

**STATE APOLOGIES AND THE TRANSFORMATION OF THE
INTERNATIONAL LEGAL SYSTEM**

Ažuolas Bagdonas

International Relations and European Studies Department

Central European University, Budapest

iphbaa01@phd.ceu.hu

Paper prepared for the 6th Pan -European Conference on International Relations

University of Turin, Italy

12-15 September 2007

DRAFT PAPER

The phenomenon of public apologies has received more attention in the last decade and a number of excellent studies are now available on the subject.¹ Most of these studies, whether focusing on domestic apologies or international apologies, tend to depict apologies as an instrument for avoiding or resolving conflicts or dealing with post-conflict situations and analyze the normative and utilitarian aspects of the subject.² Relying on the insights drawn from these studies, I will pursue a somewhat different line of inquiry in this paper. Since at the very basic level apologies mean acknowledgement of responsibility and indicate a negative stance towards a wrongdoing, apologies situate the issuing and the receiving party in a certain value order. Thus, by examining what apologies are demanded and given for, it is possible to outline the normative framework, within which relations between actors take place. Consequently, the examination of changes in the practice of apologies should allow us to trace the development of that normative framework.

While domestic apologies, as well as international apologies by non-governmental actors (churches, companies etc.), share many significant traits with international state apologies, I will focus on the latter because of the rather exclusive role of states in shaping the international normative system. The assumption here is that public international law can be viewed as a generally accepted normative system setting the minimum standards of behavior for the international actors. Thus, while non-

¹ For the classic analysis of apologies in general, see N. Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991); on apologies in international relations, see chapter 11 in B. O'Neill's *Honor, Symbols, and War* (The University of Michigan Press, 1999); on historical apologies and reparations, see R.L. Brooks (ed.), *When Sorry Isn't Enough* (New York: New York University Press, 1999), E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000) and J. Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity Press, 2002).

² At least two approaches can be distinguished here – one, based on research in sociolinguistics and pragmatics, conceptualizes apologies as speech acts that restore relational equilibriums between actors, while the other, psychology-based view sees apologies as part of the therapeutic process of healing, reestablishing broken relationships and restoring social harmony.

governmental actors may influence the international normative climate by demanding adherence to higher standards of behavior or by directing attention to areas that are not adequately covered by international law, public international law remains the ultimate frame of reference in adjudicating international conflicts of interest. Insofar as states continue being the principal lawmakers in the international realm, state apologies form a distinctive and, arguably, the most important category among all public apologies.

Within the category of state apologies, two different types of apologies should be distinguished: diplomatic and historical. Diplomatic apologies will refer here to apologies issued by a state representative on behalf of the state to another state for breaches of international law. China's apology to Japan for seizing a Japanese steamship *Tatsu Maru* in 1908³, British apology to Chile for violation of its sovereignty in 1915⁴, U.S. apology for arresting an Iranian minister in 1935⁵, China's apology to Great Britain for shooting down a civil airliner *Cathay Pacific* in 1954⁶, or Israel's apology to the United States for espionage against the U.S. in 1985 are just a few examples of the practice of diplomatic apologies that can be traced back to as early as the beginning of the seventeenth century and continues to this day. Historical apologies will refer here to apologies issued by state representatives on behalf of the nation to individuals or their groups in other states for gross human rights violations in the past that did not necessarily constitute breaches of international law at the time of their commission. This category now mostly includes apologies related to the Holocaust, the Second War, and the colonial past, although it certainly has the potential for expanding other inhuman policies or actions in history.⁷ Even though it is the spread of historical apologies that is chiefly responsible for the

³ "International Law Involved in the Seizure of the Tatsu Maru", *The American Journal of International Law* 2, 2 (1908), 391-397.

⁴ See A. Edwards and E. Grey, "Notes Exchanged Between Great Britain and Chile Respecting the Sinking of the German Cruiser 'Dresden' in Chilean Territorial Waters", *The American Journal of International Law* 10, 2, Supplement: Official Documents (1916), 72-76.

⁵ J. S. Reeves, "The Elkton Incident", *The American Journal of International Law* 30, 1 (1936), 95-96.

⁶ D. C. Huskisson, "The Air Bridge Denial Program and the shootdown of civil aircraft under international law", *Air Force Law Review* 56 (2005), 109-166.

⁷ Reportedly, in 1989, Portugal's President Mario Soares formally apologized to the Jews for centuries of persecution by the Grand Inquisition in the presence of then Israeli Ambassador, and, in 1992, the King of Spain invited the President of Israel to receive an apology for the expulsion of the Jews in 1492. This then led the inhabitants of the Moroccan city of Chaouen to ask the King of Spain to apologize for the persecution of the Moors. Thus, Michael Cunningham argues that apologies for historical wrongs are open to an objection in the form of *reductio ad absurdum*. See M. Cunningham, "Saying Sorry: The Politics of Apology". *The Political Quarterly* 79, 3 (1999), 288.

increased scholarly interest, it is a fairly recent phenomenon and only a few ambiguous instances of historical apologies can be found before the end of the Cold War.⁸

The practice of diplomatic state apologies reflected a particular understanding of the state and state responsibility and, in this regard, historical apologies indicate a remarkable change in the international normative system. Diplomatic apologies affirmed a state-centered order, within which states were like units, responsibility was collective, and acting responsibly meant respecting the sovereign rights and the property of other unit-like states. In contrast, historical apologies rely on a different human rights-based value system, the boundaries of which are marked by the concept of the crimes against humanity in general and genocide in particular. Historical apologies endow the individual with international legal subjectivity at the expense of the state, which parallels the movement from collective to individual responsibility in certain areas of international law.

My intention in this paper is limited to examining the developments in the international normative system that are reflected and advanced by the changes in the practice of state apologies and, therefore, I will not venture into discussing the reasons for why these changes began taking place only after the end of the Cold War, even though the normative points of reference for historical apologies were set immediately after the Second World War. I will begin by showing that apologies necessarily involve acknowledgement of responsibility. Then I will discuss the functions of traditional practice of apologies and the notion of state responsibility underlying it. Finally, I will examine the different nature of historical apologies and the accompanying expansion of the idea of state responsibility, discussing certain internal inconsistencies that plague the practice of state apologies.

⁸ The most notable and oft-cited example is the famous *Kniefall* of Chancellor Willy Brandt before the monument commemorating the Polish Jews in Warsaw in December 1970, although it is dubious whether it should count as an apology within the definition used in this paper.

State Apologies

Necessary elements of state apologies

What should count as an apology? The question is of theoretical and practical importance if we wish to assess the role of apologies in the international legal system. According to some, Japan has apologized for its policies during the Second World War more than once, while others maintain that Japan has never offered a proper apology to the victims of its policies. What constitutes a ‘proper’ apology?

There is a wide agreement over the necessary components of apologies, i.e. those components that distinguish it from other similar phenomena. Paul Davis names three constitutive elements of a ‘genuine’ or ‘consummate’ apology: doxastic (the belief that one has transgressed), affective (one’s feelings of self-reproach) and dispositional (one’s disposition to avoid the transgression in future).⁹ All three components together indicate that the core of an apology consists of a clear acceptance of responsibility for a transgression and its negative appraisal.¹⁰

For my purposes, it is important to note that there can be no apology without the doxastic component. In some cases it is not entirely clear what the normative frame of reference is of an apology issued by a state representative. Consider, for example, the statement by the President of Iraq Saddam Hussein on December 2, 2002, regarding the invasion of Kuwait in 1990, as reported by the international media: “We are saying what we are saying not out of weakness or as a tactic to an illegitimate end but to clarify facts as we see them. On that basis, we apologize to God for any action that may anger the Almighty if such an action took place in the past, unbeknownst to us but considered to be our responsibility, and to you [Kuwaitis] we apologize on this basis as well.” When it is

⁹ P. Davis, “On Apologies”. *Journal of Applied Philosophy* 19, 2 (2002), 169-173, M. Cunningham, “Apologies in Irish Politics: A Commentary and Critique”, *Contemporary British History* 18, 4 (2004), 83.

¹⁰ This aspect of apologies has raised a great deal of interest among legal scholarship in the United States and Canada who, realizing the potential benefits of apologies in peaceful settlements of disputes, struggled to invent a formula which would exclude apologies from admissibility into evidence. While in some cases apologies might be evidence only of the apologizer’s personal belief or feeling of culpability, which may be disregarded by judges, in other cases, to stay on the safe side, defendants were advised to offer partial apologies which are expressions of condolence or sympathy, but not statements that admit fault. On apologies and the admission of fault, see J. Cohen, “Legislating Apology: The Pros and Cons”, *University of Cincinnati Law Review* 70 (2001), 819-95; D. L. Levi, “The Role of Apology in Mediation”, *New York University Law Review* 72 (1997), 1165-1210.

not clear which norm was believed to be violated or in the absence of such a belief, an apology becomes obscure or invalid.¹¹

The acknowledgement of responsibility may turn into acceptance of liability if the normative framework within which an apology is issued is law. Thus, for example, during the UN World Conference Against Racism in Durban in 2001, the double move of the representatives of the African countries to recognize slavery as a crime against humanity (for which there is not limitation of statutes) and demand an apology for slavery from the European countries, forced the British, Dutch, Spanish and Portuguese delegations to press hard to replace the suggested use of “apology” with “regret” in order to avoid possible future liability.¹² Some of the current public apologies issued by state representatives clearly follow the legally safe path and use the formula “we are sorry that this happened”.¹³ It is important to note, however, that if apologies expressed only sympathy or regret, they could be consistently issued in the absence of the doxastic element or, indeed, by any third party – presumably, almost everyone today feels sorry that there was slavery. Therefore, while the choice of words in apology statements may vary, genuine apologies must necessarily involve acknowledgement of responsibility.

There is some tendency among students of historical apologies to overlook differences between interpersonal and institutional apologies by placing too much emphasis on the affective element.¹⁴ In this view, apologies must be sincere and the feelings of self-reproach (guilt, shame, sorrow) should be heartfelt to be genuine. Furthermore, the sincerity of apologies may be put in doubt if they are not followed by

¹¹ Compare the apology of the president of Iraq to the statement by the President of Serbia and Montenegro Svetozar Marovic during the Croatian president's first visit to Belgrade since the 1991-95 war on September 10, 2003, as reported by the media: “As a president of Serbia-Montenegro, I want to apologize for all the evils any citizen of Serbia and Montenegro has committed against any citizen of Croatia”

¹² The issue of reparations for slavery was also one of the reasons why the United States withdrew its delegation from the conference. For a more detailed account on the issue of apologies at the UN conference against racism, see J. Ukabiala, “Slave Trade A ‘Crime Against Humanity’”, *Africa Recovery* 15, 3 (2001).

¹³ This seems to be the case, for example, in the avalanche of apologies related to the torture of Iraqi prisoners in Abu Ghraib, where, as some argued, apologies became a means of avoiding responsibility. See T. Judt, “A Sorry State: The Artlessness of the Apology”, *The Washington Post* (2004), Page B01; M. Gibney and N. Steiner, “Apology and the ‘War on Terror’”. Paper prepared for Conference “The Age of Apology: The West Faces Its Own Past”, University of North Carolina, October 21-4, 2004.

¹⁴ In contrast, Tavuchis argues that “all collective apology ... has little, if anything to do with sorrow or sincerity but rather with putting things on public record” – *Mea Culpa*, 117.

material compensation to the victims.¹⁵ With regard to the role of apologies in the international normative system, however, it is not important whether apologies are accepted or whether they are accompanied with reparations – these are already quite different issues related to the question of justice. Insofar as apologies are duly performed by an official who has the authority to represent the state and insofar as they can be said to contain all the elements discussed above, they will count as state apologies.

In the following sections, I will examine the traditional practice of apologies by focusing chiefly on three aspects: on whose behalf apologies are issued (or denied), to whom and for what transgressions. In other words, I am interested in who the subjects of apologies are and what their normative framework is.

Diplomatic apologies

Apology in the ILC draft articles on the Responsibility of States

The role of state apologies in the functioning of the international legal system has been recognized and formalized in the International Law Commission's draft articles on the Responsibility of States for Internationally Wrongful Acts.¹⁶ Article 37 of the draft articles stipulates that a formal apology may be appropriate as a satisfaction for an injury caused by an internationally wrongful act in cases when full reparation is not possible by restitution or compensation. According to the ILC's commentaries on the draft articles, formal apologies serve as a form of remedy in cases of "non-material injury" (an injury that are not financially assessable), such as "insults to the symbols of the State, such as the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft, ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons and violations of the premises of embassies or consulates or of the residences of members of the mission."

¹⁵ See, for example, T. Govier and W. Verwoerd, "The Promise and Pitfalls of Apologies", *Journal of Social Philosophy* 33 (Spring 2002), 67-82; M. Gibney, "Rethinking Our Sorrow", *Peace Review* 14:3 (2002), 279-283; S. Alter, "Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations," Paper prepared for the Law Commission of Canada, May 1999, available at <<http://www.lcc.gc.ca/en/themes/mr/ica/2000/html/apology.asp>> [last accessed on August 30, 2007];

¹⁶ The draft articles and commentaries, as well as background information about the Commission's work on state responsibility, are available on the ILC website at <<http://www.un.org/law/ilc/index.htm>> (last visited on August 1, 2007).

The theoretical order of priority affirmed by the ILC in the draft articles (preferably restitution, followed by compensation, and, finally, satisfaction) is often reversed in the diplomatic practice of states – some the fiercest disagreements between conflicting parties revolve around the issue of apology, rather than compensation. In other words, compensation is of secondary importance to an explicit recognition of responsibility for violation through a formal apology. In some cases, states are prepared to pay compensation on *ex gratia* basis but decline issuing an apology.¹⁷ This is so because not only the attribution of wrongful acts but the very wrongfulness of acts under international law is often contested by states.¹⁸ In codifying the long-established practice of apologies, the ILC relied on a number of cases, where an apology was found appropriate by judiciary bodies or where it was issued by a transgressing state.¹⁹ However, in assessing the role of state apologies in international normative system, it is important to take into account that apologies are often demanded but not given, as well as to distinguish between denial of responsibility for a wrongdoing and denial of a norm. To illustrate the points made above, I will take a closer look at two instances of diplomatic apologies.

*The Corfu Channel Case*²⁰

On May 15, 1946, an Albanian battery fired in the direction of two British cruisers as they passed through the Corfu Channel. The British protested and requested an immediate and public apology. Albania retorted that the British failed to request Albanian

¹⁷ For example, in the aftermath of the USS *Liberty* incident on June 8, 1968, when Israeli jet fighters and torpedo boats attacked a U.S. Navy intelligence ship in international waters in the Mediterranean, Israel regretted the loss of life, offered compensation for the diseased and injured but refused to apologize and assume responsibility for the incident. See Walter L. Jacobsen, “A Juridical Examination of the Israeli Attack on the USS *Liberty*”, *Naval Law Review* 36 (1986), 69-119. Similarly, when the USS *Vincennes* shot down an Iranian commercial Airbus, Flight 655, killing 290 Iranian passengers, the United States refused to apologize to Iran but made an *ex gratia* payment to the victims’ families. For a discussion and more examples, see Marian Nash Leich, “Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis”, *The American Journal of International Law* 83, 2 (1989), 319-324.

¹⁸ It must be noted that the draft articles codify only the secondary rules of state responsibility (i.e., the conditions under which a breach of obligations occurs and the legal consequences that follow it) and not the substantive obligations of states.

¹⁹ The cases cited in the commentaries include the *Corfu Channel* (U.K. v. Albania), *Consular Relations* (Paraguay v. United States) and *LaGrand* (Germany v. United States of America) cases before the International Court of Justice; the *I’m Alone* arbitration; the *Rainbow Warrior* arbitration (New Zealand v. France), etc.

²⁰ *Corfu Channel Case* (UK v. Alb.), 1949 I.C.J. 4. Case materials are available at <<http://www.icj-cij.org>>.

permission for passage through the channel, part of which included Albanian territorial waters. After exchanging a series of diplomatic notes, the British decided to reassert their right of innocent passage by sending a detachment of warships through the channel. On October 22 while passing through the channel, two destroyers ran into a minefield, and the resulting explosions caused serious damage to the ships and the loss of forty-five British sailors. In November, disregarding the protests of Albania, the British Navy swept the channel, including Albanian territorial waters, and found twenty-two German mines.

The dispute was subsequently referred to the Court of Justice, which considered whether Albania was liable for the explosions and for the resulting damage and loss of human life and whether the British passage through Albanian territorial waters was a violation of Albanian sovereignty. The Court determined that Albania's failure to warn the ships of the minefields was a grave omission involving her international responsibility and that Albania had a duty to compensate the damages to the ships and their crews. On the other hand, the Court found that, while the passage of ships in October was "innocent", the sweeping operation in November constituted a violation of Albanian sovereignty.

For my purposes, it is important to note that the notion of state responsibility involved in the Corfu Channel case is that of collective responsibility.²¹ While the British found evidence that the mines were laid in the period between May and October and alleged that this was carried out by two Yugoslav warships at Albania's request, no proof could be produced that Albania either arranged or acquiesced to the laying of mines. It could not be even shown that Albania knew of their existence before the explosions in October. For all we know, not a single Albanian was involved in a violation of an international norm and yet they were found collectively responsible and had to compensate the damages caused by mines of unknown origin merely because these happened to explode on Albania's territory. Indeed, individuals lack any legal personality

²¹ A. Cassese provides another example of collective responsibility, involving an incident at Corfu in 1923, in his *International Law* (Oxford: Oxford University Press, 2001), 7-8. For a discussion of the principle of collective responsibility in international law, see H. Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", *California Law Review* 31 (1943), 530-571.

at all and appear in this particular instance on a par with ships, as part of damaged state property to be compensated.²²

*Hainan Island incident*²³

On April 1, 2001 a U.S. surveillance aircraft flying over the Exclusive Economic Zone (EEZ) waters of China collided with the intercepting Chinese fighter and was forced to make an emergency landing on Hainan Island.²⁴ Chinese authorities then detained the twenty-four crew members and demanded that the United States apologize for the incident. Apart from the attribution of responsibility for the collision, the ensuing dispute between the two countries revolved around three issues: whether U.S. reconnaissance operations in the South China Sea infringed upon China's rights over its EEZ; whether the U.S. violated China's sovereignty by entering Chinese territorial airspace and landing on Hainan Island without authorization; and whether China's boarding of the U.S. aircraft and detention of its crew was in violation of the U.S. right to sovereign immunity.²⁵

On April 11, after a series of negotiations the U.S. Ambassador Joseph Prueher sent a carefully worded letter of regret, which states that the United States was "very sorry" for the death of the Chinese pilot, as well as for entering Chinese airspace and performing the emergency landing without authorization.²⁶ Significantly, the United

²² While there is some debate regarding the legal personality of individuals under the classical doctrine of international law, in many cases of diplomatic apologies individuals appear as objects and not subjects of law and lack any rights or duties under it. For a discussion, see G. Manner, "The Object Theory of the Individual in International Law", *The American Journal of International Law*, Vol. 46, No. 3. (1952), 428-449.

²³ In many respects, this case is comparable several other: e.g., the Pueblo incident in 1968, when North Korea seized a U.S. Navy intelligence-gathering ship with an 83-man crew and forced the U.S. to apologize for intrusion into its territorial waters and "the grave acts of espionage" – see M. Lerner, *The Pueblo Incident: A Spy Ship and the Failure of American Foreign Policy* (Lawrence, Kansas: University Press of Kansas, 2002); the "Whiskey on the Rocks" incident, when a Soviet submarine ran aground in Southern Sweden and the Soviet Union was forced to issue an apology for intrusion into the Swedish territorial waters – see M. Leitenberg, *Soviet Submarine Operations in Swedish Waters 1980-1986* (The Center for Strategic and International Studies, Washington, D.C., 1987); as well as the recent seizure of the British Royal Navy personnel by Iran off the Iraq-Iran coast in March 2007.

²⁴ For an overview of the incident, see "Contemporary Practice of the United States Relating to International Law", *American Journal of International Law* 626, 95 (2001), 630-33.

²⁵ For a discussion of these issues, see M. K. Lewis, "An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident", *New York University Law Review* 77 (2002), 1404-1441.

²⁶ The full text of the letter is available at <http://en.wikisource.org/wiki/Letter_of_the_two_sorries>. While during the negotiations China insisted on obtaining a "dao qian" (formal apology) from the U.S., the

States did not accept responsibility for the collision and offered no apology for conducting reconnaissance operation in the Chinese EEZ. Nevertheless, the letter led to the release of the detained crew on April 12 and, later, the return of the U.S. plane. On June 30, China requested a compensation of approximately \$1 million for the expenses associated with the incident (the damaging of the Lingshui airfield, where the emergency landing took place, the detention of the crew, as well as the subsequent transportation of the aircraft back to the United States). On August 9, the Department of Defense offered a “non-negotiable” amount of \$34,567, which China rejected as “unacceptable”.²⁷

It would be difficult to view the U.S. assertion of its right to conduct reconnaissance flights in the airspace along China’s coast as well as China’s insistence on a peculiar interpretation of its rights in its Exclusive Economic Zone in isolation from their policies in the region in general and towards Taiwan in particular. The United States have an expressed interest in continuing airborne reconnaissance operations in the South China Sea for military purposes.²⁸ China has an interest to push back the U.S. military presence in the region and keep the option of reunification with Taiwan by forceful means open. Insofar as a particular interpretation of the legal issues involved in this case helps either country furthering their interests, it is not possible to separate politics and law.

This is the dynamic aspect of apologies – apologies do not merely give satisfaction by affirming the validity of violated rules and “restoring” the existing order to the state in which it was prior to the violation. In many cases, apologies may be used as an instrument to negotiate, develop and agree upon new rules. In this regard, Gibney and Roxstrom suggest that, under certain circumstances, apologies may: “1) contribute to the formation of customary international law; 2) constitute a source of interpretation for the purpose of determining the content of obligations arising from treaty law; and 3) serve as

Chinese version of the letter contained only “bao qian”, which can be translated as either “apology” or “regret” in English and thus allows for more flexibility in interpretation. See M. F. Shakun, “United States–China Plane Collision Negotiation”, *Group Decision and Negotiation* 12 (2003), 477–480.

²⁷ “China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications”, *CRS Report for Congress*, 8.

²⁸ The Congressional Research Service Report states that “The primary objective of the U.S. electronic eavesdropping effort is to help maintain as detailed and up-to-date an understanding as possible of the existence, locations, numbers, and technical characteristics of radars and other electronically transmitting military systems of potential adversaries, and a complementary understanding of the operating patterns, doctrine, and tactics of these foreign military forces. See *ibid.*, 30.

a unilateral declaration that is at least binding on the state that issued the apology”.²⁹ It may be added that, as illustrated by the Hainan Island incident, refusing to issue an apology may also contribute to the development of customary international law by denying the existence or validity of a rule.³⁰

However, it is equally important to note that neither state questioned the general normative framework within which an interest-driven argument over the interpretation of a particular rule took place – this is the static aspect of diplomatic apologies. While the content of China’s sovereign rights over its EEZ was disputed, the principle of sovereignty itself was reaffirmed by the U.S. apology for landing on the Chinese without authorization.

In the ILC draft articles, as well as in both the Corfu Channel case and the Hainan Island incident described above, apologies serve in upholding the so-called “state values” imbedded in public international law – state independence, equality, autonomy, impermeability and national interest.³¹ The idea of state responsibility involved in diplomatic apologies is clearly related to a bilateral relation between the delinquent and the injured state and, by invoking responsibility, the injured state normally pursues its individual interest. In other words, diplomatic apologies affirm the idea of state responsibility as it is found in traditional international law – state are responsible to each other insofar as there exists an international legal obligation in force between the two states and when it is breached.³² Furthermore, responsibility is collective in nature – the individuals involved in the violation of norms are merely agents of the state without any legal personality and their acts are imputed to the state.³³

²⁹ M. Gibney and E. Roxstrom in “The Status of State Apologies”, *Human Rights Quarterly* 23 (2001), 915.

³⁰ The role of apologies as a source of customary law may be particularly significant if the norm in question is not well-established, as in the case of the Hainan incident. See, for example, M. J. Valencia and Ji Guoxing who argue that there is a gray area surrounding navigation rights, military activities, and the use of force in the EEZ – “The “North Korean” Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned”, *Asian Survey* 42, 5 (2002), 723-732.

³¹ On state values, see L. Henkin, *International Law: Politics and Values* (London: Martinus Hijhoff Publishers, 1995), 100-101, 168.

³² M. N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997), 697.

³³ Thus, for example, when New Zealand captured two of the French secret service agents involving in the sabotage of the *Rainbow Warrior*, during which one person was drowned, and sentenced them on the charges of manslaughter, France demanded their release in exchange for an apology since the agents were not acting on their own ill but as agents of the state. See J. Wexler, “The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law”, *Boston University International Law*

Historical apologies

Most historical apologies issued to this day are related to the Holocaust, the period during or immediately after the Second World War, as well as the colonial past of countries. Almost all historical apologies are given for policies or acts that would today be viewed as constituting gross violation of human rights, although there may be doubts whether they were contrary to the norms of the international law at the time they were committed. As Jacques Derrida observes, the proliferation of historical apologies was made possible by the institution of a juridical concept of the “crime against humanity”.³⁴ Introduced in the Nuremberg Charter, the concept broke down the spatial borders of international law (a crime against humanity was to be considered “crime” whether or not it was in violation of the law of the country where perpetrated). Furthermore, at the Nuremberg trials largely ignored the principle of nonretroactivity – i.e. broke down the temporal borders of law. Insofar as the retroactive affirmation of contemporary norms through historical apologies is “rewriting” the history of the international normative system, it has relevance to understanding the role of apologies. However, I will not dwell upon this complex issue here but rather focus on the idea of responsibility involved in historical apologies and the changes that this idea introduces to international law and to the practice of apologies itself.

The role of historical apologies in the international normative system

In many regards, historical apologies function in the same way as diplomatic apologies. The issuing of a historical apology indicates an affirmation of the existence and the validity of a norm. However, if the refusal to give a diplomatic apology is an important indicator of the state’s refusal to acknowledge the validity of a norm, the interpretation of the message sent by a refusal to apologize for a historical transgression is complicated by the temporal dimension involved in all historical apologies. This is so because the conditions for the issuing a historical apology involve issues of the continuity

Journal 5 (1987), 389-412 and J. S. Davidson, “The Rainbow Warrior Arbitration concerning the Treatment of the French Agents Mafart and Prieur”, *The International and Comparative Law Quarterly* 40, 2 (1991), 446-457.

³⁴ See J. Derrida, *On Cosmopolitanism and Forgiveness*, transl. by M. Dooley and M. Hughes (Routledge, 2001), 28-29.

and identity of the parties. Each time a historical apology is demanded, the injured party posits the continuity (and, hence, the continuing responsibility) of the delinquent party as well as declares its identity with the injured group in the past. In some cases, the continuity of the delinquent party does not present a problem and the people injured are the same as the people demanding an apology for the transgression. In other cases, however, these identity moves inseparable from historical apologies may not be performed so easily. The demand for an apology and reparations for slavery highlights the complexity of the issues involved: by whom and to whom should the apology and material reparations be made (the African countries or the descendants of the slaves all around the world) and what is the nature of responsibility of the present generations?³⁵ What follows then is that the refusal to give a historical apology may not necessarily mean the denial of the validity of the norms with reference to which an apology is demanded but rather indicate the denial of continuity and identity of one of the parties. For example, the reluctance of today's Croatia, which considers itself the successor of the anti-fascist Croatia (ZAVNOH) to apologize for the crimes of the fascist Croatia (NDH), may not necessarily indicate that Croatia does not embrace the normative framework of human rights.

The normative framework reflected in and affirmed by historical apologies is fairly well established now and disputes, if they occur, revolve around the imputation of acts in violation of the norms (the secondary rules), rather than the substantive content of these norms (the primary rules of state responsibility). One important thing note in this regard is the separation of two categories of state responsibility that come into recognition among scholars of international law: "ordinary" responsibility for breaches of international rules that protect the reciprocal interests of states, and "aggravated" responsibility for the violation of the rules protecting the fundamental values of the international legal system.³⁶ If the transgressions for which diplomatic apologies are given fall under the category of "ordinary" breaches, which are normally resolved

³⁵ Some of these issues are more thoroughly discussed in J. Thompson, "The Apology Paradox", *The Philosophical Quarterly* 50, 201 (2000), 470-475; M. du Plessis, "Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery", *Human Rights Quarterly* 25 (2003) 624-659; E. A. Posner and A. Vermeule, "Reparations for Slavery and Other Historical Injustices", *Columbia Law Review* 103, 3 (2003), 689-748.

³⁶ See Cassese, 185; according to Cassese, these values include peace, human rights, and the self-determination of peoples.

bilaterally between two states, the normative framework of historical apologies consists of obligations *erga omnes*, the violation of which becomes a matter for the whole community of states. As Jack Donnelly suggests, the concept of genocide as the worst kind of crime against humanity, which provides the boundary reference point for most historical apologies, may also be at the core of “an emerging post-Cold War minimum standard of civilization”, i.e. the moral standards that underlie international order and allow talking about the existence of an international community.³⁷

Thus, the violations for which historical apologies are given are today considered as more important than those that invoke diplomatic apologies. The norms that provide a reference point for historical apologies are regarded as more fundamental and states are seen as bearing a special kind of responsibility for the violation of obligation protecting these norms towards all other states. This may explain why historical apologies are on the way of becoming a norm themselves and the international pressure exerted on some recalcitrant states to apologize for gross violations of human rights in their past.³⁸

Incompatibility between historical and diplomatic apologies

It must be noted that the practice of diplomatic apologies continues alongside the practice of historical apologies and the norms affirmed through each type of apology do not always or necessarily come into conflict. Thus, it is not inconsistent for Germany to demand an apology for the execution of its citizens in the United States not on the basis of its view of the capital punishment (the human rights approach) but on the basis of the violation of its rights under Vienna Convention on Consular Relations (the state-centered approach) in one instance, and then apologize for the atrocities perpetrated against the Herero and Nama tribes in Namibia in another.³⁹ The true extent of the incompatibility between diplomatic and historical apologies becomes clearer when we consider cases where the normative framework of diplomatic apologies comes into conflict with the

³⁷ J. Donnelly, “Human Rights: A New Standard of Civilization?”, *International Affairs* 74, 1 (1998), 16.

³⁸ For a discussion of this issue, see D. Gojkovic, “The Future in a Triangle: On Guilt, Truth and Change”, translation by Nevena Ivanovic, *Eurozine Online* (2000).

³⁹ For a discussion of the issues involved in the La Grand case, see L. E. Rothenberg, “International Law, U.S. Sovereignty, and the Death Penalty”, *Georgetown Journal of International Law* 15 (2004), 547-595. For a critical view of Germany’s apology to the Herero, see L. Jamfa, “Germany Faced with the Wrongs of Its Colonial History in Namibia”, Paper prepared for Conference “The Age of Apology: The West Faces Its Own Past”, University of North Carolina, October 21-4, 2004.

values upheld by historical apologies and the states involved have to choose one over the other.

One of the most revealing cases in this regard is Turkey's refusal to acknowledge and apologize for the Armenian genocide.⁴⁰ The international pressure on Turkey to acknowledge that the events that took place in the Ottoman Empire in and around 1915 constituted genocide is truly remarkable and unprecedented. Over the last 40 years Armenian genocide has been officially recognized by twenty states and in most cases such recognition was given by the legislative bodies of these countries or even by means of passing a law (in Uruguay and France). The unprecedented process of international recognition of Armenian genocide began with Uruguay in 1965 and Cyprus in 1982 and picked up the pace at the end of the Cold War. In addition to the legislative bodies of states, the Armenian genocide has also been recognized by 39 U.S. states and a number of substate entities all around the world, as well as international governmental and non-governmental organizations, including the Council of Europe.⁴¹ Furthermore, the Armenian genocide has been affirmed by the European Parliament (EP) in 1987, 2000, 2002, and 2005.

In this context, it is interesting to observe then that, while the Armenian interpretation of the events in the Ottoman Empire is built around the concept of genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and derives much of its international support from the depiction of the Armenian genocide as a precursor to the Holocaust, the official Turkish position is articulated in terms of the classical international law and the traditional understanding of state responsibility. More specifically, the legal doctrine of the state of necessity is often explicitly invoked and almost always implied in the discussion of the treatment of the

⁴⁰ For the most authoritative view on these events, see V. N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (6th rev. ed. New York: Berghahn Books, 2003); perhaps the best argued Turkish position is presented in K. Gürün, *The Armenian File: The Myth of Innocence Exposed* (Istanbul: Rustem, 2001). However, possibly the most impartial treatment of the subject is available chapters 5 and 6 in M. Mann's *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge; New York: Cambridge University Press, 2005).

⁴¹ Sub-state entities that officially recognized the Armenian genocide include the municipal government of Paris (1998), the legislatures of Canada's Ontario (1980), Quebec (1980, 2003, 2004) and British Columbia (2006), Scotland's Cardiff (2004) and Edinburgh city councils (2005), Australia's New South Wales Parliament (1998) and City of Ryde (2005), Brazil's Sao-Paulo Parliament and Americana City Parliament (2005), Buenos Aires City Parliament (2006), Switzerland's cantons of Geneva (2001) and Vaud (2003), and a number of others.

Armenians by the Ottoman Empire during the First World War.⁴² The basic idea encapsulated in this doctrine is very similar to the idea behind the right of self-defense found in the criminal codes of most countries: the state is permitted to suspend the rule of law and derogate from its international obligations under certain extraordinary situations that pose a fundamental threat to the state. In this vein, Gürün, for example, argues that “every country, during war, sends citizens of the enemy within its borders to concentration camps” and that “during war, the first obligation of the State is to protect the country, and this means to struggle with the enemies of the country according to the rules of war.”⁴³

The doctrine of necessity habitually reiterated in standard pro-Turkish accounts of the Armenian genocide is clearly at odds with the current thinking in human rights law. First of all, the doctrine of necessity (and its domestic counterpart – the state of emergency) is closely connected to the idea of sovereignty as the source of the whole legal order.⁴⁴ Accordingly, in order to preserve the legal order, the state has the right to temporarily suspend it. In contrast, the human rights law tends to project the definition of legal order as being outside the purview of any particular state and is therefore in conflict with the doctrine of state sovereignty.⁴⁵ In current Article 15 of the European Convention on Human Rights (1950) and Article 4 of the International Covenant on Civil and Political Rights (1966) provide for the derogation from the obligations to protect human rights set forth in these instruments under the circumstances of “threat to the life of the nation”. However, while the description of the circumstances is rather ambiguous and permissive, the idea of basic, non-derogable human rights (e.g., right to live, ban of torture, freedom of religion) has already been firmly embedded in both international human rights law and the constitutional law of many signatories to the Universal

⁴² On the doctrine of necessity, see P. Weidenbaum, “Necessity in International Law”, *Transactions of the Grotius Society* 24 (1938), 105-132.

⁴³ Gürün, 203.

⁴⁴ See G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005). For an introductory discussion of the conflict between human rights and state sovereignty, see J. Donnelly, *Universal Human Rights in Theory and Practice*. 2nd ed. (Ithaca: Cornell University Press, 2003), 108-127, 242-258.

⁴⁵ There have been attempts to redefine the meaning of the doctrine and restrict its use in situations where human rights are involved – see R. Boed, “State of Necessity as a Justification for Internationally Wrongful Conduct”, *Yale Human Rights & Development Law Journal* 3, 1 (2000), 4-12.

Declaration of Human Rights (1948).⁴⁶ Thus, if we put the right of a state to self-preservation as part of the “fundamental rights” of states and the inalienable (i.e. non-derogable) basic human rights, the scale today would be clearly tilted towards the rights of individuals.

It is not accidental that among the most popular explanations in Turkey that purport to explain the international pressure regarding the Armenian genocide totally ignore the role of individuals and non-governmental groups and it is not unusual to hear the whole issue dismissed as nothing more than this: the Armenian state is coveting the Turkish land, while the European states are trying to divide Turkey and/or using it as an excuse to exclude her from membership in the EU. Territorial sovereignty, non-interference, state equality – the normative framework based on state values is in this instance incapable of accommodating the human right-oriented and individual-centered value system that gives rise to the demands for the recognition and apology for the Armenian genocide.

State unity and collective responsibility

Perhaps the most significant change in the international normative system that is reflected in historical apologies is the emergence of individuals as subjects of law that possess rights and duties. First, it has to be emphasized that historical apologies are typically issued to groups of individuals and not to states. Indeed, in many cases it historical apologies would not make much sense if their recipient was a state. For example, Japan’s apology to the British prisoners of war during the Second World War would be clearly misplaced if issued to the British state which, after all, came out as victor in the war.⁴⁷ And, conversely, the treaties between Japan and South Korea, as well as Japan and China, whereby the settlement of all war-related claims was negotiated

⁴⁶ See, for example, R. B. Lillich, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency”, *The American Journal of International Law* 79, 4. (1985), 1072-1081; D. O’Donnell, “Commentary by the Rapporteur on Derogation”, *Human Rights Quarterly* 7, 1 (1985), 23-34; T. Meron, “On a Hierarchy of International Human Rights”, *The American Journal of International Law* 80, 1 (1986), 1-23.

⁴⁷ On Japan’s apologies to the British POW’s, see M. Cunningham, “Prisoners of the Japanese and the Politics of Apology: A Battle over History and Memory”, *Journal of Contemporary History* 39, 4 (2004), 561–574. Interestingly, the U.S. POWs also brought claims against Japan – see “World War II Era Claims against Japanese Companies”, *The American Journal of International Law*. 95, 1 (2001), 139-143.

between these states, did nothing to prevent the wave of litigations and demands for apologies by individuals.⁴⁸ One important effect of the fact that historical apologies are directed at individuals is the dissolution of the legal fiction of state unity. In this regard, historical apologies indicate the recognition that individuals have rights other than those proscribed by the domestic legal system, as well as legitimate interests that may actually be contrary to those of their states.⁴⁹

Second, as it was mentioned earlier, historical apologies are usually given or demanded for gross violations of human rights that today would be considered as leading to “aggravated” state responsibility, which in some cases calls for individual accountability.⁵⁰ More specifically, any individual, regardless of governmental status or rank, is liable for committing or ordering war crimes and crimes against humanity.⁵¹ Thus, the normative framework of historical apologies brings out both the victims and the perpetrators from under the cover of the state.

Finally, it must be noted that idea of collective responsibility that does not present difficulties for diplomatic apologies seems to go against the principles imbedded in the human right-based and individual-centered normative framework of historical apologies. The entire people cannot be held guilty (either morally or legally) because of the various degrees of involvement.⁵² Furthermore, when an apology is given for historical wrongs, responsibility is imputed to members of a collectivity who might not have even existed at the time of the wrongdoing. Hence, the paradoxical nature of the practice of historical apologies: a genuine historical apology by a state represents a denial of its own possibility – to perform it, the apologizing state must decompose itself and other states

⁴⁸ On the evolution and impact of the Korean women’s efforts to obtain redress, see C. S. Soh, “The Korean “Comfort Women”: Movement for Redress”, *Asian Survey* 36, 12 (1996), 1226-1240.

⁴⁹ There is evidence that the Chinese leadership, for example, has difficulty controlling the outpour of Anti-Japanese and anti-Western public sentiments – P. H. Gries, *China’s New Nationalism: Pride Politics, and Diplomacy* (Berkeley: University of California Press, 2004).; J. N. Wasserstrom, “Chinese Students and Anti-Japanese Protests, Past and Present”, *World Policy Journal* (2005), 59-65; For a different view, see G. W. Gong, “The Beginning of History: Remembering and Forgetting as Strategic Issues”, *The Washington Quarterly* 24, 2 (Spring 2001), 45-57..

⁵⁰ For an analysis of “aggravated” state responsibility, see Cassese, 200-206.

⁵¹ For a more detailed discussion of the issue of individual international criminal responsibility under contemporary international law, see Shaw, 234-241; Cassese, 271; L. May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 115-174..

⁵² This argument is discussed in H. Arendt, *Responsibility and Judgment* (New York: Schocken Books, 2003) and K. Jaspers, *The Question of German Guilt*. Translated by E. B. Ashton (New York: Fordham University Press, 2000).

into individuals and embrace the notion of responsibility that no longer makes sense within the normative framework which historical apologies reflect and reaffirm.