What's Wrong With Not Apologizing: International Apologies and the Rule of Law

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INTRODUCTION

International apologies, like domestic apologies, can serve a wide array of goals. They can express contrition, regret, empathy and care, reduce friction, and restore relationships. Of course, the realization of these goals depends, to a great extent, on the form and sincerity of the apology: how it is conveyed and how it is received. Importantly, however, and perhaps less dependent on the vagaries of any particular form of apology or its delivery, apologies also serve to reinforce underlying norms and expectations. An apology is a response to a failure to comply with generally accepted norms or meet legitimate expectations: Either the conduct, and/or its consequences, are to be avoided.

Unlike most domestic law, international law recognizes apologies as a formal remedy for wrongdoing by states. Together with expressions of regret or acknowledgements of breaches, apologies are enumerated as a type of remedy known as "satisfaction."[1] And, with the explicit recognition of apologies as remedies for wrongs, international law seems to bolster the role of apologies in reinforcing the underlying norms and expectations of international relations.

Yet, international law's recognition of satisfaction, and, within it, apologies, as a remedy is halfhearted. Satisfactions are designated as a secondary form of reparation, to be awarded only in instances in which the more conventional remedies of performance in kind (restitution) or monetary compensation (indemnity) are inapplicable or insufficient, and

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1. *See* Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), ch. II [hereinafter ARSIWA].

mostly in cases of moral injury to the state.[2] Moreover, while all forms of reparations are intended to be non-punitive, when it comes to satisfaction, the relevant international rules include an exceptional caveat, not attached to the other forms of reparations: Satisfaction must not be humiliating to the responsible state.[3]

Had international law followed the conventional domestic law model of leaving apologies to the discretion of leaders in deciding how they wish to manage their international relationships, that would not have been a puzzling choice. But with the formal recognition of apologies as a form of reparation, both the designation of apologies as a residual remedy as well as the warning that they should not entail humiliation for the apologizing state invite further inquiry.

In this essay, I trace both the explicit and implicit motivations behind the current treatment of apologies under international law: Why does it formally recognizes apologies as a remedy for wrongs done, yet do so equivocally? I am particularly interested in the concern that the international rules express about humiliation, especially given that the actors in question – on both sides – are political entities, not individuals. This anthropomorphism of the state is in some sense a departure from the whole body of rules on state responsibility, which otherwise insists on stringent tests of attribution of individuals' actions to the political entity of the state in order to hold the state responsible for any wrong. In fact, the explicit invocation of "dignity," "honor," and "humiliation" as attached to states[4] suggests that political abstraction could never be completely achieved.[5]

With honor, shame, and humiliation at the center of this inquiry, I draw on Professor James Whitman's work on shame sanctions in U.S. domestic criminal law,[6] and test his reservations about such sanctions against my own intuitions about international apologies, even if they carry a risk of shame or humiliation. Prof. Whitman's concerns, I claim, do not translate well when transposed onto the interstate level, with its unique structures of horizontal, largely self-help enforcement. In this system, which lacks the institutional framework which Prof. Whitman trusts in the domestic realm to pass judgment and enforce consequences, the importance of apologies as norm-reinforcer is under-appreciated. To my mind, this benefit should overcome the concerns that have motivated the half-hearted endorsement of apologies as international remedies; or, in short, international law should insist on apologies as routine, rather than exceptional, remedial practice.

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2. ARSIWA, *supra* note 1, at art. 37 and accompanying commentary.

3. ARSIWA, *supra* note 1, at art. 37(3) (italics added).

4. ARSIWA , *supra* note 1, commentary to art. 37 at ¶ 7.

5. On state anthropomorphism more generally, *see* DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE (2024).

6. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L. J., 1055, 1055-92 (1998).

I. THE PRACTICE OF INTERNATIONAL APOLOGIES

Ours has been described as "the Age of Apology."[7] Those who describe it as such allude to apologies issued by heads of states towards communities, both internal and external. A number of leaders have apologized to domestic communities who had suffered injustices at the hands of their states' governments, including the 1995 apology by President Jacques Chirac for the complicit role that French police and civil servants played in the Vel' d'Hiv' Roundup during World War II,[8] the 2008 Canadian Prime Minister's apology to the indigenous communities for the forced assimilation of their children in the state's schools,[9] and the 2022 New Zealand Prime Minister's apology to the country's Māori population.[10] Nor are such apologies limited to democracies: In 2020, North Korean leader, Kim Jung Un, made a tearful apology to his own people over the difficulties North Koreans had experienced around the Covid-19 pandemic.[11]

Instances of apologies that are directed to foreign states and populations include President Bill Clinton's apology in May, 1999, to China over the bombing of the Chinese embassy in Belgrade during the NATO military operation in Serbia.[12] Later that year, he also apologized to Guatemala for past American support for that country's military regime.[13] In 2000, North Korea's leader, Kim Jung Un, apologized to his South Korean counterpart over the "unfortunate" killing of a South Korean official who drifted into North Korean waters.[14] In 2001, a special envoy of President George W. Bush hand-delivered a letter to Japanese authorities expressing the United States' apologies and regrets over the sinking of a Japanese fishing research

7. THE AGE OF APOLOGY: FACING UP TO THE PAST (Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud, and Nijlaus Steiner eds. 2009); Roy L. Brooks, "The Age of Apology," in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3-11 (Roy L. Brooks ed. 1999).

8. *See* Julie Fette, *Apology and the Past in Contemporary France*, 26 FRENCH POL. AND SOC'Y 78, 78-113 (2008).

9. *See* Willow J. Anderson, *Indian Drum in the House: A Critical Discourse Analysis of an Apology for Canadian Residential Schools and the Public's Response*, 74 THE INTERNATIONAL COMMUNICATION GAZETTE 571, 571-85 (2012).

10. Prime Minister Jacinda Ardern, *Te Rangiwaituhi - Maniapoto Apology*, GOVERNMENT OF NEW ZEALAND (Dec. 4, 2022), https://www.beehive.govt.nz/speech/te-rangiwaituhi-maniapoto-apology.

11. Justin McCurry, *Kim Jong-Un Sheds Tears as He Delivers Rare Apology to North Korea over Failings*, GUARDIAN (Oct. 12, 2020), https://www.theguardian.com/world/2020/oct/12/kim-jong-un-sheds-tears-as-he-delivers-rare-apology-to-north-korea-over-failings.

12. *See* "China: Clinton Apologizes for Bombing Chinese Embassy." *China Business Information Network*, The Financial Times Limited, 1999, p. 1. *See also* Petras, James. "A Note on the U.S. Bombing of the Chinese Embassy and the New York Times Cover-Up." *Journal of Contemporary Asia*, vol. 31, no. 2, 2001, pp. 262–66.

13. John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES (Mar. 11, 1999), https://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html.

14. Justin McCurry, *North Korea Apologises for 'Unfortunate' Killing of South Korean Official*, GUARDIAN (Sept. 25, 2020), https://www.theguardian.com/world/2020/sep/25/north-korea-apologises-for-unfortunate-killing-of-south-korean-official.

vessel by a U.S. submarine, which resulted in the death of several students.[15] In 2008, following an explicit and public Ecuadorian demand, Colombia's foreign minister apologized to Ecuador for a breach of that country's territorial integrity in the course of military actions taken by Colombia against FARC members in Ecuador.[16] Two years earlier, the Colombian minister of defense apologized to the same neighbor for incursions into its airspace by military planes.[17] In 2011, Israel apologized to Egypt for a border incident that left five Egyptian soldiers dead,[18] and in 2013, Prime Minister Netanyahu, under American pressure, made an apology call to his Turkish counterpart, Erdogan, for the Israeli attack on a Turkish vessel, which was part of a flotilla trying to evade Israel's blockade of Gaza.[19] Most recently, in 2021, Germany apologized to Namibia for its genocide against the Herero and Nama people between 1904 and 1908.[20]

At times, apologies have been ordered as a form of reparations by an international dispute resolution body, such as in the dispute between France and New Zealand over the 1985 sinking by French agents of the Greenpeace vessel, the *Rainbow Warrior*, in the Auckland harbor.[21] In the ensuing arbitration, presided over by the Secretary General of the United Nations, France was ordered to provide, among other forms of reparations, an apology to New Zealand.[22] In 1999, the International Court of Justice, in the course of adjudicating a dispute between Germany and the United States over the American failure to notify the German consulate of the arrest of two German brothers who were subsequently convicted of homicide and sentenced to death, noted that the United States had apologized to Germany.[23] More often, however, and given that few international disputes are ever resolved through formal adjudicatory processes, the decision to

15. Doug Struck, *Japan Is Given Letter Of Apology From Bush: Envoy Says U.S. Will Try to Raise Ship*, WASH. POST 2001, p. A21.

16. *See* Reuters, *Colombia Se Disculpa Ante Ecuador Por La Incursión 'Obligada' en Su Territorio*, EL MUNDO (Mar. 3, 2008), https://www.elmundo.es/elmundo/2008/03/03/internacional/1204512283.html.

17. *See Colombian Apology for 'Incursion'*, BBC NEWS (Feb. 3, 2006), http://news.bbc.co.uk/2/hi/americas/4676664.stm.

18. *See* Kevin Flower, *Israel Apologizes to Egypt over August Border Incident*, CNN WORLD (Oct. 13, 2011), https://www.cnn.com/2011/10/13/world/meast/israel-egypt/index.html.

19. *See* Harriet Sherwood & Ewen MacAskill, *Netanyahu Apologises to Turkish PM for Israeli Role in Gaza Flotilla Raid*, GUARDIAN (Mar. 22, 2013), https://www.theguardian.com/world/2013/mar/22/israel-apologises-turkey-gaza-flotilla-deaths.

20. Kavena Hambira & Miriam Gleckman-Krut, *Germany Apologized for a Genocide. It's Nowhere Near Enough*, N.Y. TIMES (July 8, 2021), https://www.nytimes.com/2021/07/08/opinion/germany-genocide-herero-nama.html.

21. Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (Fr. v. N. Zeal.), Judgement, France-New Zealand Arbitration Tribunal (Jiménez de Aréchaga, Chairman; Sir Kenneth Keith and Professor Bredin, Members), 30 April 1990 [hereinafter Rainbow Warrior].

22. *Id*. at 224.

23. LaGrand (Germ. v. USA), Judgement, I. C. J. Reports 2001, ¶ 123.

apologize is a unilateral one or the result of an international negotiation process.

Apologies have sometimes been accompanied by other, more tangible measures, ranging from compensation to commemoration, review committees, and policy changes. In the *Rainbow Warrior* affair, for instance, France was also ordered to pay ten million dollars to New Zealand in compensation for the injuries and damage that had resulted from the vessel's explosion.[24] The United States paid monetary compensation to the victims of the Chinese embassy bombing in Belgrade, as well as directly to the Chinese government.[25] When Germany issued its apology to Namibia, it did so with a "gesture" of 1.35 billion U.S. dollars to be spent on reconstruction and development.[26] Other times, as was the case for the American apology to Guatemala or the Israeli apology to Egypt, it appears that no further remedies were offered, at least as a matter of public information.

Notwithstanding these high-salience instances, international apologies are still a relatively rare phenomenon, and especially so on a state-to-state basis. When they are offered, they attract much attention and debate around their wording, mode, and delivery. Often, there is domestic opposition on both the giving and receiving end: Constituencies on whose behalf the apology is made deny the need for an apology, and some to whom the apology is issued doubt the sincerity or completeness of the gesture. Though easy to dismiss as anything more than cheap talk, devoid of any real stakes, apologies turn out to be a significant source of contention in the practice of international diplomacy.

Indeed, in several high-stakes instances, states agreed to pay compensation for the consequences of their actions but refused to apologize for any wrongdoing. One such notable case is the 1988 downing of an Iranian passenger plane over Iran's territorial waters in the Persian Gulf by 2 surface-to-air missiles fired by a U.S. navy boat.[27] All 290 people on board were killed. In the days immediately following the incident, President Ronald Reagan sent a diplomatic note to the Iranian government, expressing deep regret, and admitting to reporters that he had meant his statement as an apology.[28] But in 1990, the American Captain of the Navy ship that fired

24. Rainbow Warrior, *supra* note 21, p. 224.

25. Michael Laris, *U.S. to Pay Embassy Bomb Victims*, WASH. POST (July 31, 1999), https://www.washingtonpost.com/archive/politics/1999/07/31/us-to-pay-embassy-bomb-victims/1a123617-e80d-43ed-a966-f3568bee550a/.

26. Hambira & Gleckman-Krut, *supra* note 16.

27. Richard Halloran, *The Downing Of Flight 655: U.S. Downs Iran Airliner Mistaken For F-14; 290 Reported Dead; A Tragedy, Reagan Says; Action Is Defended*, N.Y. TIMES (July 4, 1988), https://www.nytimes.com/1988/07/04/world/downing-flight-655-us-downs-iran-airliner-mistaken-for-f-14-290-reported-dead.html.

28. Molly Moore & Bill McAllister, *Reagan Apologized to Iran for Downing of Jetliner*, WASH. POST (July 5, 1988), https://www.washingtonpost.com/archive/politics/1988/07/06/reagan-apologized-

the missiles was awarded the Legion of Merit "for exceptionally meritorious conduct in the performance of outstanding service as commanding officer."[29] The citation made no mention of the downing of the Iranian passenger plane. Moreover, in 1996, and in the shadow of litigation brought by Iran in the ICJ, the two governments reached a settlement, which included the following statement: " . . . the United States recognized the aerial incident of 3 July 1988 as a terrible human tragedy and expressed deep regret over the loss of lives caused by the incident . . . "[30] The U.S. government did not admit legal liability or formally apologize to Iran, but as part of the settlement, it agreed to pay $61.8 million in compensation, *ex gratia*, to the families of the victims.[31]

Of course, just like in their everyday expression, apologies between states serve a variety of functions. Scholars of both domestic and international law have noted the substantial interpersonal and social benefits that can be accrued through apologies, including the cabining of responsibility, the signaling of contrition, empathy, or understanding, the reduction in friction, and the healing of relationship.[32] Scholars, however, also note the possible pernicious role of apologies: In their less attractive functions, they might deny victims of wrongdoing more tangible remedies, such as substantial compensation or costly policy reform.[33] And, of course, much depends on the form of the apology – its sincerity, completeness, what the apologizer intends and how the message is received; deficient apologies might well do more harm than good.

For present purposes, one specific benefit of apologies is particularly worth emphasizing, namely, their service in the reinforcement of underlying legal or social norms. The apologizer admits, at a minimum, that either the conduct in question, and/or its consequences, are out of line with legitimate expectations. And, presumably, the more public the apology is, the greater and broader are the benefits of the acknowledgement of wrongdoing. In fact, the more public the apology is, the less important it is – for purposes of norm reinforcement – whether the apology is authentic or not.

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to-iran-for-downing-of-jetliner/9523c6dc-a244-4b3b-90e9-054168d98c79/.

29. Molly Moore, *2 Vincennes Officers Get Medals Citations Do Not Mention Downing Of Iranian Airliner That Killed 290*, WASH. POST (Apr. 22, 1990), https://www.washingtonpost.com/archive/politics/1990/04/23/2-vincennes-officers-get-medals/cf383f02-05ce-435b-9086-5d61de569ed8/.

30. Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Settlement Agreement, Feb. 9, 1996.

31. *Id.*

32. Robert R. Weyeneth, *The Power of Apology and the Process of Historical Reconciliation*, 23 PUB. HISTORIAN 9 (2001); Richard Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. OF INT'N L. 3 (2006); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 90 (2004).

33. Yonathan A. Arbel & Yotam Kaplan, *Tort Reform through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199 (2016); Christopher P. Reinders Folmer, Peter Mascini, & Joost M. Leunissen, *Rethinking Apology in Tort Litigation Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*, 15 REV. LAW & ECON. (2019).

Of course, both the practice and meaning of apologies are informed not only by the political calculations of the parties, but also by the legal significance attached to the practice. In fact, the formal recognition of apologies as remedies for legal wrongs might well explain why states do not apologize more frequently than they do, and why they might sometimes be willing to offer compensation or take other tangible steps and yet refuse to apologize. Needless to say, this would be an ironic state of affairs: by formally authorizing apologies as remedies, international law would be making it harder for states to acknowledge wrongdoing, thereby failing to reinforce general international law norms.

Some support for this theory may be found in the debates over the role of apologies in U.S. tort law. Even though in most U.S. jurisdictions, apologies are not a formal remedy that a court can order, in some states, apologies can be admitted as evidence of the apologizer's having committed a tort – a rule that seems likely to deter apologies, at least among 'repeat-player-defendants who might be expected to be aware of the rule. Against this backdrop, some scholars and practitioners have advocated for law reforms that would shield apologies from adverse legal repercussions for the apologizer,[34] and indeed, dozens of U.S. states have adopted "apology laws" designed to do exactly that.[35] Yet, these laws, for the most part, shield only expressions of sympathy from evidentiary use, not the admission of errors or fault.[36] For this reason, it is argued, they have failed to produce an increase in the practice of apologies, at least in some realms.[37]

If the legal significance of apologies serves to deter the practice, even where it is beneficial, one of two practical implications follows. The first is to accept the recommendation of tort reformers in the United States and block inferences of wrongdoing from the issuance of apologies, thereby eliminating a possibly important disincentive to the provision of apologies. Of course, apologies might still have the beneficial signaling effect of reinforcing underlying norms, but they would not be recognized either as a remedy or evidence of wrongdoing as a matter of law. The other possibility is to turn in the opposite direction by making apologies a recognized, unexceptional, and indeed expected remedy, with the hope of making the practice more prevalent than it is. This is the possibility I argue for here.

To support my argument, it is necessary, first, to review the international rules on apologies as they currently stand, and then to trace back their

34. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL L. REV. 1009 (1999); Daniel W. Shuman, *The Role of Apology in Tort Law,* 83 JUDICATURE 180 (2000); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1273-74 (2006); Aaron Lazare, *The Healing Force of Apology in Medical Malpractice and Beyond*, 57 DEPAUL L. REV. 251, 251 (2008).

35. *See* Arbel & Kaplan, *supra* note 32, at 1201.

36. *Id.*

37. *Id. See also* Nina E. Ross & William J. Newman, *The Role of Apologies in Medical Malpractice*, 49 J. AM. ACAD. PSYCHIATRY &L. ONLINE 406, 406-14 (2021).

rationale and, especially, the motivation behind their qualified endorsement as desirable only as a subsidiary form of remedy and only as long as they avoid humiliation for the apologizer.

II. THE INTERNATIONAL LAW OF APOLOGIES

a. Doctrine

Under international law, whenever a state commits an act that violates any norm of international law, it bears legal responsibility. Of course, states do not commit anything; people do. The Articles on the Responsibility of States to International Wrongful Acts (ARSIWA), a document drafted by the International Law Committee,[38] accordingly stipulate that to hold a state responsible for any international wrong, two conditions must be met: First, that there is an actual violation of an international rule; and second, that the act (or omission) constituting the violation is attributable to a state.[39] This second condition is a clear acknowledgement that the entire concept of "state responsibility" is an exercise in anthropomorphism. Several ARSIWA articles are then dedicated to the exact terms for and circumstances in which individuals' actions are or are not considered state actions.[40]

The consequences of an international wrong, ARSIWA further instructs, are that a state bears a duty to make reparations.[41] This duty is a general one, although the repair owed will depend on the type and magnitude of the relevant wrong. In any case, reparations are understood to be compensatory, not punitive, proportionate to the injury, and designed only to restore the status quo ante.[42]

The ARSIWA chapter that deals with reparations names three types of reparative remedies: Restitution (a type of in-kind performance), monetary compensation, and satisfaction.[43] Satisfaction is identified as a "moral" remedy, and, per Article 37(2) of ARSIWA, "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[44]

Importantly, Article 37(1) of ARSIWA provides that "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act *insofar as it cannot be made*

38. ARSIWA, *supra* note 1. Note, ARSIWA is not a formally binding document in itself, but is widely thought to reflect, at least in this particular context of remedies, customary international law that is binding on all states.

39. *Id*. at art. 2.

40. *Id.* at arts. 3-11.

41. *Id.* at art. 31.

42. *Id.* at art. 34 and accompanying commentary.

43. *Id.* at art. 34.

44. *Id.* at art. 37(2).

good by restitution or compensation."[45] The official Commentary to ARSIWA, published by the ILC, thus emphasizes that satisfaction is not a standard form of reparation, and that in many cases it will be inappropriate, because the injury caused by a violation can be fully repaired by restitution and/or compensation:

"Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned."[46]

It is here that we encounter the first allusion to the idea of states' dignity or honor: the very fact of a breach committed by one state in relation to another is an "affront" to the victimized state.[47] One might have supposed from this that, because every inter-state violation is an affront, satisfaction would be due for all such violations. But this is not the case: satisfaction is instead deemed an exceptional remedy appropriate only in case of injuries that cannot be remedied by compensation or indemnity.

When it comes to apologies, more specifically, the Commentary is uncharacteristically brief. It mentions that an apology "may be given verbally or in writing by an appropriate official or even the Head of States,"[48] but says nothing further about what will constitute a proper apology. It notes the potential benefits of apologies for resolving disputes, but also finds that apologies might not always suffice and may have to be complemented by other, more tangible remedies.

After reminding us that satisfaction, like all remedies, is non-punitive, Article 37(3) adds the further caveats that "[s]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."[49] Though this stipulation begs explanation and elaboration, the Commentary offers little of either. It only observes that "It is true that the term 'humiliating' is imprecise, but there are certainly historical examples of demands of this kind."[50]

b. Legislative History

The ILC took on the study of state responsibility early in its operation, and several drafts were produced by different groups of experts over a period of several decades, until the final draft was adopted. A review of some of the earlier reports and accompanying commentaries offers a

45. *Id.* at art. 37(1) (emphasis added).
46. ARSIWA, *supra* note 1, at ¶ 3 of commentary to art. 37.
47. *Id.*
48. ARSIWA, *supra* note 1, at ¶ 7 of commentary to art. 37.
49. ARSIWA, *supra* note 1, at art. 37(3).
50. ARSIWA, *supra* note 1, at ¶ 8 of commentary to art. 37.

glimpse into the experts' consideration of the issues of satisfaction in general, and of apologies more specifically, and is therefore worthy of a brief discussion.

Most notably, the legislative history indicates that satisfaction was initially seen as an inherently punitive practice in response to political or moral injury. Those damages, the drafters noted, occurred with *any* violation of international law, which was ipso facto an affront to the honor and dignity of the injured state.

Over time, and consistent with the more general turn of international law away from the notion of interstate punishment, the drafters sought to keep in place the protection for moral injury while stripping away any punitive function. A punitive approach in which one state sits in judgment over another, so the drafters believed, was difficult to reconcile with the principle of sovereign equality, under which all states enjoy equal status as a matter of law.

Despite the rules' disavowal of punishment, the concern about humiliation persists to this day; and notwithstanding the drafters' earlier determinations that *any* violation of an international rule is an affront to the dignity and honor of the injured state, present-day rules limit satisfaction only to those injuries that cannot be repaired by the more traditional modes of reparation.

As I have argued elsewhere,[51] the concerns about states being subjected to humiliation and indignities seem to have been driven by a lingering fear, never explicitly mentioned but only hinted at, about the dire consequences of national humiliation to international peace and stability, fears hearkening back to the "War Guilt Clauses" under the Treaty of Versailles.[52] The legislative history of apologies, I argue here, can only be understood against this concern. Interestingly, this anxiety remains constant even as international law experts, over time, abandoned the idea that satisfaction remedies are best characterized as punitive in nature.

In a 1961 report by Special Rapporteur F. V. Garcia Amador, adopted by the ILC, the "essential characteristics of satisfaction" were explored at length.[53] Satisfaction, according to this report, "is essentially and invariably penal in character."[54] Indeed, the two-fold purpose of satisfaction was to "' satisfy[]' the honour and dignity of one State and [] 'punish[]' the act imputed to the other State."[55] The wide publicity surrounding measures of

51. Gabriella Blum, *The Crime and Punishment of* States, 38 YALE J. INT. L. 57 (2013).

52. *See* article 231 of the Treaty of Versailles (1919). *See also* GRAEBNER, NORMAN A., & EDWARD M. BENNETT, THE VERSAILLES TREATY AND ITS LEGACY: THE FAILURE OF THE WILSONIAN VISION (Cambridge Univ. Press 2011.

53. F.V. Garcia Amador, *sixth report on international responsibility*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1961, vol. II, document A/CN.4/134 and Add.l, ¶ 73 [hereinafter ILC 1961 Report].

54. ILC 1961 Report, *supra* note 52, at ¶ 56.

55. *Id.* at ¶ 76.

satisfaction were seen to be a "characteristic feature" that helped to achieve this punitive intent.[56]

Alongside the punitive nature of satisfaction, the 1961 report noted that satisfaction should be determined based on "the 'political and moral' injury [] appraised in the light of the act imputable to the State [. . .][and] of external circumstances affecting the act which aggravate it or diminish its seriousness, such as the amount of publicity which it received, the popular attitude towards the persons responsible, and so forth."[57]

As regards apologies more specifically, the report observed that written apologies tend to receive much less publicity than those presented verbally, and thus, the written method is best "employed only when the incident in question has had no impact on public opinion."[58] When other measures of satisfaction are demanded, they often include "public act[s], such as a salute to the flag."[59] Indeed, the report opined that, "saluting the flag of the offended State is the 'most ceremonious and spectacular' of all forms of apology."[60] Such public measures, it claimed, reflect the "essentially punitive nature" of satisfaction.[61] The report underscores that "in all cases of satisfaction, whatever the nature of the injury involved or of the act giving rise to satisfaction, the element of censure or condemnation is implicit in the measure or measures demanded if it is not explicitly indicated in the claims put forward by the State concerned."[62]

Notwithstanding its recognition of satisfaction as a punitive response to interstate wrongs, the ILC drafting committee was troubled by how punishment was meted out in practice. Thus, even though the 1961 report accepted that satisfaction is punitive in nature, it expressed concern over a serious risk of humiliation and undue harm to the dignity of the responsible state – a concern stemming from common power dynamics between injured states and responsible states:

"In the great majority of cases, the 'injured party' is a powerful State and the other party is a State that is incapable of resisting successfully the demands for satisfaction put forward by the first State, even though they may be utterly disproportionate to the acts imputed to the respondent State. [. . .] What most strikingly characterizes the history of satisfaction . . . is this disequilibrium of power between the States concerned and the resultant abuse of discretion by one State for the purpose of demanding, and perhaps exacting, from the other State such measures of satisfaction as it considers

56. *Id.*at ¶ 60.
57. *Id.* at ¶ 73.
58. *Id.* at ¶ 81.
59. *Id.* at ¶ 76.
60. *Id.* at ¶ 82 (citing Bissonnette, La satisfaction comme mode de reparation en droit international (Thesis, Geneva, 1952), pp. 55-56).
61. *Id.* at ¶ 76.
62. *Id.* at ¶ 76.

appropriate."[63]

In 1989, an ILC report again undertook the study of satisfaction. Under that category, the authors name, among other measures, "apologies, with the implicit admission of responsibility and the disapproval of and regret for what has occurred."[64] They find that "[f]orms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely, forms of publicity—concerning in particular the request for apologies or the offer thereof —seem to have increased in importance and frequency."[65]

The report begins by noting that moral injury, whether to natural persons or the state itself, is as much deserving of a remedy as is material injury. But while the moral damage to individuals (either as mere nationals or agents of the injured states) should be "compensated as an integral part of the principal damage suffered by the injured State,"[66] the special remedy of satisfaction is most appropriate for moral injury to the state "in its honour, dignity and prestige, and which is considered, at times, to be a consequence of any wrongful act regardless of material injury and independent thereof."[67] The report adds, "A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys—namely, in one of its most precious and politically most highly valued assets."[68]

Here, the authors invoke the following passage from Italian jurist and former judge on the Permanent Court of International Justice, Dionisio Anzilotti:

"The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element: honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that it is not required to tolerate, even if material consequences do not ensue; in no part of human life is the truth of the well-known saying' Wer sich Wurm macht er muss getreten werden' so apparent . . . "'[69]

In considering the question of whether satisfaction is punitive or compensatory, the authors note a difference of opinion among scholars

63. *Id.* at ¶ 75.

64. Special Rapporteur Gaetano Arangio-Ruiz, *Second Report On State Responsibility,* INTERNATIONAL LAW COMMISSION FORTIETH SESSION (2 May—21 July 1989), document A/Cn.4/425/Add.L, ¶ 139 [hereinafter ILC 1989 Report].

65. *Id.* at ¶ 128.

66. *Id.* at ¶ 9.

67. *Id.* at ¶ 13.

68. *Id.* at ¶ 14.

69. 1 DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 404 (4th ed. 1964). The German text is from Immanuel Kant on obedience, translated as "Anyone who makes a worm of himself cannot complain afterwards if he is trampled underfoot."

surveyed, but ultimately find that it is indeed punitive.[70] In any case – and notwithstanding their strong emphasis on the importance of protecting the dignity of injured states – they also insisted that respect for the dignity of the wrongdoer state entails that any satisfaction it is required to provide must be proportionate to the injury and not itself an indignity to the wrongdoer. Disproportionate measures are incompatible with the principle of sovereign equality, warn the authors. But their real fear seems to be rooted in the possibility that satisfaction remedies will be asymmetrically applied and abused: "Such has been the case of measures claimed as satisfaction—especially prior to the Second World War—by offended States which took advantage of the situation to make excessive or humiliating demands upon weaker States, in contempt of their dignity and sovereignty."[71]

Surprisingly missing from the report, which is otherwise rife with allusions to honor and dignity, is any concern about what these concepts actually mean in relation to states. A rare instance of the authors' awareness of this conundrum appears in a quote from Ladislas Reitzer, who was a dissenting voice on the proportionality requirement:

"... Leaving aside the question of whether it is very judicious to transpose the notion of psychological guilt into the field of international law, the problem of the seriousness of the fault is too elusive and it leaves a wide margin for every interpretation"[72].

It is only towards the very end of their analysis that the authors turn to ask whether the afflictive nature of satisfaction, even if proportionate, is at all compatible with the principle of sovereign equality. It is in this context that they raise the possibilities "*(a)* that punishment or penalty does not 'become' persons other than human beings, and notably not the majesty of sovereign States; and *(b)* that the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon—if ever—in the 'society of States.'"[73]

These concerns are then quickly dismissed: "To confine the consequences of any international delict (let alone an international crime) to restitution in kind and pecuniary compensation would mean to overlook the necessity of providing some specific remedy—having a preventive as well as a punitive function—for the moral, political and juridical wrong suffered by the offended State . . . " Moreover, "[o]ne must conclude that,

70. ILC 1989 Report, *supra* note 64, at ¶ 136.

71. *Id.* at ¶ 140. Notably, the authors cite a couple of cases, but not the German guilt clauses from the Treaty of Versailles.

72. ILC 1989 Report, *supra* note 64, at ¶ 109.

73. *Id.* at ¶ 141.

far from being incompatible with the lack of institutionalization of the 'society of States', an afflictive or relatively more afflictive/punitive form of reparation like satisfaction in its various forms would help to reduce the gap represented by the absence of adequate institutions."

All subsequent reports, from 1992, 1997, and 2001, included explicit references to moral damages in regard to satisfaction.[74] However, the language regarding the function of satisfaction remedies shifted dramatically away from notions of punishment. Thus, the authors of the 1997 report were far more equivocal in their the conceptual categorization of satisfaction as punitive: "Some authors describe such acts as a form of redress for 'moral damage', while others go so far as to see them in a penal light."[75] By the time the final report was adopted, the ILC, in direct opposition to its 1961 view, concluded that "satisfaction is not intended to be punitive in character, nor does it include punitive damages."[76]

No less consequential, the category of violations that merit satisfaction as a distinct remedy was explicitly narrowed. The 1997 report found that "the important point lies . . . in the fact that, in determining the cases in which these 'supplementary' acts should be required of the State committing the breach, the criterion taken is not the subject-matter of the breached obligation but the specific circumstances in which the breach was committed, such as the fact that they indicate that the honour and dignity of the injured State were impugned."[77] The proposed draft further stipulated that satisfaction should be obtained, including by the form of an apology, if and to the extent necessary to provide full reparation."[78] By 2001, the residual designation of satisfaction only to violations that cannot be otherwise redressed was complete.

As the afflictive nature of satisfaction and the types of injury that call for it have changed, the concern about the honor and dignity of both the wronged and wrongdoing states remained a consistent theme in the ILC's decades-long work. If Anzilotti was particularly concerned about the proper treatment of injured states, the 1997 draft expressed comparable concern about offending states: "the right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act."[79] This was so even though

74. *Id.* at art. 8(2); *Draft Articles On State Responsibility: Titles And Texts Of Articles Adopted By The Drafting Committee*, INTERNATIONAL LAW COMMISSION FORTY-FOURTH SESSION (4 May - 24 July 1992), document À/Cn.4/L.472, art. 10; *Draft Articles On State Responsibility With Commentaries Thereto Adopted By The International Law Commission On First Reading*, Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996, published January 1997), document 97-02583, art. 45[10] [hereinafter ILC 1997 Report]; ARSIWA, *supra* note 1, at art. 37.

75. ILC 1997 Report, *supra* note 74, at fn. 520.

76. ARSIWA, *supra* note 1, at p. 107.

77. ILC 1997 Report, *supra* note 74, at fn. 520.

78. *Id.* at p. 296.

79. *Id.* at art. 45(3).

the ILC experts were by then fully aware of both the 1985 *Rainbow Warrior* apology from France to New Zealand[80] or the 1995 French apology for the Vel' d'Hiv' Roundup[81] and no longer expressed the past-voiced concern about great powers wrestling degrading apologies from weaker states. The worry about emotional and psychological harm persisted: The final, authoritative version from 2001 replaced dignity impairment with humiliation, and warned that "[s]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."[82]

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What the ILC experts have never alluded to, surprisingly, is the vastly changing nature of the international system over time. If, in the earlier days of the experts' work, there were only a few dozen independent states in existence, by the 1980s and 1990s, the number of recognized states grew closer to two hundred. For many of the new states, international law, however biased in its creation and content towards stronger powers, was also a check on how much favoring could be legitimately exercised. In an anarchic system that must depend on norm internalization more than on any external power, apologies could have served as another tool of norm reinforcement. This was especially the case given that the past concern about the coercive extraction of humiliating apologies should have waned, at least to some degree, through the subsequent practice of apologies between similarly situated states or even from the strong to the lesser power.

And yet, rather than making apologies a routine remedy for all international wrongs, alongside or independent of other remedies, the exceptional nature of apologies was maintained.

III. WHAT'S WRONG WITH SHAME SANCTIONS?

In thinking about the possible perils of dignitary harm to states as a motivation behind the equivocal recognition of apologies as remedies, I turn to inspiration from Jim Whitman's work on shame sanctions in domestic criminal law.[83] Unlike others who have criticized the use of shame sanctions in domestic criminal law, Whitman's concerns have less to do with the immediate psychological harm caused to the target of the sanctions and more with the broader social-political consequences of imposing such sanctions. "The chief evil in public humiliation sanctions," he warns, "is that they involve an ugly, and politically dangerous, complicity between the state and the crowd . . . They involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace . . . They are, at base, a form of officially

80. *See supra* note 21.
81. *See supra* note 8.
82. ARSIWA, *supra* note 1, at art. 37(3).
83. Whitman, *supra* note 6.

sponsored lynch justice."[84]

If I am correct that the ILC's consistent concerns about humiliation were driven less by any psychological harm to the individuals who make up the state and more with concerns about the consequences of humiliating apologies for international peace and stability, there are clear parallels to Whitman's argument. In both analyses, the effects of shaming sanctions on their targets is not the basis for resisting them. Instead, the call to minimize the use of such sanctions is motivated by the potential socio-political and systemic effects of their deployment.

Of course, the analogy is not perfect. Unlike in Whitman's treatment, the national humiliation of the apologizing state takes center stage; we are told again and again about the past abuses of apologies, their susceptibility to power disparities, and their possible humiliating forms. And yet, the true motivation seems to go beyond the mere costs to individuals; those, after all, might not be worse than in the case of other forms of reparation imposed on a wrongdoing state. Rather, the more significant motivation of the ILC, however implicitly alluded to in its commentaries, seems to lie in the consequences that might follow from national humiliation: the destabilization of an anarchic international society that lacks any enforcement mechanism and that is in constant peril of cycles of rule-breaking, to the point of violence. In fact, the concern about humiliation is so great that it drives the ILC to take a very cautionary attitude towards all modes of satisfaction and apologies, whether humiliating or not.

And yet, ironically, this precise concern about the structure of the international system might point in favor of more, not less, reliance on satisfaction. Whitman's core concern – allowing the apparatus of the state to be harnessed to do the bidding of an angry mob – does not translate well to the international plane. There is no "government" that is delegating its enforcement power to a "fickle and uncontrolled general populace."[85] There is no "government" at all, only a potentially fickle and uncontrolled general populace. And where there is no government, and no judge or enforcer, the role of norms, and the inculcation of norms, is particularly important. In this setting, one might reasonably suppose that apologies actually have a constructive role to play as a way of acknowledging and thus reinforcing rules of law that are consistently underenforced and always in danger of being ignored. Even an apology that is forced or less than fully sincere might have expressive value of this sort.

It is possible, of course, that the exceptional nature of apologies serves to amplify their expressive value, and, if so, the effectiveness of apologies as norm reinforcers depends on their being used sparingly. But it is equally possible that this exceptionalism is also what invites a greater association

84. *Id.* at 1059.
85. *Id.* at 1055.

between apology and a dangerous humiliation – the exact concern that had motivated the equivocal stance of the ILC in the first place. Perhaps, then, if we made apologies a predictable remedy for international wrongs, we could both strengthen international law and avoid much of the risk that apologies are presumed to harbor.