_opinio_juris.pdf.

25 Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 429 (2002); *see also* Picciotto, *supra* note 23, at 1049 ("[T]he informal nature of international networks [at the sub-state/regulator level] allows them to operate so much in the shadows that often their very existence is concealed; their activities, and even their decisions, are generally unpublicised.").

26 *See, e.g.*, Fallon, *supra* note 19; Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471 (2018); Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. 1211 (2019); Araiza, *supra* note 1.

27 *See generally* Shaw, *supra* note 1.

28 Indeed, the most significant treatment of the question of state intent has been in the specific context of genocide. *Cf. infra* notes 128-142 and accompanying text.

29 Grove, *supra* note 1, at *2.

30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, December 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

31 *Id.* at art. 51(2) (emphasis added).

civilian population or to the adverse Party."[32] Both of these rules speak to the state's purpose in taking military action, yet these two "purpose" provisions are understood differently: the former infers the state's intent from the nature of the act whereas the latter looks to actual, subjective motivation.[33]

A deeper look, however, reveals at least a potential taxonomy of the ways in which international law understands intent, which this Article seeks to describe. To be clear, I am not overly sanguine with respect to the conceptual and practical difficulties that attend identifying state intent under international law. Given, however, that international law increasingly refers to state intent, the topic deserves deeper consideration than it has hitherto received.

Part II introduces the three principle ways in which state intent has been understood: objectively, from the perspective of the reasonable observer; objectively, from the perspective of the reasonable actor; and subjectively. It briefly explains that each model of state intent can potentially be understood as serving a different purpose: that is, for instance, relying upon a reasonable observer heuristic to understand state intent could provide a common frame of reference for identifying what a state is trying to communicate, whereas analysis of subjective intent facilitates drawing a line around "excluded reasons" for actions (such as the intent to destroy a vulnerable group). The Article then goes on in Parts III, IV, and V to explore each model of state intent in greater depth, providing both descriptive examples and a tentative explanation of the normative work each model performs.

In Part VI, the Article seeks to show why this matters in practice and how the taxonomy this Article has sought to identify can assist in thinking through how one might wish to assess intent. To that end, Part VI describes two unsettled areas of law—that is, where there are differing views on how to understand state intent—in an effort to further elucidate the stakes in selecting among the three models described.

Finally, Part VII offers thoughts on why the effort to identify state intent is likely to become ever more difficult, including as decisions become harder to explain (to the extent they rely upon algorithms), and with the proliferation of both true "fake news" and self-serving

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32 *Id.* at art. 54(2) (emphasis added).

33 Townley, *Indiscriminate Attacks*, *supra* note 12, at 1239. Interestingly, the latter provision of API also stipulates that the prohibition applies "whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

leaks. Part VII goes on to argue, however, that all is not lost: relying upon scholarship regarding corporate criminal liability, it points out that there are ways to identify the intent of a legal entity; and it suggests that a (broadly discussed elsewhere) policy suggestion might facilitate the identification of state intent. Part VIII then offers a brief conclusion.

II. TOWARD A TENTATIVE TAXONOMY OF STATE INTENT

This Part outlines in broad strokes the three different ways of describing state intent under international law that are pursued in the three Parts that follow.[34] The first distinction, which is common to U.S. domestic law, is between "objective" intent and "subjective" intent.[35] Roughly speaking, "objective" intent is ascribed intent; "subjective" intent is "true" intent. To give an analogy, a "true threat" in U.S. law requires an intent to cause fear. In some cases, courts have considered how a reasonable person would understand the statement in question (objective intent), whereas in others they have sought to ascertain the actor's *actual* intent (subjective intent).[36] More broadly, the question of objective intent and subjective intent might be (grossly) mapped onto the *mens rea* categories of negligence and purpose. Thus, the Model Penal Code distinguishes negligence—when a person acts in such a way as to deviate from the standard of care "a reasonable person would observe in the actor's situation"[37]—from purpose—where a person acts and "it is his conscious object to engage in conduct of that nature or to cause such a result."[38] That is, while negligence can be assessed simply by reference to observable facts, i.e., what the person *did*, purpose requires evidence of what the individual *was actually thinking*.

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34 I make no claim that there are only three ways, but these are the three that have seemed most prevalent from an impressionistic survey of the field.

35 *See* Fallon, *supra* note 19, at 536–37 ("In rough terms, subjective conceptions—of which there are several subvarieties—first seek to identify the actual thought processes or psychological attitudes of the legislators who proposed or enacted a statute. . . . By contrast, objective conceptions of legislative intent aspire to identify a form of legislative intention that exists independently of the thought processes of individual legislators and that is ascertainable through inquiries that do not focus on individual psychology.").

36 Paul T. Crane, *"True Threats" and the Issue of Intent*, 82 VA. L. REV. 1225, 1227, 1235-36 (2006).

37 MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 2019).

38 MODEL PENAL CODE § 2.02(2)(a)(i).

One might argue of course that objective intent is not intent at all, insofar as it may not *actually* be the reason why a person or entity acted. However, objective intent is widely relied upon (indeed, noted legislative-intent skeptic Justice Scalia condoned "objectified intent" [39]). So, for instance, it is a broadly accepted way of understanding legislation—i.e., speaking of the "intent of a statute"[40]—but more than that, it is also a necessary legal fiction in the many cases when subjective intent cannot actually be identified.[41]

This distinction between objective and subjective intent is one way in which one might divide up how international law understands state intent. However, there is an additional distinction within the category of objective intent. To return to the true threats analogy, one might ask whether the question is how a reasonable person would expect their statement to be understood[42] or how an "an ordinary, reasonable recipient" would understand the statement. [43] That is, should objective intent be assessed from the perspective of the actor or from the perspective of an observer? This distinction, too, is found in international law.

These, then, are the three forms of intent this Article will explore: objective intent from the perspective of a reasonable observer; objective intent from the perspective of a reasonable actor; and subjective intent. But before doing so, it is worth pausing to discuss the consequences of the choice—that is, what each way of looking at intent could potentially help the law achieve.[44] Taking each in turn, the first model I have sought to describe—the assessment of intent from the perspective of the reasonable observer—provides a common referent for understanding the views of a state. As Victoria Nourse has

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39 Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005) (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997)).

40 *See* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

41 *See, e.g.*, Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1447-48 (2009); *cf.* Fallon, *supra* note 19, at 545 & n. 96 (citing Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000)) ("[T]he objective theory of contract formation and interpretation holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions.").

42 *See* Crane, *supra* note 36, at 1243–45.

43 *Id.* at 1227 (citing United States v. Bly, No. CRIM. 3:04CR00011, 2005 WL 2621996 (W.D. Va. Oct. 14, 2005)).

44 *Cf.* Shaw, *supra* note 1, at 1373 (arguing that the way one seeks to understand presidential intent should vary depending on the context).

recently noted, in U.S. statutory interpretation theory the reasonable observer can help unpack legislative meaning, using what she calls "[i]ntent-as-communication."[45] This model of intent performs a similar function in international law. It is useful where what is needed is an external heuristic for what a state means to signal by its words or acts.

The second model, on the other hand—intent from the perspective of the reasonable actor—allows for the imposition of "reasonableness" limits on state conduct. That is, it helps to establish what George Fletcher has referred to as "second-level norms,"[46] or reasons why a state's course of conduct should be rejected. It relies upon the following syllogism: The law requires that a state act in accordance with a defined purpose (e.g., in good faith, for peaceful purposes, etc.); no reasonable state would have taken a particular action in pursuit of that purpose; therefore, if the state took that action, it did not have the defined purpose. Unpacking this kind of intent therefore allows the international community to say that certain acts are out of bounds because they are presumed to manifest an improper intent.

The third model—subjective intent—has yet a third potential purpose, which is allowing the international community to deem certain *reasons for action* out of bounds (in the parlance of Joseph Raz, "excluded reasons").[47] The third model differs from the second in that it is not a vehicle for regulating conduct *per se* (or at least, not *only* a vehicle for regulating conduct), but rather is also a way to flush out inappropriate bases for what might otherwise putatively appear to be lawful conduct. Think here of the way ostensibly neutral government actions may be deemed unlawful if in fact they have a discriminatory purpose or are intended to restrict speech.[48] Each of these ideas is explored in turn in the Parts that follow.

III. COMMUNICATIVE INTENT

The reasonable observer, of course, is a well-established figure, often relied upon to parse what an actor means. Take for instance contract law. The case of *Embry v. Hardagine, McKittrick Dry Goods*

45 VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 142 (2016).

46 George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 952 (1985) (discussing abuse of right under German domestic law).

47 *Cf.* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 n.2 (1994).

48 *Cf. infra* notes 152-154 and accompanying text.

Co., for example, posed the question of how a statement that was given in response to a demand for clarification regarding whether a contract would be renewed should be understood—and the court adverted to the reasonable observer standard.[49] To give another example from U.S. domestic law, "the reasonable observer" plays a similar role in Establishment Clause jurisprudence, helping to unpack "the social meaning of a government practice"[50]—or in other words, how a practice should be understood. Indeed, Justice O'Connor described her view of the "endorsement test" under the Establishment Clause as turning on the "'objective' meaning of [a] statement."[51]

The same approach obtains at the international level. For example, the United Nations Convention on Contracts for the International Sale of Goods stipulates that in the absence of evidence of subjective intent, "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."[52]

The "reasonable observer" is relied upon to similar effect in public international law. That is, intent is defined by reference to the "reasonable observer" when the question is what a state means—the state's "communicative intent." It is to that form of intent that I now turn.

A. The Reasonable Observer

Perhaps the most prominent example of communicative intent comes from doctrine regarding the formation of customary international law. The blackletter rule is that custom requires both state practice and *opinio juris*—meaning that state practice is accepted as arising from a sense of legal obligation.[53] The International Court of Justice has glossed this to the effect that "[t]he States concerned

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49 Embry v. Hardagine, McKittrick Dry Goods Co., 105 S.W. 777, 777 (Mo. Ct. App. 1907).

50 B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1408 (2014).

51 Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

52 United Nations Convention on Contracts for the International Sale of Goods art. 8(2), Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

53 *Cf.* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

must therefore *feel* that they are conforming to what amounts to a legal obligation."[54] But how do we understand what states "feel?"

In general, scholars have eschewed the question of what the state *actually thinks*[55] in favor of looking to what the state *says it thinks* when assessing whether the state "believes" they are acting out of a sense of legal obligation. As Anthea Roberts has summarized, "*[o]pinio juris* concerns statements of belief rather than actual beliefs."[56] That is, it is "objective behavior evidencing subjective beliefs."[57] Michael Wood, the International Law Commission ("ILC") rapporteur on the topic, has also opined that "[a]n express statement by a State that a given rule is obligatory qua customary international law, for a start, provides the clearest proof that it believes itself bound by, or that from now on it will adhere to, [that] certain principle or rule."[58]

Courts have taken the same approach. In the *Jurisdictional Immunities of the State* case, for instance, the International Court of Justice stressed that one source of *opinio juris* regarding the scope of immunity was "*the assertion* by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States."[59] Likewise, a number of judges of the ICJ in the *Fisheries Jurisdiction* case asserted that "declarations and

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54 North Sea Continental Shelf (Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3 , ¶ 85 (Feb. 20) (emphasis added); *see also* Int'l Law Comm'n, Second Report on Identification of Customary International Law, U.N. Doc. A/CN.4/672, at 45 (May 22, 2014) (prepared by Special Rapporteur Michael Wood) ("States are to believe . . . .") (internal quotation marks omitted) [hereinafter Wood, Second Report].

55 *See, e.g.*, Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 BRIT. INSTIT. INT'L & COMP. L. 501, 514 (1995) ("If *opinio juris* is described as belief or conviction, the problems involved in finding out its content are patent.").

56 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757-58 (2001); *see also* Elias, *supra* note 55, at 515; Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 536 (2004) ("[I]t is the fact of the making of the claim, not of the 'value' of the claim that is relevant.").

57 William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 490 (2014); *see also* Omri Sender & Michael Wood, *Celebrating 50 Years of Scholarship: Reflections on Key Articles from the First Five Decades: A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law*, 50 ISR. L. REV. 299, 301 (2017).

58 Wood, Second Report, *supra* note 54, at 53 (internal quotation marks and alteration marks omitted).

59 Jurisdictional Immunities of the State (Ger. v. It.), *supra* 24, at ¶ 55 (emphasis added).

statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and the *opinio juris* on a subject regulated by customary law."[60]

It is thus clear that a state's intent in complying with an international norm is not a subjective question. Rather, the question is what a state says, not what it thinks. But how to understand what a state says? This, in turn, is a question of linguistics, communicative semiotics,[61] and social meaning.[62] And the reasonable observer offers a construct for unpacking such statements.

In part, this focus on what a state says is common-sense. As Curtis Bradley has trenchantly noted, "nations presumably follow many customs out of self-interest (and, indeed, one would assume that customs develop because they are generally in the interest of the participants), yet it is unclear why behavior motivated by self-interest [rather than motivated by a sense of legal obligation] should not count when discerning CIL."[63] A second reason why it makes sense to look to what states say rather than what they think when it comes to the intent relevant to the formation of customary international law is that this approach helps to solve the "tipping point scenario."[64] That is, we might say that a particular practice crystallizes into custom when a final, important state undertakes to conform its practice to that rule;[65]

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60 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3, 45, ¶ 13 (July 25) (separate Opinion of Judges Forster, Bengzon, de Arechaga, Singh, and Ruda); *cf.* Anthony D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892, 895 (1970) (parsing ICJ jurisprudence and arguing that whether treaty provisions state a rule of customary international law turns upon whether "the treaty manifests an intent to have a particular provision create customary law" rather than subjective intent of the treaty parties).

61 *Cf.* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L. J. 427 (2005).

62 *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 CHI. L. REV. 943, 954 (1995).

63 CURTIS A. BRADLEY, THE CHRONOLOGICAL PARADOX, STATE PREFERENCES, AND OPINIO JURIS (2006), *available at* https://web.law.duke.edu/cicl/pdf/opiniojuris/panel_1-bradley-the_chronological_paradox,_state_preferences,_and_opinio_juris.pdf; *see also* Worster, *supra* note 57, at 491 (discussing "the difficulty of the distinction between political positions of state organs and the 'beliefs of state.'").

64 *See* Sender & Wood, *supra* note 57, at 301 (calling it the "opinio juris paradox").

65 Even if this perspective is dismissed as the self-serving view of influential states, there must be a tipping a point at some point, even if it is just the *x*th state to see a norm as legally binding.

but at the time the state takes that decision, it presumably cannot truly be said that it is doing so out of a sense of legal obligation (because the norm has not crystalized yet).[66] So instead, we accept as evidence of custom when a state simply says it *will* follow a rule out of a sense of legal obligation, even if it is not *opinio juris* in the strictest sense of the phrase.[67]

A look at the way state intent is parsed in the related area of unilateral commitments makes even clearer that the reasonable observer is a helpful vehicle for understanding a state's statements regarding whether it considers a norm binding or not. In determining whether a unilateral statement should be treated as binding, the key question is whether a state *wishes* to be bound to what it is has said.[68] And again, the question is not one of interior motivation but rather whether an external facing declaration "manifest[s] the will to be bound."[69]

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66 Kammerhofer, *supra* note 56, at 533-35 (discussion of two prevailing approaches to the subjective element in the formation of CIL).

67 The U.S. statement of policy regarding Article 75 of Additional Protocol I is a good example of this phenomenon (at least as the U.S. may see it). In March 2011, the U.S. announced that it would "choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict." It went on to say that it "expects all other nations to adhere to these principles as well." White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), *available at* https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. At the time, if the U.S. could "choose" to adhere to the principles set forth in Article 75, they must not have been custom (at least in the U.S. view). But the fact that the U.S. would thereafter "expect all other nations to adhere" to those principles suggests a belief that they crystalized into custom at the moment the U.S. announced that it would comply with them. One way of squaring this circle is to squint at the U.S. statement and accept it as *opinio juris*, rather than inquiring more deeply into whether the U.S. really believed itself to be bound by customary rules at the time it made that announcement of its "choice." *See, e.g.*, Marko Milanovic, *Article 75 AP I and U.S.* Opinio Juris, EJIL TALK! (Mar. 9, 2011), https://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/ ("If, on the other hand, Art. 75 was not customary at the time of the US statement, then the expression of US opinio juris might take it over the tipping point. . . .").

68 Nuclear Tests Case (Austl. v. Fr.), Judgement, 1974 I.C.J., ¶ 43 (Dec. 20) ("When it is the *intention of the State* making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking.") (emphasis added); *see also* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J., ¶ 39 (Dec. 22).

69 Int'l L. Comm'n, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto*, 2 YR. BOOK INT'L L. 2006, at 370 [hereinafter Unilateral Declarations GPs].

Here, the inquiry has explicitly focused on the context in which the statements in question were made.[70] Thus, in the *Nuclear Test Cases*, the ICJ explained that the "the intention is to be ascertained by interpretation of the act."[71] The court looked in particular to the *speaker* (in that case, the French President),[72] and held that because the statement at issue was made to other states, it should be assumed that those states were likely to rely upon it.[73] Likewise, the ILC points to the "the importance of the reactions of other States concerned in evaluating the legal scope of the unilateral acts in question," again suggesting that intent, when it comes to evaluating the legal significance of a unilateral commitment, is a question of how the commitment would reasonably be interpreted by observers.[74]

Communicative intent is also relevant to analysis of a treaty's object and purpose. Tremendous ink has, of course, been spilled on how to understand a treaty's "object and purpose;" and the phrase can be used in different ways.[75] How a treaty's object and purpose should be understood in the context of interpretation of the treaty as a whole,[76] at least, has been said to hinge on "the communicative intention of the treaty parties."[77] While in some sense ascertaining the intent of treaty drafters is a question of aggregate state intent, rather than the intent of a single state, it is state intent nonetheless. And again, it is an exercise

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70 Unilateral Declarations GPs, *supra* note 69, at 377 (emphasizing that "weight shall be given first and foremost to the text of the declaration"); *id.* at 378 (noting that "priority consideration must be given to the text of the unilateral declaration, which best reflects its author's intentions.").

71 Nuclear Tests Case, *supra* note 68, at ¶ 44; *id.* at ¶ 50 ("The general nature and characteristics of these statements are decisive for the evaluation of the legal implications.").

72 *Id.* at ¶ 49.

73 *Id.* at ¶ 51.

74 Unilateral Declarations GPs, *supra* note 69, at 372. The same is generally true of the questions regarding whether a state ultimately intends to become party to a treaty (or not), Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331[hereinafter VCLT], and whether a state has consented to be bound to a treaty, *see also* VCLT art. 12(1)(c), 14(1)(d).

75 *See generally* David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNT'L L. 565, 571–77 (2010).

76 *See* VCLT, *supra* note 74, art. 31(1).

77 Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 EUR. J. INT'L L. 169, 171 (2015); *cf.* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 242 (Jul. 13) ("It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention.").

in understanding what states are trying to communicate[78] which turns on the treaty's text and context[79] and how that text and context should reasonably be understood.

Finally, communicative intent is relevant to whether a statement or action constitutes a threat of force. Whether a state is making an unlawful threat within the meaning of Article 2(4) of the UN Charter turns, at least in part, on its purpose.[80] But with respect to the subsidiary question of whether a statement *is* a threat, the analysis has turned on the words that states use.[81] Thus, for instance, a clear case is where State A tells State B to take a certain action or force will follow.[82] In the *Nuclear Weapons Case*, the ICJ likewise focused on how a threat (or an action that might be a threat) would be understood, explaining that the possession of nuclear weapons as deterrence "necessitates [gives rise to an inference] that the intention to use nuclear weapons be credible."[83] On the flip side, more equivocal

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78 *See, e.g.*, Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. at 24 (Aug. 27) (looking to the preamble of the treaty to understand what states *say* the object and purpose may be); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2001 I.C.J. Rep. at ¶ 49-50 (Oct. 23) (same); *cf.* Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. INT'L L. 73, 86 (1998) ("The preambles to SCRs may assist in interpretation, by giving guidance as to their object and purpose."). In other cases, states will specifically express themselves on the question of a treaty's object and purpose. Thus, for instance, in the context of the Comprehensive Nuclear Test-Ban Treaty, the permanent five members of the Security Council stated that a nuclear explosion would defeat the object and purpose of the treaty. *See P5 Statement on the Comprehensive Nuclear-Test-Ban Treaty (CTBT) adopted on September 15, 2016*, FRANCE DIPLOMATIE (Sept. 15, 2016), https://www.diplomatie.gouv.fr/en/french-foreign-policy/disarmament-and-non-proliferation/events/article/p5-statement-on-the-comprehensive-nuclear-test-ban-treaty-ctbt-adopted-on. Of course, this was in the context of a different use of "object and purpose" but it is noteworthy, nonetheless.

79 *See generally* Sanja Djajić, *Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration*, 2016 INT'L REV. L. 1 (2016).

80 *See, e.g.*, Case Concerning the Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9) (the ICJ looked to whether the UK's "demonstration of force" was "*for the purpose* of exercising political pressure on Albania.") (emphasis added). *Cf. supra* note 9 and accompanying text (noting the difference between whether a statement is a threat and whether a statement is an unlawful threat).

81 *See, e.g.*, Helal, *supra* note 7 (defining a threat of force as an "unambiguous statement that communicates an intention to use armed force unless a specific demand . . . is met").

82 James A. Green & Francis Grimal, *The Threat of Force as an Action in Self Defense Under International Law*, 44 VAND. J. TRANSNT'L L. 285, 295 (2011).

83 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at ¶ 48 (July 8).

demonstrations of force—i.e., actions that would not necessarily be understood by an observer as communicating a threat—are not generally regarded as breaches of Article 2(4).[84] Thus, in this quite distinct area of law, intent is also understood as turning on how a reasonable observer would understand the situation.

B. Why Communicative Intent?

If this Part has thus far sought to show that state intent is understood in several areas of international law as turning on the perspective of a reasonable observer, here I briefly describe *why* one might wish to understand intent this way. First and foremost, it provides a common vocabulary for understanding what a state is communicating. As one author has put it in a related context, "[t]he addressee or addressees of [an] utterance have to assume that in verbalizing and expressing her intention, the utterer act [sic] in conformity with some particular standards of communication."[85] More broadly, though, this form of state intent can give "public meaning"[86] to state action, unpacking not only content but also significance. Thus, for instance, in the U.S. domestic context, some have argued that regulations should be understood by reference to "the public meaning of the rule's legally binding text."[87] One would therefore expect that this form of intent would be relevant in international law where the question is how to interpret what a state is saying or doing.

And, indeed, that is the thread that ties together the examples adduced above. Some turn on consent or are what might be termed

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84 *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1625 (1984) ("But in many situations the deployment of military forces or missiles has unstated aims and its effect is equivocal. . . . Curiously, it [Article 2(4)] has not been invoked much as an explicit prohibition of such implied threats.").

85 Ulf Linderfalk, *The Concept of Treaty Abuse: On the Exercise of Legal Discretion* at *16, *available at* https://ssrn.com/abstract=2526051; *see also* Tom Campbell, *Legislative Intent and Democratic Decision Making*, *in* INTENTION IN LAW AND PHILOSOPHY 291, 292 (Ngaire Naffine et al. eds., 2011) ("[T]he legislating assembly must be taken to intend that its enacted words . . . be understood in terms of their public meaning as captured by the conventions of language and legislation in that society.").

86 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

87 Jennifer Nou, *Regulatory Textualism*, 65 DUKE L. J. 81, 84 (2015) (discussing how "a reasonable reader of the regulation would have understood the meaning of the regulation as negotiated by the President, Congress, and other authoritative regulatory actors.").

"consent adjacent."[88] And whatever one thinks of consent-based theories of international law,[89] there needs to be a common way to understand when and to what a state has consented. And the other example—threats—likewise turns on what a state's actions should be understood to signal.[90]

IV. INTENT AS REASONABLENESS

A second form of objective intent is intent measured from the perspective of a reasonable actor in the acting state's position. This differs from the form of intent described above insofar as it requires hypothesizing what a reasonable actor *would have done*, rather than seeking to understand *what has been done*. To draw an analogy, consider the difference between the way U.S. domestic courts seek to understand legislation and how they approach questions about what Congress would have intended under a hypothetical set of facts, such as when deciding whether a provision of law should be deemed severable from broader legislation.[91] The latter requires a court to imagine what a legislature *would have* done,[92] which is what the reasonable actor lens facilitates. The question of whether someone was negligent entails a similar exercise, as it turns on how a reasonable person in the actor's shoes would have proceeded.[93] Essentially, the difference between the form of objective intent this Part describes, and the one described in Part III above, turns on where one places the

88 Whether customary international law requires consent is a notoriously tricky question. *Cf.* Wood, Second Report, *supra* note 54, at 51 ("[S]ome have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will)."); Olufemi Elias, *Some Remarks on the Persistent Objector*, 6 DENNING L.J. 37, 47-48 (1991). On its face, it does not, not only because a belief that a rule is obligatory is not the same thing as consent to that rule, but also because not all states must believe a rule to be obligatory for it to become so. *Cf.* Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 775-76 (2011).

89 *Cf.* Fernando R. Teson, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84, 101-02 (1990).

90 *Cf.* Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. STATE L. REV. 1, 25 (2009) (arguing that what matters is how citizens see the reasons for state action).

91 Nelson, *supra* note 39, at 404.

92 *Cf.* Jonathan H. Adler & Abbe R. Gluck, *What the Lawless Obamacare Ruling Means*, N.Y. TIMES (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html.

93 MODEL PENAL CODE § 2.02(2)(d).

hypothetical reasonable person—are they watching what transpires or are they themselves taking the relevant action?

A. The Reasonable Actor

There are several examples of a reasonable actor approach to intent under international law.[94] This Section focuses on two: the requirement to negotiate in "good faith"[95] (as well as corresponding rules regarding "bad faith"); and "peaceful purposes" limits on state action. Good faith/bad faith is addressed first.[96]

The concepts of "good faith" and "bad faith" under international law are—at a general level— thought to turn on a state's mindset.[97] In the context of negotiations, the latter is perhaps easiest to see, for negotiating in bad faith can loosely be described as bargaining *without* any intent to see negotiations come to fruition.[98] Good faith is trickier, at least in part because it can mean so many different things under international law.[99] But in the narrow sense described here, good faith

94 In broad strokes, much of proportionality analysis could be seen as turning on this same concept, at least at proportionality stage one—the identification of the purpose of a regulation. Moreover, this same approach can be said to undergird much of the approach to permissible restrictions on human rights, which also often turn on the question of whether a government rule fits a defined exception. *Cf.* International Covenant on Civil and Political Rights art. 19(3), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; U.N. Human Rights Comm., General Comment No. 34, ¶¶ 28-32, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011). Both topics are too broad to be addressed adequately here (but warrant separate exploration), although I address both somewhat obliquely in the context of discussion of non-discrimination. *Cf. infra* note 175 and accompanying text (discussing proportionality).

95 Robert Kolb, *Principles as Sources of International Law*, 53 NETH. INT'L L. REV. 1, 17 (2006) (describing this aspect of good faith as "by far the most important form in which good faith appears in international law").

96 These are treated together because in many ways they mirror each other. *See, e.g.*, Shrimp Turtle Case, *supra* note 6, at ¶ 158.

97 *Cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 892 (2016) (explaining that in the U.S. domestic-law context, "[c]lassic formulations of legal bad faith look to the actor's state of mind").

98 In this sense, I see bad-faith negotiation as a sub-component of the international-law doctrine of "abuse of right." *See, e.g.*, Mitchell, *supra* note 6, at 349; *see also* Bernardo M. Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 768 (2012) (A "[s]pecific manifestation of good faith as a general principle of law might be the abuse of law through an antisocial exercise of a right."). For a general overview, *compare* Alexandre Kiss, *Abuse of Rights*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1, *with* Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L. J. 389, 389 (2002).

99 *See* ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW 15 (2017) (describing good faith as "a vague standard for evaluating the reasonableness or the normality of behavior"). I do not focus here on the aspect of good faith that concerns protection of legitimate expectations, nor the adjacent areas of estoppel and

negotiations are those pursued with a genuine intention to reach a resolution.[100]

And yet, how is one to assess whether a state is acting in good or bad faith during negotiations? How is one to determine whether a state genuinely intends for negotiations to succeed if possible, or whether in fact their objective is to frustrate efforts to reach agreement? In both cases, the assessment is made by reference to what a reasonable state would do under the circumstances.[101] That is, this form of "good faith [and its corollary, bad faith] has an objective sense . . . ."[102] One author has gone so far as to explicitly situate the concept of good faith within the standards "prevailing in the international community at that time,"[103] akin to the classic sense of reasonableness familiar from tort law.

Indeed, the duty to negotiate in good faith is generally understood as turning on just such extrinsic evidence[104] of reasonableness.[105] For instance, in the *Fisheries Jurisdiction* case, the ICJ characterized the obligation as requiring that "each must in good faith pay *reasonable regard* to the legal rights of the other."[106] Likewise, in the *North Sea Continental Shelf* case, the Court explained that parties were "under an obligation so *to conduct themselves* that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of

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acquiescence. *See* Matthias Goldmann, *Putting Your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, 41 YALE J. INT'L L. (SPECIAL ISSUE) 117, 125 (2016). I also do not focus on the requirement to interpret treaties in good faith. *See, e.g.*, KOLB, *supra*, at 65 ("The principle of good faith here [interpretation] ushers largely into the standard of 'reasonableness.'"); Steven Reinhold, *Good Faith in International Law*, 2 UCL J. L. & JURIS. 40, 59 (2013) ("The exact contours of how to interpret a treaty in good faith are difficult, yet an element of 'reasonableness' must be inherent when an interpretation is advanced.").

100 Int'l Inst. for the Unification of Private Law, Principles of International Commercial Contracts art. 2.1.15 (2010). *Cf.* Mitchell, *supra* note 6, at 340 ("The touchstone of good faith is therefore honesty, a subjective state of mind."). Likewise, the Uniform Commercial Code defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(b)(20) (2014).

101 *Cf.* KOLB, *supra* note 99, at 256 ("'[O]bjective good faith' is incomparably more present and important than 'subjective good faith.").

102 Kolb, *supra* note 95, at 17.

103 J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 124 (1991).

104 Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 930 (1925) ("Undoubtedly, the required proof may be supplied by circumstantial evidence.").

105 Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443, 447 (1981).

106 Fisheries Jurisdiction, *supra* note 60, ¶ 78 (emphasis added).

it."[107] Thus, from analysis of a state's acts, and whether a reasonable state wishing negotiations to succeed would undertake them, the idea is that one can reverse engineer an understanding of intent.

This same approach obtained in the *Lac Lanoux* case, where, in applying the principle of good faith, the arbitral tribunal looked to whether France had given due consideration to Spain's interests—that is, whether France had given "a *reasonable* place to these interests in the solution finally adopted."[108] Indeed, these precedents can be summed up as suggesting that "[t]he focus is on whether, considering all of the facts and circumstances at issue, the negotiation is, *or can be said to have been*, 'meaningful.'"[109]

Bad faith, and the doctrine of abuse of right more generally, is also generally understood as turning upon reasonableness assessed from the perspective of the actor.[110] As one commentator has put it, "objective factors are key."[111] Thus, for instance, in the *Conditions of Admission of a State to the United Nations* case, the ICJ held that the criteria laid down in the UN Charter for state admission to the UN were exhaustive, but that "Article 4 does not forbid the taking into account of any factor which it is possible *reasonably* and in good faith to connect with the conditions laid down in that Article."[112] In essence, bad faith excluded consideration only of those factors that no reasonable state would consider. Likewise, in a famous dissent, Judge Anzilotti glossed the bad faith principle by noting that facts and

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107 North Sea Continental Shelf, *supra* note 54, at ¶ 85 (emphasis added); *see also* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 49 (Dec. 20) (discussing reasonableness).

108 Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281, at 34 (Perm. Ct. Arb. 1957) (emphasis added).

109 Robert P. Barnidge, Jr., *The International Law of Negotiation as a Means of Dispute Settlement*, 36 FORDHAM INT'L L.J. 545, 560 (2013) (emphasis added); *see also* Guy. v. Surin., 30 R.I.A.A. 1, ¶ 476 (Perm. Ct. Arb. 2007) ("In order to satisfy its obligation to make every effort to reach provisional arrangements, Suriname would have actively had to attempt to bring Guyana to the negotiating table, or, at a minimum, have accepted Guyana's last minute 2 June 2000 invitation and negotiated in good faith.").

110 Lest this be overstated, it bears noting that there are some inflections of subjective intent within the doctrine of bad faith, e.g., the concept of malicious action as an abuse of rights. *Cf.* Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46 (June 7). For a discussion of a related area of law—the concept of "ulterior motives"—*see infra* notes 149-53 and accompanying text. *Cf.* KOLB, *supra* note 99, at 142.

111 Mitchell, *supra* note 6, at 351.

112 Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep. 57, 63 (May 28) (emphasis added).

circumstances could give rise to an inference of bad faith[113]—by virtue of what a reasonable actor would or would not have done under those same circumstances.

A second doctrinal area where intent turns on what a reasonable state would have done under the circumstances is the law of "peaceful purposes." The Nuclear Non-Proliferation Treaty ("NPT"), for instance, provides that "[n]othing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy *for peaceful purposes*."[114] This provision has been glossed as turning on a state's intention in undertaking enrichment activities.[115] However, it has generally been understood by reference to the uses to which an activity would ordinarily be put.[116] That is, the approach has been to infer a state's intent by virtue of what a reasonable state would intend by undertaking certain activities.

The same is true of another treaty where a "peaceful purposes" limit appears. Indeed, Article IV of the Outer Space Treaty provides that "[t]he moon and other celestial bodies shall be used by all States Parties to the [Outer Space] Treaty exclusively for peaceful purposes."[117] There is some disagreement about whether this prohibits all military activities or only "aggressive" behavior.[118] But again, the discussion has tended to focus on the character of the activities rather

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113 The Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), Preliminary Objections, 1939 P.C.I.J. (ser. A/B) No. 77, at 98 (Apr. 4) (dissenting opinion of Anzilotti, J.) ("The situation might be somewhat different if the Bulgarian Government, being free to denounce the Treaty at any time, had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case."); *see also* G. D. S. Taylor, *The Content of the Rule against Abuse of Rights in International Law*, 46 BRIT. Y. B. INT'L L. 323, 332 (1972-73) ("The object is to find whether the facts indicate a defective reason without attempting to find that the State had that reason actually in mind.").

114 Treaty on the Non-Proliferation of Nuclear Weapons art. 4(1), Apr. 22, 1970, 729 U.N.T.S. 161 (emphasis added).

115 Acton, *supra* note 20, at 120. The U.S. has generally taken the view that "peaceful purposes" in this context means "non-aggressive."

116 David S. Jonas & Ariel E. Brownstein, *What's Intent Got to Do with It? Interpreting 'Peaceful Purpose' in Article IV.1 of the NPT*, 32 EMORY INT'L L. REV. 351, 354-55 (2018).

117 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IV, Oct. 10, 1967, 610 U.N.T.S. 205.

118 *See* David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1198 n.28 (2009); WHITE HOUSE, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 3, https://obamawhitehouse.archives.gov/sites/default/files/national_spa ce_policy_6-28-10.pdf, (June 28, 2010).

than the subjective intent of the actor[119] with the thought that a state's "purpose" can be read back from the nature of the activities in question.[120]

B. Intent, Reasonableness, and Regulation of Behavior

If a reasonable observer test for intent offers a way to *understand* the state, a reasonable actor test for intent is a way to limit its discretion. That is, sometimes intent, understood from the perspective of a reasonable actor, can be a proxy for placing bounds on conduct. The criminal law concept of negligence, to which I previously drew a parallel, is an example of this. While some have argued that criminal negligence is in fact subjective,[121] it is more broadly seen as an objective standard. That is, it is a way to use "intent" (at least in the sense in which the Model Penal Code uses *mens rea*[122]) as a way to define objective boundaries on conduct.

This is sometimes how intent—and in particular, the intent relevant to good faith and bad faith—functions in international law. Take the *Rainbow Warrior* arbitration, for example. New Zealand alleged that difficulties they had in verifying a French prisoner's medical condition amounted to a breach of France's obligation to comply in good faith with a bilateral treaty. The arbitral tribunal held otherwise, noting that there was no "questioning their[, France's,] good faith" and discussing a range of factors that made the behavior of each party reasonable.[123] In that case, intent functioned as a backdoor to assessing the reasonableness of state conduct.

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119 *See* Emily Taft, *Outer Space: The Final Frontier or the Final Battlefield?,* 15 DUKE L. & TECH. REV. 362, 376-77 (2017) (distinguishing passive or defensive activities from "aggressive" activities). In fact, Bin Cheng refers in one paper to peaceful *uses*. *See also* Bin Cheng, *Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space*, 73 INT'L L. STUD. 81, 85-86 (2016).

120 Other examples include UN Security Council sanctions exceptions for materiel "intended solely" for specific purposes, *see, e.g.*, S.C. Res. 2399 ¶ 1(b), and *animus occupandi* (the intent to occupy territory), which has traditionally been shown through objective action such as raising a flag, *cf.* Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senakaku Islands*, 29 U. PA. J. INT'L L. 903, 914 & n.53 (2008).

121 *See* George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 PENN. L. REV. 401, 406 (1971) ("West German and Soviet theorists now hold, with equal conviction, that liability for negligent conduct is based on a subjective standard of responsibility.").

122 *See* MODEL PENAL CODE § 2.02.

123 N.Z. v. Fr., 20 R.I.A.A. 215, at ¶ 90 (Apr. 30, 1990).

One would therefore expect to see this form of intent analysis where the legal regime concerns obligations of conduct. And indeed that is the case. So, for instance, the WTO has recently applied the concept of good faith in an objective "reasonableness" sense to require respect for reasonable due process in negotiations.[124]

V. INTENT AND EXCLUDED REASONS

While the prior two Parts have discussed two forms of objective intent, subjective intent is also relevant in international law. Indeed, the third form of state intent is the search for what the state (or its agents) *actually thought*.

A. Subjective Intent

This form of intent is most common in international criminal law,[125] and the most prominent scenario in which it has arisen has been in addressing whether a state has engaged in genocide. Before embarking on the substance, a quick word on the issue of how to treat an inference of intent from knowledge. Vaughn Lowe has argued that "as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts."[126] This Article likewise treats "intent inferred from knowledge" (meaning, when one assumes that a state "intends" a result where it knows about a relevant course of conduct and takes action in furtherance of that course of conduct) as subjective intent insofar as it turns on *actual knowledge*, and is not simply a matter of looking at statements or acts and

124 Mitchell, *supra* note 6, at 353-55.

125 The question of whether a state can commit a crime has historically been a thorny one. Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?,* 31 FORDHAM J. INT'L L. 921 (2007). In concluding that states have an obligation not to engage in genocide, the ICJ relied on two principal legal arguments: first, that by classifying genocide as an "international crime," it necessarily follows that states have agreed not to commit that crime. *See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* ICJ REPORTS, 2007, REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS, ¶ 166 (Feb. 26, 2007)) ("[B]y agreeing to such a categorization ['international crime'], the States parties must logically be undertaking not to commit the act so described.") [hereinafter Genocide Case]. Second, that the obligation to *prevent* genocide carries with it the obligation of states not to commit genocide, *see id*. ("It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence but were not forbidden to commit such acts through their own organs.").

126 Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 JAPANESE J. INT'L L. & DIPL. 1, 8 (2002).

assessing how a reasonable observer would understand them or how they square with what a reasonable actor would have done under the same circumstances.[127]

This Section first addresses how intent has been treated in connection with potential state involvement in genocide and then how state intent is discussed with respect to state liability for aiding and abetting another state's wrongful acts, before finally turning to cases concerning ulterior motives.

Beginning with the question of genocide, the blackletter law is relatively clear—at least when it comes to individual perpetrators—that genocide requires specific intent.[128] Indeed, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has suggested that one can only infer intent from knowledge (e.g., that genocidal acts are underway) where knowledge is coupled with active engagement[129] and where intent is the only reasonable inference from conduct.[130] Thus, for instance, in the *Karadžić* case, the relevant intent with respect to the genocide at Srebrenica was inferred from the defendant's failure to act to stop the killings after having been informed of them.[131]

The ICJ has explicitly looked to this same kind analysis of leaders' intent in discerning whether a state should be held responsible for genocide—that is, the ICJ has sought to ascertain the state's subjective intent by reference to the subjective intent of its key agents. Thus, for instance, in the *Genocide Case*, the Court analyzed the

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127 Likewise, for instance, when the U.S. Supreme Court inferred animus from the lack of a rational relationship between any government interest and the legal rules in question in *Romer v. Evans*, this too counted as "subjective" scrutiny. 517 U.S. 620, 632 (1996). *See generally* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) ("The cases instruct that there are essentially two methods: by pointing to direct evidence of private bias in the legislative record, or by supporting an inference of animus based on the structure of a law.").

128 *See, e.g.*, Kai Ambos, *What Does 'Intent to Destroy' in Genocide Mean*, 91 INT'L REV. RED CROSS 833, 837 (2009) (discussing "a 'special intent' or dolus specialis").

129 Marko Milanovic, *ICTY Convicts Radovan Karadzic*, EJIL TALK! (Mar. 25, 2016), https://www.ejiltalk.org/icty-convicts-radovan-karadzic/.

130 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶¶ 5811, 5830 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

131 Prosecutor v. Karadžić, *supra* note 130, ¶ 5830; *cf.* Milanovic, *supra* note 129 ("The whole reasoning rests on what inferences can be drawn from Karadzic's contacts with Deronjic."); Kai Ambos, *Karadzic's Genocidal Intent as the "Only Reasonable Inference?,"* EJIL TALK! (Apr. 1, 2016), https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/ ("[T]his transfer from knowledge to (genocidal) intent appears to be the key to the Chamber's finding of Karadzic's genocidal intent regarding Srebrenica.").

Decision on Strategic Goals of the Republika Srpska to try to discern Milošević's intent, and from his intent that of the state.[132] Indeed, the ICJ specifically relied on prior judgments of the ICTY regarding individual defendants in analyzing whether Serbia should be deemed to have committed genocide.[133]

This approach stands in stark contrast to both concepts of objective intent described above. That is, the relevant intent is not inferred from how a reasonable state would have behaved.[134] And while semiotics play a role in understanding the way particular attacks (for instance, on cultural symbols) may evidence a subjective intent to destroy a group,[135] the question is not how to understand what the state is trying to communicate, especially given the likelihood that much of what the state will say is to deny that it is committing genocide.

So, for instance, the Myanmar Fact-Finding Mission—which also looked to the jurisprudence of the criminal tribunals in assessing whether genocide had been perpetrated by Myanmar against the Rohingya[136]—relied on factors such as "specific utterances of

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132 Genocide Case, *supra* note 125, ¶ 371.

133 *Id.* at ¶ 223 ("[T]he Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal."); *cf. id.* at ¶ 295 (deferring to the ICTY's determination of when specific intent was established).

134 Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in* Bosnia v. Serbia *and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L. J. 871, 899-900 (2008); *see also* Amabelle C. Asuncion, *Pulling the Stops on Genocide: The State or the Individual?*, 20 EUR. J. INT'L L. 1195, 1221 (2009). The ICJ looked to how the ICTY scrutinized a "Strategic Goals" document of the Republika Srpska and then said "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it *could only point* to the existence of such intent." Genocide Case, *supra* note 125, ¶ 373 (emphasis added). I take no position on whether such a stringent standard is appropriate as a legal matter; my point here is descriptive.

135 Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1127 (Jan. 1, 2004) (discussing "acts of violence against cultural symbols associated with the group").

136 Human Rts. Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, at 356-58 (Sept. 17, 2018) [hereinafter FFM Detailed Report]; *see also id.* at 359 ("On the basis of information before it, and mindful of the limits of its mandate, the Mission has not concluded that particular individuals committed the identified prohibited acts with the requisite special intent, giving rise to individual criminal responsibility for genocide. Instead, the Mission assessed the body of available information in light of the jurisprudence of international tribunals, and considered whether the factors that have allowed for the reasonable inference of genocidal intent in other contexts and cases, are present in the case of the Rohingya in Rakhine State.").

commanders and direct perpetrators" in finding genocide.[137] Likewise, a legal assessment of the situation in Myanmar by the Public International Law & Policy Group noted that "[t]he perpetrators regularly referred to their Rohingya victims using racial and ethnic slurs."[138] And a recent paper on the subject pointed to the possibility that "a formal and written policy to destroy the Rohingya" may exist.[139]

While one may of course also look to state acts,[140] the Myanmar Fact-Finding Mission did not infer intent on the basis of what one might reasonably expect based on such facts, but rather found that the requisite intent existed because all other explanations for the acts in question were *unreasonable*.[141] This is thus different from the concept described in Part IV, insofar as circumstances are genuinely sought to be used to prove subjective intent, rather than ascribe an intent that may or may not have actually been the intent of the relevant party.[142]

A second area of law where state intent means—at least in the view of some—subjective intent, is the rule governing the responsibility of a state for the bad acts of another state to which it provides aid or assistance. Article 16 of the ILC's draft Articles on State Responsibility asserts that liability should attach where "[t]he assisting State has intention to facilitate and/or knowledge of the circumstances of the internationally wrongful act."[143] "Intention" here is understood (at least by some) as distinct from knowledge and as a

137 Human Rts. Council, Rep. of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64, at 16 (Sept. 12, 2018) [hereinafter FFM Report].

138 PILPG, DOCUMENTING ATROCITY CRIMES COMMITTED AGAINST THE ROHINGYA IN MYANMAR'S RAKHINE STATE 75 (2018), *available at* https://www.publicinternationallawandpolicygroup.org/rohingya-report.

139 Beth Van Schaack, *Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations*, J. INT'L CRIM. JUST. 285, 311 (2018) [hereinafter Van Schaack, *Commission of Genocide in Myanmar*].

140 *See, e.g.*, PILPG, *supra* note 138, at 76; Van Schaack, *Commission of Genocide in Myanmar*, *supra* note 13939, at 18-19.

141 FFM Report, *supra* note 137, at 16 ("Having given careful consideration to other possible inferences regarding intent, the mission considers that these can be discounted as unreasonable.").

142 *Cf. infra* notes 175-176 and accompanying text (discussing rational basis review); Van Schaack, *supra* note 1355, at 1128 ("Evidence of genocidal intent can be obscured where alternative intents or purposes can be identified, *hypothesized*, or claimed.") (emphasis added).

143 *State Responsibility*, 2001 U.N.Y.B. INT'L L. COMM'N art. 16, at 65 (2001) [hereinafter *Draft Articles on State Responsibility*].

subjective concept.[144] So, to use Yemen as an example, the question would be whether for the U.S. to bear responsibility for Saudi Arabia's indiscriminate attacks it would need to "not only intend[] the act to occur [i.e., an attack] but intend[] for it to occur in an internationally wrongful manner [i.e., indiscriminately]."[145] There is sufficient support for the latter view from some quarters that one author has worried that "[i]f intent is required, liability will only be found in the most limited of instances where a country makes clear its intentions to facilitate human rights abuses. Countries will rarely declare these intentions and meeting the intent requirement without these declarations will prove near impossible."[146]

Finally, a third area of international law that seeks to understand the state's subjective intent is cases of "ulterior motive." Both the Inter-American Convention on Human Rights and the European Convention on Human Rights contain provisions prohibiting the invocation of rules permitting the restriction of rights for ulterior motives.[147] These provisions are distinguishable from the rules governing bad faith that are described above, although they are closely

144 *Cf.* Genocide Case, *supra* note 125, ¶ 421 ("[T]he question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator."); Robert Lawless, *A State of Complicity: How Russia's Persistent and Public Denial of Syrian Battlefield Atrocities Violates International Law*, 9 HARV. NAT'L SEC. J. 180, 199 & n.96 (2018); Ryan Goodman & Miles Jackson, *State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)*, JUST SECURITY (Aug. 31, 2016), https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen ("The third condition – the fault required of the assisting State – is the most disputed element of the rule.").

145 *See* Hathaway et al., *supra* note 10.

146 Kate Nahapetian, *Confronting State Complicity in International Law*, 7 UCLA J. INT'L L. & FOREIGN AFF. 99, 110 (2002). Of course, even if one thinks that subjective intent is required, as with respect to the question of intent to commit genocide this intent could potentially be inferred from knowledge. *See* Goodman & Jackson, *supra* note 144 ("[W]hatever the assisting State's overall purposes, if it knows that its assistance is significantly contributing to the commission of the principal wrong it may be legally responsible."); Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407, 417 (2016), ("[I]f an assisting State continued to provide assistance to its partner with knowledge of systemic deficiencies in its partner's targeting or detention practices that render LOAC violations more likely, there is a risk that the intent by the assisting State to facilitate LOAC violations could be inferred.").

147 American Convention on Human Rights art. 30, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art. 18, Nov. 4, 1950, 213 U.N.T.S. 222.

related. [148] And they turn on whether either direct [149] or circumstantial[150] evidence shows that the government took a decision for a reason other than the reasons prescribed by the relevant rule. Thus, for instance, paradigmatic cases before the European Court have focused on whether a government arrested an individual for the purpose of bringing them to justice, or, instead, in order to suppress speech or quash dissent. Suspicion of a crime is a basis to infringe an individual's right to liberty. However, the question is whether the state had an ulterior motive for invoking the rule permitting a restriction on liberty, and courts have sought the *subjective* reasons for action. Thus, for instance, in a recent case, the Inter-American Court found that Venezuela had decided not to renew a broadcast license for reasons relating to the content of the broadcaster's speech and not for the reasons it had claimed.[151]

B. Why Regulate Motive?

This model of intent turns on the thought that whatever the *conduct* of a state, there are certain *reasons* for acting that are normatively disfavored[152]—or that render already disfavored conduct even more heinous. This concept of "smoking out" illicit motives is of course a familiar one in the U.S.[153] In particular, in the U.S., courts have used means-ends testing to engage in such "flushing out."[154]

148 *Cf.* Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R., at ¶ 283 (2017), *available at* http://hudoc.echr.coe.int/eng?i=001-163671.

149 *Id.* at ¶ 278.

150 *Id.* at ¶¶ 323-24.

151 *See* Silvia Higuera, *Venezuela's Supreme Court: Inter-American Court's Ruling on RCTV is 'Unenforceable*,' KNIGHT CTR. FOR JOURNALISM IN THE AMERICAS (Sept. 22, 2015), https://knightcenter.utexas.edu/blog/00-16310-venezuelas-supreme-court-inter-american-courts-ruling-rctv-unenforceable.

152 *See generally* Schwartzman, *supra* note 18; *see also* Garrett, *supra* note 26, at 7 ("[G]overnment action that intentionally discriminates is itself illegitimate: it cannot be justified as in the public interest, not just because it harms groups but because it is not in the public interest to demean or disparage a group.").

153 *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 6 U. CHI. L. REV. 413, 441 (1994) ("These rules use objective criteria, focusing on what a law includes and excludes, on what classifications it uses, on how it is written. But in making such inquiries, the rules in fact serve as an arbiter of motive.").

154 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980).

While this kind of normativity with respect to reasons is more familiar to U.S. domestic[155] and criminal law,[156] the idea that there can be normative limits on the reasons for state behavior has some support in international law more broadly. Indeed, it was at the root of the debate regarding fault when the ILC's Articles of State Responsibility were being drafted—in particular, the question of state responsibility for international crimes.[157] As one scholar said at a time when the ILC's approach was up for debate, the difference between the proposed international-crimes regime and other forms of state responsibility turned on whether the central focus should be on restoration of the *status quo ante* or "the normative integrity of the legal system" and "the 'violation' as such."[158] Indeed, in one of his reports the ILC's Special Rapporteur on State Responsibility noted that "the notion of 'objective' responsibility, which is a keynote of the draft articles, is more questionable in relation to international crimes than it is in relation to international delicts, and the case for some express and general requirement of fault (*dolus*, *culpa*) is stronger in relation to international crimes."[159]

Of course, the draft Articles ultimately adopted by the ILC do not purport to address fault (in the sense of blameworthiness, which in the context of criminal law is often predicated upon intent). But the idea that there should be "excluded reasons" remains relevant to other areas

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155 Niels Petersen, *Legislative Inconsistency and the 'Smoking Out' of Illicit Motives*, 64 AM. J. COMP. L. 121, 141 (2016) ("Courts are not able to observe the intention of the members of the legislature enacting a law. . . . Legislative inconsistency is precisely such indirect evidence."). *Compare* Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller*: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 387 (2009) (describing means-ends testing in the U.S. as "instrumental in smoking out elicit motives"), *with id.* at 393 ("[B]alancing is viewed in Germany, and elsewhere on the Continent, as the objective, systematic, and logical implementation of constitutional rights, while realizing values in everyday life considered the quintessential task of the Court."), *and id*. at 394 ("[B]alancing [over and above means-ends testing] enjoys a central status in German constitutional law.").

156 Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345, 347 (1990) ("The classical view of crime saw it as a moral code, with morality affecting both definition and sanction.").

157 *Cf.* Nollkaemper, *supra* note 21, at 617 ("The conduct of the state as a legal person is assessed against an objective standard."); Marko Milanovic, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 560 (2006) ("Some of the more delicate questions of state responsibility, such as whether fault or damages comprise a necessary element of responsibility, have also been relegated to the area of primary rules.").

158 Georges Abi-Saab, *The Uses of Article 19*, 10 EUR. J. INT'L L. 339, 350 (1999).

159 James Crawford (Special Rapporteur on State Responsibility), *First Rep. on State Responsibility*, U.N. Doc. A/CN.4/490 and Add. 1-7, at 20 (1998).

of international law. Take the law of countermeasures. The ILC has suggested that these may only be taken "in order to induce that State [that has breached its obligations] to comply with its obligations."[160] The commentary provides little gloss on the purpose element, other than to say that "[t]he word 'only' in paragraph 1 applies equally to the target of the countermeasures as to their purpose."[161] But it would make sense to think of subjective intent here because the *reason* for the intent requirement is to rule out improper purposes—such as invocation of countermeasures in order to assert dominance over another state. For instance, in a recent dispute between Macedonia and Greece, the ICJ was not convinced of the ostensible reasons asserted for Greece's objection to Macedonia's admission to NATO.[162] That is, subjective intent allows for disapproval of actions that, even if lawful on their face, should not be permissible because of the underlying, subjective reason for acting.

VI. WHY THE FORM OF INTENT MATTERS

If the prior three Parts have sought to sketch a rough taxonomy of ways of understanding intent under international law, this Part seeks to show why the choice among these different models matters—that is, by briefly describing two areas of law in which the manner of interpreting the requisite state intent is unsettled (or at least more unsettled than with respect to those areas of law covered above), this Part seeks to show the normative stakes. The goal is not to argue that one way of conceptualizing intent is better or worse for each of these two areas of law; rather, the purpose is simply to demonstrate that greater thought should be given to how to understand intent, as it is a choice with consequences. This Part first addresses discrimination before turning to expropriation.

A. Discrimination

This Section seeks to show that intention in the context of discrimination is generally understood objectively, but that there are

160 *Draft Articles on State Responsibility*, *supra* note 143, at art. 49(1).

161 *Id.* at 130.

162 Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Maced. v. Greece), Judgment, 2011 I.C.J Rep. 644, ¶ 164 (Dec. 5) ("[T]he Court is not persuaded that the Respondent's objection to the Applicant's admission was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2.").

still some lingering glimmers of subjectivity.[163] International law prohibits both direct and indirect discrimination.[164] "Direct discrimination" is also frequently described as differential treatment.[165] "Indirect discrimination," by contrast, covers measures that have a disparate impact.[166] So, for instance, the Convention on the Elimination of Racial Discrimination provides that "'racial discrimination' shall mean any distinction . . . based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights."[167] Purposeful discrimination is direct discrimination; and measures with discriminatory effect are indirect discrimination.

One might think that indirect discrimination does not entail consideration of intent at all. Indeed, a recent decision of the Committee on the Elimination of Racial Discrimination held that domestic "courts' insistence that the petitioner prove discriminatory intent is inconsistent with the Convention's prohibition of conduct

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163 This may simply be a function of change over time—in that the more subjective approach had previously been favored—but it also could have something to do with the dominant status of the U.S. on the international stage and the role it ascribes to subjective intent in the law of discrimination (as a matter of domestic law). *Compare* Reva B. Siegel, *The Supreme Court 2012 Term: Foreword*, 127 HARV. L. REV. 1, 10, 19 (2013) (noting that early more-protective Equal Protection decisions focused on "the harms of segregation," but that later the Supreme Court focused on whether decision-makers were motivated "because of" discriminatory impact), *with* Julie C. Suk, *Disparate Impact Abroad*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT 50, 283, 300-01 (E. Katz & S. Bagenstos eds., 2015) ("[T]he European law of indirect discrimination . . . did not begin as an evidentiary dragnet for racism, ethnic animus, or any other evil."). Ironically, other states appear to have potentially adopted disparate impact tests on the basis of U.S. jurisprudence. *See generally* Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 109 (1998).

164 Dinah Shelton, *Prohibited Discrimination in International Human Rights Law*, *in* THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 261, 279 (Aristotle Constantinides & Nikos Zaikos eds., 2009) ("Most treaties, like ICCPR Article 26, address measures having the purpose *or* the effect of nullifying or impairing the equal recognition, enjoyment or exercise by all persons of their rights and freedoms.").

165 *Cf.* Jack M. Balkin & Reva B. Siegel, *Symposium: Fiss's Way: The Scholarship of Owen Fiss: I. Equality: The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (discussing the ways in which discrimination law seeks to prohibit classifications on the basis of race).

166 *See* Hunter & Shoben, *supra* note 1633, at 109 & n.1.

167 International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Dec. 21, 1965, 660 U.N.T.S. 195 (emphasis added).

having a discriminatory effect."[168] The same is true under the European Convention.[169] Thus, for instance, in *D.H. v. Czech Republic*, the Court explained that it had "already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group . . . . [and that] such a situation may amount to 'indirect discrimination.'"[170]

And yet, while direct and indirect discrimination sound conceptually distinct, insofar as the latter could be conceptualized as independent of intent, courts and other human rights bodies have approached them in a somewhat similar way. That is, once a threshold is reached—in the former class of cases, where a distinction on the basis of a protected class is identified, and in the latter cases, where statistics or other evidence show uneven impact—the government's asserted justification for the measure is evaluated as to whether it provides "objective and reasonable" grounds for the distinction or effect at issue.[171] And it is there that intent re-enters the picture with respect to indirect discrimination—as the governmental "purpose" needs to be identified to be weighed against the harms caused by the distinction.

With respect to both direct and indirect discrimination, there is little effort to ascertain whether the government's stated justification is in fact the real reason for the measure at issue. Sometimes bodies

168 V.S. v. Slovk., Opinion, Comm. on the Elimination of Racial Discrimination, Communication No. 56/2014, at ¶ 7.4, U.N. Doc. CERD/C/88/D/56/2014 (Dec. 4, 2015).

169 *See* Oddný Mjöll Arnardóttir, *Non-Discrimination Under Article 14 ECHR: The Burden of Proof*, 51 SCANDINAVIAN STUD. L. 13, 26 (2007) ("Generally, there is no express requirement under the Convention to establish intent to discriminate against particular groups."); *see also* Rupert Althammer et al. v. Austria, Human Rights Comm., Commc'n No. 998/2001, ¶ 10.2 (Aug. 8, 2003) (explaining in the context of the ICCPR that "a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate").

170 D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 313 (2007).

171 Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 56 (Jan. 19, 1984). Sometimes this amounts to something akin to full blown proportionality analysis. *See, e.g.*, Abdulaziz et al. v. U.K., App. Nos. 9214/80; 9473/81; 9474/81, 7 Eur. Ct. H.R. 471, at ¶ 72 (1985)) (noting that a measure will be considered unlawful "if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'").

suggest that it is simply a question of reviewing proffered reasons;[172] in some systems, there are even limited lists of valid potential reasons for discriminatory measures, which must be clearly invoked in legislation.[173] Other courts and bodies even go beyond simply evaluating the government's asserted purpose; they ask what a rational actor *might have intended* (i.e., they rely on objective intent from the perspective of the reasonable actor). Thus, for instance, the Inter-American Court has suggested *possible reasons* for a measure.[174]

Overall, this kind of review bears some similarity to U.S. rational basis review,[175] where courts will identify objective reasons for a measure (without such reasons even being asserted by the legislature).[176]

That said, there is also some evidence that courts look to subjective intent in discrimination cases.[177] For instance, in one case, the European Court of Human Rights examined whether there was "any conclusive evidence to contradict [the purpose asserted by the government] in the Parliamentary debates."[178] Likewise, Ted Meron

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172 Shirin Aumeeruddy-Cziffra et al. v. Mauritius, Human Rights Committee, Communication No. 35/1978, ¶ 9.2 b(2)(i)(8) (Apr. 9, 1981) ("No sufficient justification for this difference has been given."); *see also Abdulaziz*, 7 Eur. Ct. H.R. at ¶¶ 84-85 (rejecting the approach of a minority of the Commission that had sought to discern the true purpose of legislation in favor of accepting the government's stated rationale).

173 Justyna Maliszewska-Nienartowicz, *Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?*, 3 INT'L J. SOC. SCI. 41, 51 (2014) ("The traditional approach in this regard is that direct discrimination can be justified only by particular reasons clearly set out in legislation.").

174 Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, *supra* note 171, ¶ 61 ("The provisions in question *may*, however, have been . . . .") (emphasis added).

175 Alec Stone Sweet & Jud Mathews, *All Things in Proportion? American Rights Doctrine and the Problem of Balancing*, 60 EMORY L. REV. 797, 802 (2011) ("This mode of scrutiny is broadly akin to what Americans call 'rational basis' review."); *cf.* U.S. R.R. Ret. Bd. v. Fritz, 449 U. S. 166, 179 (1980) ("Where . . . there are plausible reasons for Congress' action, our inquiry is at an end.").

176 Thomas B. Nachbar, *Rational Basis 'Plus*,*'* 32 CONST. COMMENT. 449, 454 (2017) ("Rational basis scrutiny doesn't require a rational relationship to the legislative end, though—it requires a relationship to any conceivable end."); *see, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993).

177 Even direct discrimination could in theory be understood in this way. *Cf.* Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("Certain classifications . . . in themselves supply a reason to *infer antipathy*. Race is the paradigm.") (emphasis added).

178 *Abdulaziz*, 7 Eur. Ct. H.R. at ¶ 78. One author has described recourse to legislative history as part of "step one" of proportionality analysis—that is, identifying the purpose of the measure at issue. *See* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L. REV.

has argued with respect to "distinctions [that] are made on the explicit basis of race" that "the discriminatory purpose may be apparent," and noted that "[a]n authoritative commentator has described purpose as the subjective test, and effect as the objective test of discrimination." [179] Some scholars have likewise suggested that indirect discrimination should be understood as a way to "smoke out" illegitimate motives.[180] Indeed, one has said of the European approach that "indirect discrimination is an effect-related concept . . . [and] [t]herefore, it is a useful tool in combating covert forms of discrimination."[181]

There is also a sense among some commentators that the concept of objective intent can be taken too far. That is, for instance, the European Court of Justice ("ECJ") held in a recent case challenging a rule prohibiting the wearing of religious symbols (including head-scarves) that "[t]he rule must . . . be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally."[182] But to some, the ECJ failed to reckon with the way in which ostensible neutrality might mask an invidious intent.[183]

383, 389 (2007) ("Determining the purpose of a law has not been a particularly difficult part of applying the proportionality principle in Germany. Usually the legislative history contains sufficient information about the purpose.").

179 Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 287 (1985).

180 Arnardóttir, *supra* note 169, at 37 (in an article written before *D.H. v. Czech Republic*, asserting that "in cases where the discrimination ground is covert the operative concepts of direct and indirect discrimination alike still seem to be conceptualised by the Court by requiring intent in the terms of a subjective motive to discriminate"); Meron, *supra* note 179, at 288 (discussing the CERD and arguing that "[t]he word 'effect' may thus bring actions for which discriminatory purpose could not be established within the scope of the Convention by allowing the inference of purpose from effect").

181 Maliszewska-Nienartowicz, *supra* note 173, at 43.

182 Case C-157/15, Achbita v. G4 Secure Solutions, 2017 E.C.R. 203.

183 *See, e.g.*, Eva Brems, *European Court of Justice Allows Bans on Religious Dress in the Workplace*, IACL-AIDC BLOG, Mar. 25, 2017 ("Neutrality can be an easy cover-up for prejudice."), *available at* https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace; Solon Solomon, *The Right to Religious Freedom and the Threat to the Established Order as a Restriction Ground: Some Thoughts on Account of the* Achbita *Case*, EJIL TALK! (Mar. 23, 2017), https://www.ejiltalk.org/the-right-to-religious-freedom-and-the-threat-to-the-established-order-as-a-restriction-ground-some-thoughts-on-account-of-the-achbita-case/ ("[T]he teleological reasons behind the imposition of such religious neutrality restrictions must be taken also into account. On this, *Achbita* and the other aforementioned judgments largely differ. In the latter, a policy of religious neutrality is imposed in the name of respect for

And in other areas of law that apply discrimination concepts, there are also elements of subjectivity. This is true with respect to the non-discrimination norm in bilateral investment treaties.[184] And it is likewise true of the concept of discrimination reflected in the crimes against humanity of persecution and apartheid.[185] The former explicitly requires intent to discriminate.[186] And while there is more willingness (objectively) to infer intent to discriminate than there is intent to destroy in the context of genocide,[187] there remains some sense that subjective intent is required.[188] The same is true of the crime of apartheid, which requires that "systematic oppression and domination not only have the effect, but moreover the purpose of maintaining a regime by one racial group over another racial group,"[189] and which has been interpreted as turning on the same kind

legality and the rule of law. On the contrary, in *Achbita*, such a policy is linked with the subjective and ideologically-loaded perceptions of a firm's owner and his opposition to any change to his firm's image or to the dynamics at work.").

184 Christopher H. Schreuer, *Protection Against Arbitrary or Discriminatory Measures*, *in* THE FUTURE OF INVESTMENT ARBITRATION 183, 196, 198 (C. A. Rogers & R.P. Alford eds., 2009) ("Despite *some cases pointing to discriminatory intent*, . . . [i]n general tribunals seem to favor an objective approach.") (emphasis added).

185 I take no position on the question of whether states are prohibited from committing these crimes other than to note that the logic of the ICJ in the *Genocide Case* would seem applicable to a range of crimes. *See supra* note 125.

186 Antonio Cassese, *Crimes Against Humanity*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 364 (Antonio Cassese et al. eds., 2002). For instance, in the *Krnojelac* case before the ICTY, the trial chamber held that "[t]he crime of persecution also derives its unique character from the requirement of a specific discriminatory intent. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate." Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgment, ¶ 435 (Int'l Crim. Trib. Former Yugoslavia Mar. 15, 2002).

187 *See, e.g.*, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 500 (Int'l Crim. Trib. Former Yugoslavia Mar. 24, 2016); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 366 (Int'l Crim. Trib. Former Yugoslavia Feb. 28, 2005).

188 Thus, for instance, the Fact-Finding Mission on Myanmar found "[o]n the basis of the overall pattern of conduct, . . . [that] there are reasonable grounds to conclude that the perpetrators carried out these actions with the intent to discriminate." FFM Detailed Report, *supra* note 136, at 372-73. However, the UN Commission of Inquiry on Eritrea on the other hand appears to have focused on statements and plans of the government. *See e.g.*, Human Rts. Council, Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea, U.N. Doc. A/HRC/29/CRP.1, 162 (June 5, 2015) (discussing radio statements); *id.* at 164 (discussing a plan document).

189 Carola Lingaas, *The Crime Against Humanity of Apartheid in a Post-Apartheid World*, 2 OSLO L. REV. 86, 102 (2015).

of subjective-intent-from-knowledge approach as has been taken with respect to genocide.[190]

All this to say that the question of how to understand intent for purposes of establishing discrimination under international law remains a contested question. I will next show that the same is true with respect to the law of expropriation before offering some thoughts regarding how these debates show that the model of intent selected has normative consequences.

B. Expropriation

Describing the role of intent in the law of expropriation is challenging because intent is relevant in two different ways. In general, a state may only take property for a "public purpose."[191] But the question of intent is also relevant to whether a taking has occurred in the first place. That is, courts and scholars have wrestled with the question of how to determine whether a regulatory action should be considered a taking (often described as a "regulatory taking") and, while they have sometimes sought to analyze the *effects* of the regulatory action (e.g., how significantly did it diminish a foreign

190 So, for instance, the UN Commission of Inquiry on Myanmar concluded that "those who designed and implemented the discriminatory policies and practices were aware of their *manifest impact* on the welfare and quality of life of the Rohingya. In this context, a finding that the perpetrators who went on to imprison, rape and kill on a mass scale were intending to maintain the institutionalized regime is not a significant leap." FFM Detailed Report, *supra* note 136, at 379.

191 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(1)(a) (AM. LAW INST. 1987). I do not address here difficult questions about compensation for takings nor do I address discriminatory takings. *Id.* at (1)(b)-(c).

entity's investment vis-à-vis its expectations),[192] in other cases they have looked to the "taking" state's intent.[193]

But how to discern the "aim" or purpose of regulations has been less than clear. In *Sea-Land Services Inc. v. Iran*, the Iran-U.S. Claims Tribunal considered a claim that Iran effectively expropriated Sea-Land's port service (by, for instance, requiring dismissal of any non-Iranian employees and limiting the cargo that could be brought into port).[194] It ultimately held that proof of intent was key.[195] And it appeared to focus on the state's *subjective* purpose.[196] *S.D. Meyers* is to a similar effect. There, the panel noted that "[t]he intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and officials with differing philosophies and perspectives."[197] It then went on, however, to scrutinize the actions and words of various government officials before concluding that "[i]nsofar as intent is concerned, the

192 Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT'L L. & POL'Y 275, 283 (2007) ("These statements indicate that in instances where government regulatory action achieves a complete taking, the purpose of this taking is more or less irrelevant."). Thus, for instance, in the *Metalclad* arbitration brought under NAFTA Article 1110 (an article that deals with expropriation), an arbitral panel relied on the *effect* of a state's action and explicitly disclaimed the relevance of the state's purpose. *See* Metalclad Corp. v. United Mex. States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 2000) (expropriation includes "covert or incidental interference with the use of property which has *the effect* of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State") (emphasis added); *id.* at ¶ 111 ("The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree.").

193 Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 GLOBAL BUSINESS L. REV. 189, 199 (2013) ("In lieu of the 'sole effect' test, many arbitral tribunals apply a broader standard by examining the purpose of a government action in addition to its effects on an investor."); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See it, or Caveat Investor*, 13 ASIA PAC. L. REV. 79, 84 (2005); *see also id.* at 85 ("Another approach is to test *the purpose* of a measure in order to determine its true nature.") (emphasis added).

194 Sealand Serv. v. Iran, Iran-U.S. Cl. Trib., Award No. 135-33-1, at *5 (June 22, 1984).

195 *See id.* at *13 ("Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land."); *see also* Katherine A. Byrne, *Regulatory Expropriation and State Intent*, 38 CAN. Y.B. INT'L L. 89, 92 (2000) ("In the tribunal's view, proof of intent was fundamental to a finding of expropriation.").

196 *But see* Fortier & Drymer, *supra* note 193, at 100 ("It bears noting that the majority decision in *Sea-Land* has not been followed in any subsequent case of the Iran-United States Claims Tribunal, and has been expressly contradicted.").

197 *S.D. Meyers v. Government of Canada*, Partial Award, ¶ 161 (Nov. 2000).

documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition."[198]

On the other hand, the U.S. Model Bilateral Investment Treaty ("BIT") appears to suggest that the appropriate test is that of a reasonable observer. That is, in determining whether a policy constitutes indirect expropriation, the Model BIT refers to the "character" of the action and regulatory actions "designed" to protect legitimate public welfare objectives.[199] The use of "character" and "design" suggest an extrinsic test.

Intent is also, of course, relevant to the question of whether an expropriation (including a regulatory taking) is for a public purpose.[200] U.S. courts, in connection with long-running litigation regarding the interplay between the act of state doctrine, sovereign immunity, and expropriatory actions have sometimes suggested that the (*subjective*) *intent* of the state should be key to this question. So, for instance, in the *Sabbatino* case, before it reached the Supreme Court and was dismissed on act of state grounds,[201] the Second Circuit looked to whether there was a "retaliatory purpose"[202] and ultimately concluded "we have no doubt that one of the basic reasons for the seizure here involved was to retaliate against the reduction by the United States in the sugar quota it had allotted to Cuba."[203] Likewise, the Restatement notes (presumably on the theory that "public purpose" is a rather subjective measure) that "[t]he requirement that a taking be for a public purpose . . . has not figured prominently in international claims practice, perhaps because the concept of public purpose is . . . not subject to effective reexamination by other states."[204] But there are also precedents to the contrary. So, for instance, in *ADC Affiliate v. Hungary*, an arbitral panel appeared to take the view that it would be sufficient for a state to advance a public interest that a policy *might*

198 *Id.* at ¶ 194.

199 OFF. OF U.S. TRADE REPRESENTATIVE, U.S. MODEL BILATERAL INVESTMENT TREATY, at Annex B 4(a)(iii), (b) (2012) [hereinafter U.S. MODEL BIT], *available at* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

200 *See also* U.S. MODEL BIT art. 6(1)(a).

201 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

202 Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 864 (2d Cir. 1962), rev'd 376 U.S. 398 (1964).

203 *Id.* at 865. *Cf.* Note, *Expropriation in International Law*, 48 IOWA L. REV. 878, 881 (1963) ("It would seem, therefore, that the court in *Sabbatino* was confusing 'motive' with 'purpose.'").

204 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 cmt e.

serve,[205] more akin to rational-basis type objective intent.[206] Thus, as is the case with respect to discrimination claims, understanding intent in the context of expropriation is a complex task.

C. Applying the Taxonomy

If different ways of understanding intent serve different purposes, it means that there is something at stake in areas of uncertainty such as those this Article has sought to identify.[207] That is, for instance, the way in which discriminatory intent is to be understood will have consequences for whether anti-discrimination is in fact an anti-classification or an anti-subordination principle (to use U.S. parlance). [208] For instance, should the headscarf cases be conceptualized as turning on whether rules meant to instantiate secularism reflect animus toward religion or how legislatures may lawfully balance competing objectives?[209]

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205 ADC Affiliated Ltd. v. Rep. of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, ¶¶ 432-33 (Oct. 2, 2006) ("If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless . . . . the claimed 'public interest' [is] unproved.").

206 Both approaches have historical antecedents. Thus, for instance, in the *Upper Silesia* case, the Permanent Court of International Justice, in seeking to understand the "purposes" served by large rural estates looked to the needs identified by the industries with which they were affiliated, including asserted future needs. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at ¶ 129 (May 25) ("[F]uture needs cannot be ignored, since it is not only legitimate but necessary for every industrial undertaking to provide in good time for future requirements."). But in the *Walter Fletcher Smith* arbitration, the tribunal looked to the "features" of an expropriation—including how it was carried out—in ruling that property had not been taken for a public purpose. Walter Fletcher Smith Claim (Cuba v. U.S.), 2 R.I.A.A. 913, 917 (May 2, 1929).

207 *Cf.* Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018) (contrasting what the authors describe as a concern with etiquette—i.e., subjective intent—and scrutiny of reasons—i.e., objective intent).

208 Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472-73 (2004) (describing the view of some that "anticlassification embodies the [anti-discrimination] tradition's fundamental value, the value of individualism" and contrasting it with the antisubordination principle, which stands for "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.").

209 *Cf.* Catherine Warin, *Two Opinions on Discrimination Based on Religion: Opinion of AG Kokott in C-157/15*, Achbita *and Opinion of AG Sharpston in C-188/15*, Bougnaoui, RSIBLOG (Sept. 6, 2016), https://rsiblog.blogactiv.eu/2016/09/06/two-opinions-on-discrimination-based-on-

Likewise, the question of how to understand the intent of a regulation (for purposes of assessing whether it is a taking) will affect the government's scope of authority to regulate, for instance the environment.[210] That is, focusing on intent rather than on effect is likely to mitigate the risk of arbitral challenge to regulations; moreover, focusing on subjective intent rather than objective intent would presumably further mitigate the risk of such challenges. Take, for instance, the arbitral award in *Methanex v. United States*. There, Methanex sought to have the tribunal accept a "conspiratorial thesis" (i.e., that there had been improper subjective intent); but the tribunal noted that the history of the measure in question, which Methanex alleged had effected a regulatory taking, did not support such an inference.[211] While *Methanex* was not entirely clear on whether it would take an objective or subjective approach to the question of intent, it has been widely seen as narrowing the scope of regulatory takings under NAFTA Article 1110, at least by refocusing on intent and away simply from the effect of the measure.[212]

Moreover, by understanding the purposes for which one might wish to look to intent, one can also construct reticulated regimes involving different kinds of intent. Take for instance the jurisprudence of the European Court of Human Rights regarding Article 18 of the European Convention, which concerns ulterior motive;[213] in cases brought under Article 18, there is often a first assessment as to whether an objective intent is satisfied (that is, whether the predicate to a restriction of a right exists) before subsequently looking to whether (subjectively) there is a second, ulterior motive for the action. Thus, for instance, in a recent seminal case on the topic, the court acknowledged that there had been a basis to detain the applicant (i.e., that there was appropriate objective intent), but also that his claim that

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religion-opinion-of-ag-kokott-in-c-15715-achbita-and-opinion-of-ag-sharpston-in-c-18815-bougnaoui-by-c-warin/.

210 *Cf.* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 N.Y.U. L. REV. 30, 61, 70 (2003) (noting the narrowness of the U.S. regulatory takings jurisprudence and contrasting that with a more expansive balancing before NAFTA tribunals).

211 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter D, p. 6 (Aug. 2005).

212 Kara Dougherty, *Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation*, 27 NW. J. INT'L L. & BUS. 735, 746-47 (2007); *see also* PEDRO J. MARTINEZ-FRAGA & RAYN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA 78 (2015).

213 *See supra* notes 148-150 and accompanying text.

the government had had an ulterior (subjective) motive had merit. That is, the purpose of an arrest must be to bring a person before a "competent legal authority,"[214] which the Court found had been established, but it went on to note that there may a "plurality of purposes,"[215] including an unacceptable ulterior motive. This kind of multi-faceted inquiry permits both a reasonableness inquiry *and* an overlay of excluded reasons.

VII. DIFFICULTIES IN ASCERTAINING STATE INTENT

If the prior Parts have sought to describe the different ways in which state intent is understood under international law, and show that these differences have consequences, this Part takes a step back and sketches some of the many difficulties in assessing state intent—and in particular subjective intent. That is, even if state intent is a useful tool, the next question is whether it is possible to ascertain. This Part argues that we should not rule out that it might be. Indeed, the idea that a legal entity might have subjective intent is not so foreign after all (insofar as we imagine corporations to have intent), and a policy shift already underway might assist with the unenviable task of understanding state intent.

A. The Problems

Before seeking to respond to concerns, though, this Section first describes them. That is, it is indeed the case that it can be difficult to identify the intent of a state. That is so even if it is to be assessed objectively. So, for instance, statements, which could be parsed from the perspective of a reasonable observer, may be expressed by a variety of agents—whether the President or Prime Minister, the Foreign Minister, an Ambassador, etc.,[216] resulting in confusion regarding "who speaks for the state." Indeed, more and more actors are now seeking to "speak for the state."[217] For example, in the U.S.,

214 *Merabishvili*, App. No. 72508/13 Eur. Ct. H.R., at 42.

215 *Id.*

216 Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10), ("States can act only by and through their agents and representatives.").

217 Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks & the Future of International Law*, 43 VA. J. INT'L L. 1, 3 (2002) ("[C]onstituent parts—especially regulatory agencies tasked with elaborating upon and enforcing the laws that manage complex societies—are increasingly networking with their counterparts abroad."). I do not address here the question of whether the intent of the state is in fact becoming less relevant because

much was made of when Senator Tom Cotton and other senators wrote a letter regarding the Iran deal while President Obama remained in office.[218] We have come a long way from the days when it was precisely true that "the President alone has the power to speak" in matters of foreign affairs,[219] and this makes more difficult any effort simply to read over from the intent of the head of state.[220] Nor is it the case that public remarks necessarily represent an official position. Look no further than recent litigation regarding President Trump's tweets, in which the Department of Justice has asserted that "[t]he President's quotation of media reporting cannot be assumed to be his confirmation of the media reporting."[221] And it remains to be seen whether even proponents of the "unitary executive" theory in the U.S. can rescue it from what has been described as an "inversion" of that theory.[222]

Two further complications that apply with respect to efforts to analyze state intent from the perspective of the reasonable actor are the concomitant proliferation of leaks about government decision-making (and their unreliability) and the increasingly complicated ways in which decisions are taken. That is, it is beyond dispute that leaks are on the rise. As David Pozen trenchantly put it, "[o]urs is a policy saturated with, vexed by, and dependent upon leaks."[223] Leaks can serve salutary purposes, helping to illuminate decisions that might

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of the participation of sub-state entities, *cf.* Max Greenwood, *20 States, 50 Cities Sign Pledge to Abide by Paris Agreement Even If US Withdraws*, THE HILL (Nov. 11, 2017), or non-state entities, *cf.* Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 J. L. CONTEMP. PROB. 195, 209 (Autumn 2004) ("An aggregated approach may produce the conclusion that the 'United States' is not participating in an international regime when in fact much (or even all) of what comprises the United States has signed on.").

218 *Cf.* Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 CHI. L. REV. 609, 636 (2018); *see also id.* at 613 ("Increased familiarity with the US policy process allows foreign governments to forum shop, reaching out to potentially sympathetic audiences in US government entities other than their traditional State Department interlocutors.").

219 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

220 *Cf.* Nollkaemper, *supra* note 21, at 634.

221 James Madison Project v. Dep't of Justice, No. 17-cv-00597-APM, Defs Mem. of Opp., at *10, *available at* https://www.documentcloud.org/documents/5348154-Reply-to-opposition-to-motion.html.

222 Jack Goldsmith, *Our Non-Unitary Executive*, LAWFARE (July 30, 2017), https://www.lawfareblog.com/our-non-unitary-executive. Of course, in many countries, there are few subscribers to that theory.

223 *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 513, 513 (2013).

otherwise be kept secret. But as leaks proliferate,[224] they can also be difficult to parse, with only-partially-accurate stories planted in an effort to gain status (or cause someone else to lose status).[225] Moreover, advances in technology are likely to further enable deepfakes and other online conspiracies.[226] All of this means that the effort to understand a state's decision-making will only grow more difficult, as leaks no longer serve as a reliable way to circumvent secrecy rules. The second difficulty is that as decisions are increasingly made in reliance on algorithms, this may reduce their "explainability."[227]

These difficulties are exacerbated when it comes to assessing subjective intent. That is, one advantage of an objective approach to intent is that it avoids aggregation problems—i.e., the difficulty in coming to a view of a state's subjective intent when that subjective intent is comprised of a number of individuals' intents.[228] The fraught

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224 *Cf.* Alex Lubben, "*Fire and Fury" Claims the Worst Leakers Were Top Advisers—and Trump Himself*, VICE NEWS (Jan. 5, 2018), https://www.vice.com/en_us/article/qvwz3p/fire-and-fury-claims-the-worst-leakers-were-top-advisersand-trump-himself.

225 *Cf.* Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *in* TRANSPARENCY IN INTERNATIONAL LAW 1, 10-11 (Andrea Bianchi & Anne Peters eds., 2013) ("The high level of manipulability of information, the risk of an information overload or of a disinformation are all potential dark sides of transparency.").

226 Michael Chertoff & Eileen Donahoe, *Commentary: For Election Hackers, A New and More Dangerous Tool*, REUTERS (Nov. 12, 2018), https://reut.rs/2JYaw7n ("By the next U.S. presidential election, these tools will likely have become so widespread that anyone with a little technical knowledge will—from the comfort of their home—be able to make a video of any person, doing and saying whatever they want.").

227 *Cf.* Cliff Kuang, *Can A.I. Be Taught to Explain Itself?*, N.Y. TIMES, (Nov. 21, 2017), https://nyti.ms/2hR2weQ (noting that the EU has begun "enforcing a law requiring that any decision made by a machine be readily explainable").

228 Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89, 94 (2002). In its classic formulation, the problem can be described as follows: If taking a decision requires making a number of subsidiary judgments on a range of premises, one may end up with a different result depending on whether one aggregates views on the premises or only the ultimate question to be decided. That is, suppose the question is whether a three-judge panel should find Person A guilty of a crime, and he has been charged with murder and conspiracy. Further suppose that Judge 1 believes Person A guilty of murder, but not conspiracy; Judge 2 believes Person A to be guilty of conspiracy, but not murder; and Judge 3 believes Person A to be innocent. If one aggregates the judges' views of Person A's guilt, then he should be found guilty, but if one aggregates their views on each charge, he or she will be found innocent (as two judges think he did not commit murder and two judges think he is not guilty of conspiracy).

enterprise of aggregating intent is less easily avoided when it comes to subjective intent.

B. Lessons from Corporate Intent

But all may not be lost. That is, the search for state intent is not necessarily a fool's errand. One need to look no further than the robust scholarship surrounding corporate intent (including under international law[229]) to see that discussions of the intent of a legal entity, while thorny, need not be fruitless.[230]

Just as with respect to the question of state intent, there has long been skepticism that corporate intent can be readily discerned.[231] But that has not prevented the development of various approaches to it. One scholar has helpfully divided those approaches into the "atomistic" and the "holistic."[232] The former tend to be characterized by a heavy emphasis on *respondeat superior*. Take for instance *United States v. Sun-Diamond Growers of California*.[233] In that case, the court held that even where the corporation might "look more like a victim than a perpetrator," an employee's conduct could nevertheless be imputed to the corporation where the employee was acting with "an intent (however befuddled) to further the interests of his employer."[234] This has significant parallels under international law insofar as state intent is often a function of the intent of state officials.[235]

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229 Prosecutor v. New TV SAL et al. (Decision on interlocutory appeal concerning personal jurisdiction) STL-14-05/PT/AP/ARI26.1 (Oct. 2, 2014); *see also id.* at 30 ("[C]orporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law."); Sean Murphy, *Corporate Liability and Crimes Against Humanity*, JUST SECURITY (Oct. 24, 2017), https://www.justsecurity.org/46242/corporate-liability-crimes-humanity/. I take no position here on the various questions that have been raised with respect to corporate criminal liability under international law. I simply note that there are precedents for its application.

230 *Cf.* Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351, 384-85 (2016) (discussing advantages to a collective knowledge approach with respect to liability for atrocity crimes).

231 Thus, for instance, Justice Kennedy's opinion in a recent Alien Tort Statute case cited the Nuremberg dictum that "'[c]rimes against international law are committed by men, not by abstract entities.'" *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402, 200 L. Ed. 2d 612 (2018).

232 Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2071 (2016).

233 United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1997), *aff'd*, 526 U.S. 398 (1999).

234 *Id.*

235 *See, e.g.*, *Draft Articles on State Responsibility*, *supra* note 14343, art. 5.

There are variants on this, too, just as there are variants on similar constructs under international law.[236] For instance, the Model Penal Code emphasizes the role of the "inner circle" in divining corporate intent.[237] Just so, Andre Noelkamper argues that "[i]t might be said that the intent of a state is directly contingent on the intent of, for instance, the head of state, and that his or her intent can directly be attributed to the state."[238]

On the other hand, some take the view that corporate intent should be derived from the intent or knowledge of multiple employees, whose views/knowledge can be aggregated and imputed to the corporation. Take for instance *United States v. Bank of New England, N.A.*, in which the trial court held that a "bank's knowledge is the totality of what all of the employees know within the scope of their employment," [239] a conclusion that was upheld on appeal.[240] Others have offered variants on this, such as the idea of inferring intent based on a collection of actions.[241]

So, for instance, one might suggest that corporate intent can be found in the "empathetic collectivity of the organization," meaning the "organizational objective or purpose which explains the membership." [242] The corollary at the international level would presumably be that state intent can be inferred from the state's broader course of conduct, even if effected by a variety of state actors.

All this suggests that there are ways to approach the question of intent of a state, including subjective intent. That's not to say that these theories of corporate intent—or any analogous theories of state intent—are beyond reproach. Thus, for instance, as one scholar has said of the "atomistic" approach, *respondeat superior* "provide[s] a relatively consistent answer in the vast majority of cases" where there

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236 It bears noting however that "[s]tate responsibility neither depends on nor implies the legal responsibility of individuals." Nollkaemper, *supra* note 21, at 616.

237 MODEL PENAL CODE § 2.07(1)(c) (2019); *see also* Diamantis, *supra* note 232, at 2068.

238 Nollkaemper, *supra* note 21, at 634; *see also* Kai Ambos, *What Does 'Intent to Destroy' in Genocide Mean*, 91 INT'L REV. RED CROSS 833, 845 (2009) (proposing a distinction between high- and low-level figures for purposes of individual-liability intent).

239 821 F.2d 844, 854-56 (1st Cir. 1987).

240 *Id.* at 856 ("The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.").

241 Diamantis, *supra* note 232, at 2082.

242 Suzanne Corocoran, *Bad Faith and Bad Intentions in Corporate Law*, *in* INTENTION IN LAW AND PHILOSOPHY 255, 259 (Ngaire Naffine et al. eds., 2001).

are only a "few employees running the corporation."[243] That situation is no longer the case in today's business world, nor of course in the case of the modern state. Likewise, the problem with the "holistic"' approach is that while it may be possible to aggregate knowledge, aggregating intention is a considerably more difficult proposition.[244] However, the point is only to suggest that further work on the question of state intent must be feasible—if comparable work is being done on the question of corporate intent.

C. Transparency

Finally, this Section lays out another practical way to facilitate the inquiry into state intent: getting states to explain themselves and make their decision-making processes more transparent. Indeed, there is a trend in what some call "global administrative law" toward requiring states to disclose the reasons for their decisions. This would go a long way toward better understanding state intent—and achieving the objectives that scrutiny of state intent may serve. Explanations are crucial because too often, currently, "information about relevant policy and decision-making processes is . . . unknown to all but the cognoscenti, including NGOs and business interests, who closely follow specific global regulatory issues."[245]

Targeted efforts to get states to explain themselves are both long-standing and on the rise. Take, for instance, Article 51 of the UN Charter. This article provides that "[m]easures taken by Members in the exercise of [the] right of self-defence shall be immediately reported to the Security Council." The thought is that, as Ashley Deeks has put it, "states that have decided to use force across borders without consent should explain their actions publicly."[246] Such reporting could facilitate, for instance, analysis of whether a state's invocation of self-defense is in "bad faith" or contributes to the development of *opinio juris* by virtue of exposing the state's view of the international law of self-defense.[247] Too often, though, states simply refer to Article 51

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243 Diamantis, *supra* note 232, at 2056.

244 *Id.* at 2071.

245 Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 429 (2002); *see also* Picciotto, *supra* note **Error! Bookmark not defined.**, at 1049.

246 Ashley Deeks, *A Call for Article 51 Letters*, LAWFARE (June 25, 2014), https://www.lawfareblog.com/call-article-51-letters.

247 *Cf.* James A. Green, *The Article 51 Reporting Requirement for Self-Defense Actions*, 55 VA. J. INT'L L. 563, 568 (2015) (arguing that "reporting was supposed to give the Council the opportunity to *scrutinize* claims of self-defense").

without further detail.[248] This has prompted several states to call for more robust Article 51 reporting.[249] While there are sometimes sound reasons to be circumspect with respect to the facts—e.g., where classified information is at issue—additional transparency in reporting under Article 51 would seem helpful.

To give another example from an entirely different area of international law, the WTO has also focused on the need for states to explain themselves.[250] This is both as a matter of treaty law and of the WTO's interpretation. For instance, Article 5, section 8 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), explicitly permits one member to request an explanation from another member.[251] Likewise, the WTO Appellate Body has further clarified the relationship between explanations and intent in the context of a specific dispute: in the *Shrimp/Turtle* case, it held that the U.S. lack of explanation for its decisions was grounds for finding discrimination under the GATT.[252]

In the policy realm, this sense—that states should explain themselves—is part of what underlies the Open Government Partnership[253] and other such initiatives. For instance, the Extractive Industries Transparency Initiative requires states that sign up to disclose information on licensing decisions.[254] Collectively, these existing and emerging norms may encourage states to explain their

248 Green, *supra* note 247, at 604 ("During the period 1998-2013, however, the reports submitted by states were generally extremely cursory.").

249 Press Release, Gen. Assembly, Concluding Debate, Sixth Committee Stresses Importance of Special Charter Committee in Ongoing United Nations Reform, U.N. Press Release GA/L/3574 (Oct. 15, 2018), *available at* https://www.un.org/press/en/2018/gal3574.doc.htm ("It is critical that States provide sufficient information regarding the attack, based on which self-defense is being invoked. . . . The flow of information toward non-members of the Council must also be improved.").

250 *See generally* Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61 INT'L & COMP. L.Q. 641, 646-49 (2012).

251 Agreement on the Application of Sanitary and Phytosanitary Measures art. 5.8, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, annex 1A, 1867 U.N.T.S. 493.

252 Shrimp Turtle Case, *supra* note 6, ¶¶ 183-84.

253 *Open Government Declaration*, OPEN GOVERNMENT PARTNERSHIP (Sept. 2011), https://www.opengovpartnership.org/open-government-declaration ("We commit to promoting increased access to information and disclosure about governmental activities at every level of government.").

254 The EITI Standard 2016, Requirement 2.2 (May 24, 2017), https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf.

decisions,[255] which, in turn, will facilitate assessment of state intent, and help achieve the benefits that such scrutiny may entail.

VIII. CONCLUSION

Intent is topical, but insufficient attention is being paid to the way U.S. domestic debates might be refracted onto the international law of state intent (and vice-versa). There are, of course, reckonings to be had, including with respect to whether the search for state intent will foster cooperation, or will exacerbate interstate tensions.[256] Moreover, much further theoretical work remains to be done. While this Article has posited that there potentially *should* be "excluded reasons" for state action, one could imagine seeking to understand why. Without a compact of the sort that exists between a national government and its citizens, is it possible to argue that the state must, on the international plane, act only to further the interests of its citizens (and should not have its own "naked preferences")?[257] Answering this question entails answering some profound questions about the nature of modern sovereignty.

This Article does not purport to have these answers. It merely suggests that this underexplored area of international law would benefit from some of the deep scholarly treatment that now attends discussion of intent under U.S. domestic law.

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255 *Cf.* Anne Peters, *Towards Transparency as a Global Norm*, *in* TRANSPARENCY IN INTERNATIONAL LAW 534, 548 (Andrea Bianchi & Anne Peters eds., 2013) ("Transparency also requires *giving reasons* for action taken or not taken.").

256 *Compare* Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014) (arguing that assertions of animus foster divisions), *with* KOLB, *supra* note 99, at 21 ("It has been claimed that it is almost impossible for a judge to find that a sovereign state has acted in bad faith, since that judgment would be almost injurious.").

257 Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); *see, e.g.*, Bagchi, *supra* note 90, at 19 ("States, on the other hand, are—or should be—entirely servile creatures. In prevailing liberal democratic theory, states are not just constrained by individuals' values but their existence is motivated by the projects and values of the individuals they govern."); *cf.* Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 195 (2019); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 (2013).