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Article

***433 THE ROLE OF APOLOGY IN INTERNATIONAL LAW AND DIPLOMACY**

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There has recently been a striking and widespread resort to the use of public apologies in both intranational and international contexts. [\[FN1\]](#) The ***434** most dramatic of these have been governmental apologies for historical injustices--such as past wartime or other atrocities, racial or religious discrimination, or the abuses of colonialism [\[FN2\]](#)--spurring a burgeoning ***436** interest and literature on the potential uses of such apologies as a way of rectifying or atoning for long-past wrongs. [\[FN3\]](#)

Less scholarly attention has been paid, however, to the use of governmental apologies in trying to resolve the more quotidian international incidents and disputes with which foreign office diplomats and international lawyers are more typically concerned. [\[FN4\]](#) How prevalent is the use of apology in the more usual conduct of diplomatic practice? What role

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does apology play as a remedy in the international law of state responsibility? Can apologies influence the development of international law or otherwise have normative consequences? Is the role of apology in international relations the same as in interpersonal contexts? Does the recent proliferation of governmental apologies for historical injustices suggest that apologies are now likely to play a more important part in how governments deal with these more ordinary types of diplomatic problems as well? More broadly, what is the likely future role of apology in resolving ongoing international grievances and disputes--and does apology deserve a more important place in our toolbox of international dispute resolution techniques? The present "apology phenomenon" may furnish occasion for reexamining some of these questions. [\[FN5\]](#)

*437 I. What Do We Mean by an "Apology"?

It is not always clear what constitutes an apology, why one apologizes, or exactly how or why an apology "works." A few introductory comments in this regard may be useful.

The American Heritage Dictionary of the English Language defines "apology" as: "1. An acknowledgment expressing regret or asking pardon for a fault or offense" and defines "apologize" as: "1. To make excuse or regretful acknowledgment of a fault or offense." [\[FN6\]](#) It defines "sorry" as: "Feeling or expressing sympathy, pity or regret." [\[FN7\]](#) Interestingly, an apology is characterized by linguistic scholars as a type of "performative utterance"--an utterance that performs the action the utterance describes; that is, the stating of the words "I apologize" in itself constitutes and accomplishes the apology.

Apologies have traditionally, in virtually all human societies, performed important social functions, including diffusing conflict, avoiding retaliation, facilitating reconciliation and reaffirming the value of rules and obligations. Human experience shows that, in many contentious social situations, apologies can really help. Aaron Lazare, in his recent book *On Apology*, notes that:

One of the most profound human interactions is the offering and accepting of apologies. Apologies have the power to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of the offended parties. For the offender, they can diminish the fear of retaliation and relieve the guilt and shame that can grip the mind with a persistence and tenacity that are hard to ignore. The result of the apology process, ideally, is the reconciliation and restoration of broken relationships. [\[FN8\]](#) *438 The above dictionary definitions suggest that the expressions "I apologize" or "I'm sorry" are most frequently used and understood as meaning that the speaker accepts fault and responsibility for wrongfully causing injury to another and expresses regret and sorrow for having done so. However, the concept of apology is subtle and ambiguous, and the expression "I apologize"--or, more particularly, "I'm sorry"--can also be used with somewhat different meanings, including: (1) as a ritualized form of "politeness discourse" in response to minor transgressions in casual social interactions; (2) as an acknowledgment or expression of sorrow, sympathy or compassion for the suffering of others arising from events wholly unrelated to the speaker; or (3) as an expression of regret for an event to which the speaker has some causal or other relation, but for which the speaker claims not to be legally or morally responsible or offers some explanation, justification or excuse. [\[FN9\]](#)

In this regard, there has been considerable discussion in the relevant literature as to the elements required for a so-called "genuine," "authentic," or "effective" apology. These elements are often said to include, for example: (1) admitting one's fault or blameworthiness and accepting responsibility for a specific injury to another or others, without excuse or justification; (2) expressing sincere remorse and regret for the injurious action or inaction and the other's injury; and (3) offering appropriate reparation and promising that the wrong done will not recur in the future. [\[FN10\]](#) Some proposed criteria are quite elaborate. Thus, with particular regard to political apologies, one commentator, after surveying the literature, suggests that an authentic political apology should ideally: (1) be recorded officially in writing; (2) clearly name the wrongs in question; (3) accept responsibility; (4) state regret; (5) promise non-repetition; (6) not demand forgiveness; (7) not be hypocritical or arbitrary; and (8) undertake--through measures of publicity, ceremony, and concrete reparation--both to morally engage *439 those in whose name apology is made and to assure the wronged group that the apology is sincere. [\[FN11\]](#)

Such "genuine," "authentic," and "effective" apologies are often contrasted with "insincere," "partial," "conditional," "grudging" or "coerced" apologies and "pseudo-apologies," which are considered not only less likely to be accepted and prove effective, but possibly even capable of increasing resentment and tensions. Lazare, for example, suggests that the distinguishing characteristics of such "pseudo-apologies" may include: (1) offering a vague or incomplete acknowledgment of the offense; (2) using the passive voice; (3) making the offense conditional; (4) questioning whether damage occurred or its seriousness; (5) minimizing the offense; (6) using the empathic "I'm sorry," without taking responsibility; (7) apologizing to the wrong party; and (8) apologizing for the wrong offense. [\[FN12\]](#)

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As the examples of diplomatic apologies in the following section indicate, the words "apology" and "sorry" can be used in different ways in diplomatic practice as well; indeed, a government may deliberately word an apology or expression of regret so as to be ambiguous in this respect. Moreover, there may be some question whether the distinction between "authentic" and "less than authentic" apologies is as significant in diplomatic practice as in interpersonal relations.

*440 II. Some Recent Diplomatic Apologies

The UN's International Law Commission (ILC), in its various reports on its work concerning the international law regarding state responsibility, gives a number of examples of official state-to-state apologies or expressions of regret during the last several centuries--in particular, for conduct involving insults to the symbols of the state or government, attacks against diplomatic or consular representatives or other diplomatically protected agents, or attacks on diplomatic or consular premises, ships, or private citizens of the protesting foreign state. [\[FN13\]](#) Many other instances could be cited. [\[FN14\]](#) However, as the ILC *441 reports note, the role of apology in inter-state relations has historically been somewhat problematic. Not infrequently, stronger states have coerced apologies from weaker states or peoples as expressions of dominance or means of humiliation. [\[FN15\]](#)

Some fairly recent examples--particularly regarding incidents or disputes in which the United States was involved--may give a sense of the range of situations and variety of contexts in which government apologies or "quasi-apologies"--or refusals to give such apologies--have played a role in international diplomacy in recent years:

*442 The U-2 Spy Plane Incident. [\[FN16\]](#) On May 1, 1960, just before the scheduled Paris Summit meeting between President Eisenhower and Soviet Premier Khrushchev, an American U-2 spy plane, flying a covert intelligence-gathering mission over the Soviet Union, was shot down near Sverdlovsk in the Soviet Union and the pilot, Francis Gary Powers, was imprisoned. Khrushchev demanded that the United States "publicly express regret over these incursions, punish those who are guilty, and give assurances that such incursions will not be repeated in the future" as a condition of participating in the Summit. However, Eisenhower termed these demands an "ultimatum" which would "never be acceptable to the United States" and said that in holding to them Khrushchev had "scuttled" the conference. In part because of this incident and the U.S. failure to apologize, the Paris Summit collapsed and mistrust between the two countries further developed, culminating in the 1962 Cuban Missile Crisis.

Attack on the U.S. Ambassador to Japan. [\[FN17\]](#) Following an attempt on the life and the physical injury of the U.S. Ambassador in Tokyo in 1964, both the Prime Minister and the Foreign Minister of Japan presented apologies to the U.S. Ambassador, and the Japanese Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join members of the Japanese government in the presentation of apologies for the incident.

Israel's Attack on the USS Liberty. [\[FN18\]](#) On June 8, 1967, during the "Six-Day War," Israeli air force planes attacked an American intelligence ship, the USS Liberty, while it was off the Sinai coast, killing thirty-four Americans and wounding 171. Israel's ambassador called the attack a "tragic mistake" but contended that the "fog of war" was to blame, and that Israeli pilots had mistaken the Liberty for an Egyptian ship. President Johnson accepted Israel's explanation. The Commander-in-Chief of Israel's navy subsequently wrote, "We immediately accepted humanitarian responsibility, offered our apology *443 and condolences and paid humanitarian reparations to the dead and the wounded in amounts set by the United States government." [\[FN19\]](#) The Israeli and U.S. governments finally resolved the diplomatic aspects of the incident by an exchange of diplomatic notes on December 17, 1980, without either country accepting responsibility. [\[FN20\]](#)

The Pueblo Incident. [\[FN21\]](#) In 1968, North Korean authorities seized the USS Pueblo, which it accused of gathering intelligence within North Korean territorial waters. In order to obtain release of the eighty-two officers and men of the vessel, the United States ultimately acceded to the North Korean government's insistence that the United States sign a document stating that it "shoulders full responsibility and solemnly apologizes for the grave acts of espionage committed by the U.S. ship" and "gives firm assurance that no U.S. ships will intrude again in the future into the territorial waters" of North Korea. At the same time, however, the United States made a statement declaring that the document it had signed was at variance with the true position of the United States that the ship had been illegally seized, "that the facts of the case call for neither an admission of guilt nor for an apology," and that the document was signed "to free the crew and only to free the crew."

The Rainbow Warrior Affair. [\[FN22\]](#) In 1985 a team of French agents sabotaged and sunk the Rainbow Warrior, a vessel belonging to the environmental organization Greenpeace International, while it lay in harbor in Auckland, New Zealand, resulting in the death of a Dutch crewman. Greenpeace had intended to use the vessel to protest the French nuclear tests at

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Mururoa Atoll in the South Pacific. The French agents were arrested, convicted, and sentenced to ten years each in New Zealand prisons. France and New Zealand discussed reparation but no settlement was reached. Eventually, the parties sought a ruling by the U.N. Secretary-General. In 1986, the Secretary-General ruled, *inter alia*, that "the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, *444 contrary to international law, on the Rainbow Warrior by French service agents which took place on 10 July 1985," and that the French government should pay New Zealand the sum of seven million U.S. dollars in compensation for the damage it suffered.

President Clinton's Apologies to Rwandans and Guatemalans. [FN23] In March 1998, President Clinton, visiting Kigali, Rwanda, apologized to Rwandans for not doing "as much as we could have and should have done to try to limit what occurred in Rwanda in 1994." In March 1999, during a visit to Guatemala, he apologized for U.S. support of right-wing governments in Guatemala that killed tens of thousands of rebels and Mayan Indians in a thirty-six-year civil war, and promised American support for national reconciliation.

The U.S. Downing of Iran Air Flight 655. [FN24] On July 3, 1988, the USS Vincennes, operating in the Persian Gulf, shot down an Iranian commercial Airbus, Flight 655, killing 290 Iranian passengers. The United States never apologized to Iran, taking the position that Iran was in part culpable for allowing the aircraft to take off from a joint military/civilian airfield to fly over an area where there were active surface hostilities and that the Vincennes was engaged in a proper defensive action. However, both President Reagan and Admiral Crowe, *445 Chairman of the U.S. Joint Chiefs of Staff, expressed "regret" for the loss of life and the United States subsequently agreed to make an *ex gratia* payment of \$131 million to the victims' families.

NATO's Bombing of China's Belgrade Embassy. [FN25] On May 7, 1999, during NATO's air campaign against Yugoslavia regarding Kosovo, U.S. aircraft bombed the Chinese Embassy in Belgrade, killing three Chinese nationals, wounding approximately twenty others and eliciting an outraged protest by the People's Republic of China government, as well as violent public protests in China leading to extensive damage to the U.S. Embassy and other U.S. diplomatic properties in China. On May 8, 1999, NATO's North Atlantic Council issued a statement expressing "its deep regret for the tragic mistake" and stating that the bombing was a "deeply regrettable mistake." President Clinton also immediately declared that the bombing "was a tragic mistake" and offered his "sincere regret and [his] condolences to both the leaders and people of China." On June 17, 1999, Under Secretary of State Thomas R. Pickering made a detailed oral presentation in Beijing to Chinese officials, explaining that the attack was a mistake based on faulty intelligence and targeting procedures and not intentional. The United States ultimately agreed, on July 30, 1999, to pay \$4.5 million to China, to be given to the families of those killed and to those injured in the bombing. However, the U.S. State Department Legal Adviser at the time stated that the "payment will be entirely voluntary and does not acknowledge any legal liability" or "create any precedent." The United States also subsequently agreed to compensate the PRC for the damage to its embassy.

*446 U.S. Reconnaissance Plane's Collision with a Chinese Fighter Jet. [FN26] In early April 2001, a U.S. reconnaissance plane conducting operations off the coast of the Chinese mainland collided with a Chinese jet fighter which was flying close to it. The Chinese jet fighter crashed, killing the pilot, and the damaged U.S. plane made an emergency landing at a Chinese military airfield on Hainan Island, where Chinese authorities detained its twenty-four-person crew for eleven days, demanding an apology. Following intense negotiations, the U.S. Ambassador to China delivered a letter to the Chinese Foreign Minister expressing both President Bush's and Secretary of State Powell's "sincere regret" over the missing Chinese pilot and aircraft, conveying to the Chinese people and family of the pilot "that we are very sorry for their loss," and stating that, "[a]lthough the full picture of what transpired is still unclear, [w]e are sorry the entering of China's airspace and the landing did not have verbal clearance" and "appreciate China's efforts to see to the well-being of our crew." The Chinese government treated the letter as the demanded apology and released the crew.

The LaGrand Case. [FN27] Article 36 of the Vienna Convention on Consular Relations, to which both the United States and Germany are party, provides that nationals of any parties must be notified of their right to communicate with their consular officials when they are detained by law enforcement officials in other states which are parties. The State of Arizona in the United States arrested, charged with murder, and later sentenced to death and executed two German nationals, the *447 LaGrand brothers, without at any time informing them of their right to communicate with German consular officials. Germany protested and brought suit against the United States in the International Court of Justice (ICJ) claiming that the United States had violated its obligations under the Vienna Convention. In its 2001 opinion, the ICJ held that the United States had breached its obligations to Germany. The Court noted that the United States had acknowledged that, in the case of the LaGrand brothers, it had not complied with its obligation to give consular notification and had presented its apology to

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Germany for this breach. The United States argued that Germany's entitlement to a remedy did not extend beyond such an apology. However, the Court considered that an apology was not sufficient in this case or similar cases where foreign nationals had not been advised without delay of their rights under the Convention and had been subjected to prolonged detention. [FN28] Germany had not requested material reparation for injury to itself or the LaGrand brothers, but sought a general assurance of non-repetition which the Court found was met by certain U.S. commitments regarding notification in the future.

The Ehime Maru Incident. [FN29] On February 9, 2001, a U.S. submarine, the USS Greenville, while surfacing, collided with and sank a Japanese fishing research vessel, the Ehime Maru, resulting in the death of a number of young students training on the vessel. Immediately following the incident, U.S. Admiral Fallon, a special envoy of President George W. Bush, hand delivered a letter to Japanese authorities expressing the United States' apologies and regrets; the commanding officer of the submarine, Commander Waddle, presented his "most sincere regrets to the people of Japan"; and the U.S. Secretary of State phoned the Japanese Foreign Minister to express his regrets. However, relatives of the victims said they would not accept an apology unless it was made in person. Shortly after the incident, Commander Waddle expressed his desire to visit Japan to apologize. It was reported at that time, however, that the U.S. Navy, along with the Commander's lawyers, were *448 preventing him from doing so since it might dilute their legal position in negotiations for compensation. In December 2002, Commander Waddle did go to Japan, met and expressed condolences to the family of one of the victims, and offered a "heartfelt apology" to four surviving students. Most of the victims agreed to an American offer of compensation. Some relatives said that an apology was a condition of reaching a settlement.

U.S. Abuse of Iraqi Prisoners at Abu Ghraib. [FN30] In late May 2004, following the U.S. invasion and occupation of Iraq, widely-published photographs revealed instances of abuse by U.S. military personnel of Iraqi prisoners held at Abu Ghraib prison in Baghdad, resulting in worldwide revulsion and condemnation. In early May 2004, apologies or statements of condemnation or regret were made, in various contexts, by U.S. Secretary of State Powell, Secretary of Defense Donald Rumsfeld, National Security Adviser Condoleezza Rice, Deputy Secretary of State Richard Armitage, and Generals Mark Kimmit and Geoffrey Miller. For example, U.S. Secretary of Defense Donald Rumsfeld, testifying at the U.S. Capitol on May 7, 2004, said: "So to those Iraqis who were mistreated by members of the U.S. armed forces, I offer my deepest apologies." However, President Bush's comments were more equivocal. On April 30, 2004, President Bush described the conduct shown by the photographs as "abhorrent" and expressed his "deep disgust" at the images. While President Bush has never directly apologized to the Iraqi people, on May 6, 2004, at a White House ceremony with visiting King Abdullah of Jordan, he recounted that, in a private Oval Office conversation with King Abdullah: "I told him that I was sorry for the humiliation suffered by Iraqi prisoners and the humiliation suffered by their families." The U.S. government has to date *449 consistently maintained that the abuses shown, and others reported, were not approved practice but the aberrant behavior of a few "bad apples."

III. Apology as a Formal Remedy in International Law

In contrast to many national legal systems, [FN31] international law recognizes apology as a formal remedy for violations of international law. However, its formal role is generally exceptional and subordinate or auxiliary to the role of other remedies such as restitution or the provision of monetary compensation.

The role of apology as a remedy for internationally wrongful conduct is most recently and authoritatively described in the U.N. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("the Articles"), which the Commission, after several decades of study and debate, finally adopted and referred to the U.N. General Assembly in 2001. [FN32] As the ILC's Commentaries to the Articles explain:

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for *450 wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional. [FN33]

The broad structure of the Articles, as here relevant, may be briefly described. In general, every internationally wrongful act of a State--that is, conduct attributable to a State which constitutes a breach of its international obligations--entails the international responsibility of that State (Articles 1 and 2). A responsible State is under a duty to continue to perform the obligation breached (Article 29); to cease the wrongful act and, if circumstances require, to offer appropriate assurances and

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guarantees of non-repetition (Article 30); and, finally to make full reparation for the injury (including both material and moral damage) caused by its internationally wrongful conduct (Article 31). [\[FN34\]](#) Full reparation for the injury caused by the wrongful act can take the form of restitution, compensation, or satisfaction, either singly or in combination (Article 34). The responsible State is, first, under an obligation to make restitution--that is, to reestablish the situation which existed before the wrongful act was committed, provided that restitution is not impossible and does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation (Article 35). However, to the extent that the damage caused by the wrongful act cannot be made good by restitution, the responsible State is under an obligation to compensate for the damage caused thereby (Article 36). Finally, insofar as the injury caused by a wrongful act cannot be made good by restitution or compensation, Article 37 of the Articles requires the responsible State to give "satisfaction"--which may include a formal apology-- for the injury caused by the wrongful act. [\[FN35\]](#)

*451 More specifically, Article 37, Satisfaction, provides:

1. 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 good by restitution or compensation.

2. Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

The ILC, in its Commentary on Article 37, while noting that the remedy of satisfaction for nonmaterial injury "is well-established international law," also comments that satisfaction "is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation" and that it has a "rather exceptional character" in that it is only in those cases where restitution and compensation have not provided full reparation that satisfaction may be required. [\[FN36\]](#)

The ILC Commentary on Article 37 comments, with respect specifically to "apology," that:

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the head of State. Expressions of regret or apologies were required in the "I'm Alone", Kellet and Rainbow Warrior cases, and were offered by the responsible State in the Consular Relations and LaGrand cases. Requests for, or offers of, an *452 apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an ex gratia basis, or it may be insufficient. In the LaGrand case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties."

(8) Excessive demands made under the guise of "satisfaction" in the past suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States. In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; second, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind. [\[FN37\]](#)

In a recent discussion of the ILC's Articles on reparations, [\[FN38\]](#) Professor Dinah Shelton notes that the ILC Articles are based primarily on a theory of remedial justice--to rectify the wrong done an injured party and to correct injustice by restoring the status quo ante--rather than on possible alternative theories such as punishment, deterrence or restorative justice and reconciliation. She comments:

*453 Damages fulfill a purely compensatory purpose, excluding exemplary or punitive awards. Guarantees of nonrepetition and satisfaction are disfavored, the first because such assurances anticipate future breaches, and thus do not remedy injury already caused, and the second because satisfaction has been used in the past as a punitive measure. . . .

Like restitution and compensation, satisfaction is intended to restore the injured state to its preinjury status, as though the wrong had not occurred, but it focuses on the wrongful conduct of the responsible state so as to provide a remedy for injuries that are not financially assessable, such as moral or legal injury. . . .

The more general concern of the international community as a whole to uphold the rule of law. . . does not extend to allowing the injured state to request measures to punish the violation or deter the responsible state from further wrongful acts. [\[FN39\]](#)

In sum, it is evident that the role of apology as a formal remedy in international law, at least as currently viewed, is limited.

First, its function is seen as primarily reparational and supplementary--essentially a "fallback" remedy if more adequate ways of seeking to restore the status quo ante, such as restitution or compensation, are not available or appropriate. Second, the ILC Commentary makes clear the Commission's distrust of apology as a remedy and its concern that demands for apology may be misused as a means of humiliation. Indeed, there is little indication in the ILC's Commentary or various reports that the Commission seriously considered the broader possible role or relevance of apology as an instrument of dispute management, reconciliation, or restorative justice. [\[FN40\]](#)

IV. Apology as Practice Affecting the Formation or Reinforcement of Customary International Law, Treaty Interpretation, or Estoppel

In a recent article on "The Status of State Apologies," Mark Gibney and Erik Roxstrom suggest that:

*454 state apologies might play a . . . direct role in terms of the development of the law of state responsibility. Statements by high level officials--such as apologies--may under certain circumstances, constitute evidence of state practice and therefore 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 a unilateral declaration that is at least binding on the state that issued the apology. [\[FN41\]](#)

Let me briefly comment on their points.

First, as they suggest, an apology may, in appropriate circumstances, serve as evidence of the existence of a customary rule of international law. As familiar to those involved in international law, customary international law results from a general consistent practice of states followed by them from a sense of legal obligation. [\[FN42\]](#) In an authoritative recent study, the International Law Association's Committee on Formation of Customary International Law stated:

(i)[a] rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.

(ii) If a sufficiently extensive and representative number of states participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law." [\[FN43\]](#)

It is usually said that, to establish the existence of a customary rule of international law it is necessary to show both that: (1) the conduct in question (which can be either acts or omissions to act) amount to a settled practice--that is, a practice which is generally uniform, extensive and representative in character (the so-called "objective element"); and (2) that this pattern of state conduct evidences a belief on their part that this practice is required by international law--that is, that *455 the states concerned believe that they are conforming to what amounts to a legal obligation to engage (or not to engage) in that conduct (the so-called "subjective element" or *opinio juris sive necessitatis*). [\[FN44\]](#) Unlike obligations established by international agreements, which are generally binding only on those states which, through their express consent, have become parties to the agreement, a rule of customary law is binding on all states without the need for evidence of their express consent.

It is generally accepted that state practice can be manifested not only by physical acts but also by verbal acts such as diplomatic or other official policy statements. [\[FN45\]](#) Consequently, it is clear that an official state apology, as a "speech-act," may in appropriate circumstances constitute an instance of a particular state's practice which can contribute to or evidence a broader settled practice of states regarding the conduct for which the apology is made. Perhaps more significantly, an official apology may, by its language or context, also acknowledge that the apologizing state regards its conduct--either its act or failure to act--as wrongful under international law, thereby manifesting its belief that the violated norm is obligatory (the *opinio juris*). Certainly, France's apology for the blowing up of the Rainbow Warrior in Auckland harbor acknowledged that this conduct violated applicable international law, thus reinforcing the customary law (and treaty-based) prohibitions on the use of force involved. Indeed, even an apology which essentially seeks to excuse or justify the conduct in question as not violating a customary rule may implicitly serve to affirm the existence and validity of the rule. [\[FN46\]](#)

However, in assessing the possible effect of a state's apology on the formation or reinforcement of a purported rule of customary international law, certain cautions may be in order. First, it may be clear from the language or context of the apology that the apologizing state does not, in fact, regard its conduct as violating any obligatory rule of customary international law, either because it does not acknowledge or expressly or impliedly disclaims the existence of such an alleged norm, or because (as in the case of U.S. apology in the Pueblo incident) it *456 disputes the facts that would bring its conduct within the ambit of such a norm. Moreover, a state's apology may, due to its language or context, be ambiguous as to whether that state in fact regards its conduct as violating an obligatory rule of customary law. [\[FN47\]](#) It is presumably only

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"authentic" apologies--ones that genuinely and unequivocally recognize the existence of particular rules--and that perhaps also meet other criteria of "authenticity"--that can, in theory, have this custom-formative effect. For example, as Gibney and Roxstrom recognize, it is not clear that President Clinton, by his apologies, really intended to acknowledge that the United States had violated legal--as contrasted with moral--obligations towards Rwanda and Guatemala; certainly, he did not intend to imply that the United States was financially responsible for the extensive injuries and monetary loss suffered by those countries and their peoples. Again, where a government joins its apology or expression of regret with monetary payments expressly stated to be solely on a "humanitarian" or ex gratia basis, as in the case of Israel's apology for the Liberty incident, the evidentiary weight of the apology for the purpose of establishing the existence a customary norm will be significantly attenuated or, arguably, negated.

Moreover, even if a particular state's apology is appropriately regarded as an evidentiary example of the existence of the practice and sense of obligation relevant to establishing a particular alleged customary rule, the question remains as to the weight to be given that instance in establishing the existence of a broadly-applicable customary rule. [FN48] Thus, while a coerced apology, an apology by a state with little interest or involvement in the conduct regulated by an alleged customary norm, or an apology by some minor state official in a limited or informal setting may all theoretically "count" as instances of state "practice," they will likely have very limited significance or persuasive authority as evidence of the alleged norm. And, it must again be emphasized that a particular apology evidences, at best, only one state's practice, whereas it is necessary to show a fairly uniform and representative practice on the part of a number of states to persuasively establish the existence of a general customary rule--a burden increasingly difficult to meet as the number of states recognized as constituting the international community has grown.

It is also important to recognize that, just as an apology may conceivably serve as evidence of the practice and opinio juris necessary *457 to establish an obligatory customary rule, a state's refusal or failure to apologize for particular conduct also constitutes or "counts" as "practice" and may manifest a belief that the conduct involved is not inconsistent with any customary norm, thus serving as evidence of the non-existence of the alleged norm. This might particularly be the case where an apology has been expressly sought by another state but the state engaging in the protested conduct refuses to offer such an apology.

Second, as Gibney and Roxstrom suggest, an apology by one of the parties to an international agreement may help to inform or confirm the interpretation of an obligation established by that agreement. The Vienna Convention on the Law of Treaties, generally acknowledged as codifying the customary law of international agreements, provides, inter alia, that in interpreting a treaty:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. . . . [FN49]

An apology by a party specifically acknowledging that its conduct has failed to conform with particular obligations of an international agreement might arguably constitute, or at least be analogous to, such a subsequent agreement or practice and thus be considered as confirming the interpretation of the agreement as creating the obligation the apologizing state acknowledges having breached. Thus, the U.S. apology to Germany in the LaGrand case for Arizona's failure to notify the LaGrand brothers when they were arrested of their right to communicate with German consular officials, as Germany insisted was required by the Consular Convention, clearly evidences and establishes the two countries' now common interpretation of those obligations under the convention.

Third, an apology may have legal consequences even apart from the possible effect of the apology on customary or treaty law. For example, an official apology acknowledging or representing that particular conduct is required by international customary law, especially if relied on by another state, may arguably be held to "estop" the apologizing state from later denying the existence of that rule as applicable in their *458 relations. That is, the apologizing state's statement, intended to induce reliance, may be held to require that the apologizing state subsequently conduct itself in accordance with the norm it purported to recognize. [FN50] Again, even if the U.S. apology in the LaGrand case was regarded as not establishing an agreed interpretation by Germany and the United States regarding the meaning of the Convention's consular notification provisions, it would clearly be very difficult for the United States, in any future dispute with Germany, to suggest that those provisions had some different meaning. Moreover, as Professors Gibney and Roxstrom suggest, there is international

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authority (albeit somewhat controversial) indicating that official unilateral statements, such as an official state apology, may in some circumstances be given legal effect. This might presumably be true, in particular, of a formal apology which represents or promises that the apologizing state will act, or cease to conduct itself, in certain ways in the future. Thus, in the 1974 Nuclear Test case, involving France's conduct of nuclear tests in the atmosphere on a French island in the South Pacific, the International Court of Justice held that certain unilateral statements by French authorities indicating that they would no longer conduct nuclear tests in the atmosphere in the South Pacific had binding legal effect, and on that basis mooted and dismissed the case. [\[FN51\]](#)

*459 Finally, even if an apology is not of such a character as to entail formal legal consequences, it may arguably still have some normative effect in shaping expectations concerning state behavior. Scholars have recently become increasingly interested in the phenomenon of so-called "soft law"--non-binding or informal collaborative actions or instruments which, while not intended to be legally obligatory, may nonetheless normatively influence how states believe they should conduct themselves. [\[FN52\]](#) Indeed, "soft law" may in some circumstances evolve over time into "hard" customary or treaty law. Certainly apologies, such as President Clinton's apologies concerning Rwanda and Guatemala, may--as Professors Gibney and Roxstrom suggest--have at least this kind of informal effect on the development of international normative expectations regarding the appropriateness of humanitarian intervention or the giving of assistance to repressive regimes.

In sum, apology may conceivably affect the formation or reinforcement of customary international law, inform the interpretation of treaties, and perhaps "estop" a state from challenging the existence of an alleged rule for the "violation" of which it apologized. However, whether a particular apology can arguably be considered to have such effects, and the weight it will likely be accorded in this respect, will depend on many factors--the particular context and circumstances under which the apology is made, its wording and content, the official level at which it is rendered, and so forth. Moreover, in practice most state apologies--apart from the current wave of apologies for historic injustices--have involved conduct fairly clearly violating well-established international norms--for example, the U.S. submarine's negligent collision with the Ehime Maru--and thus serve primarily to reinforce existing norms rather than to help form new ones.

In this regard, is it arguable that, exceptionally, the recent spate of government apologies for historic injustices heralds the emergence of a new customary international law principle under which states can be held legally responsible for such long past conduct. While the jury is still out on this question, this seems at present unlikely. First, these recent state apologies have been cast, for the most part, in solely moral *460 terms, avoiding any suggestion of legal responsibility or the possibility of reparation. Consequently, evidence of either a practice or opinio juris supporting such an emerging principle is lacking at the present time. Moreover, as regards the intertemporal application of international law, it seems generally accepted that long-past state conduct should be judged by the norms recognized at the time the conduct occurred rather than by retroactively applying those norms existing when the conduct is being assessed. [\[FN53\]](#) While much of the past behavior for which states are now apologizing--such as aggression, genocide, slavery, racial and religious discrimination and colonial exploitation--would presumably violate present-day international norms, most of these norms have emerged only recently--in some cases only since 1945--and it is not at all clear that they would have violated the norms recognized when the conduct took place.

Nevertheless, it is evident that concerned groups and their advocates-- seizing particularly on the precedents of U.S. payment of reparations to Japanese-American World War II internees and German payment of reparations to Holocaust victims, slave laborers, and other World War II victims--will continue to argue that "sorry isn't enough," that apology implies and entails legal responsibility, and that such legal responsibility in turn requires reparation. [\[FN54\]](#) In at least some instances, interest groups may succeed in mobilizing sufficient moral, political and economic pressure to induce the provision of at least some measure of reparation or other forms of redress. To the extent that such claims meet with success, it is possible that we may see a blurring of traditional doctrines of intertemporal law and at least some growing recognition that state responsibility may extend to even long-past historical injustices.

*461 V. Are State-to-State Apologies Different from Other Kinds of Apologies?

It is evident that official state or governmental apologies--particularly those to other states or peoples--may differ significantly in nature and function from apologies in interpersonal contexts. In the case of an interpersonal apology, the person apologizing is usually personally involved and responsible for the conduct in question and expresses his or her sense of personal responsibility and consequent sorrow and remorse directly to the person or persons harmed by that conduct, who may or may not then decide to accept the apology and grant forgiveness. In contrast, state-to-state or governmental apologies are typically of a more indirect, abstract, and representative character.

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Nicholas Tavuchis, for example, has proposed the following typology of apologies: (1) interpersonal ("One to One"); (2) individual to collective ("One to Many"); (3) collective to individual ("Many to One"); and (4) collective to collective ("Many to Many"). [FN55] He would presumably classify state-to-state apologies in the "Many to Many" category. Tavuchis points out that the authentic communication of "sorrow" (which he considers a central component of an apology) is ruled out or, at best, perfunctory in light of the formal, official and public discursive requirements of apology from the Many to the Many and raises the question:

If this is indeed so, does it mean that in comparison with interpersonal apology, the achievement of a collective one is somehow "inferior," so compromised by the necessity of delegation as to be inconsequential in effecting reconciliation? Or that intergroup apology bears so faint a resemblance to the other forms as to call into question its conceptual kinship to them? [FN56] Some of the more obvious differences between state-to-state and interpersonal apologies are expressed in the following questions.

How does "a state" apologize? A public official making a state-to-state apology functions only as a representative of the collectivity. Such an official may have had no personal responsibility or involvement with the offending conduct, and may not even have been in a position of authority when that conduct occurred. Consequently, as Tavuchis suggests, the official's expression of sorrow or remorse will frequently be *462 more rhetorical and ritualistic than genuine. Moreover, there may be a question whether the official accurately represents the authentic feelings or attitudes of most--or even many--people in the apologizing state.

How can a state "be responsible" for offending conduct? A state apology purportedly accepts responsibility for the offending conduct on the part of "the state" as a whole. But, a state is an abstraction and cannot itself "act"; only individual people, presumably acting as its agents, actually engaged in the conduct in question. Consequently, there may be a question whether, in any given case, it is fair to assign or attribute responsibility to the people of the state as a whole, who may have had no voice in, or even opposed, the conduct involved. Indeed, as often noted with respect to apologies for long-past conduct or historical injustices, the participants in the present political community may not even have been members of that community or alive when the conduct in question occurred. [FN57]

To whom can a state apologize? Similar issues arise as to how one state can authentically apologize to another "state" or "people." Usually, the apology can be made only to a representative official of the other state or through a generalized public statement carried by the media. Perhaps where only primarily symbolic and abstract values are at issue--for example, another state's "honor" or "dignity"--it may be possible to regard the other "state" as a whole as the wronged entity. But where the wrongful conduct has injured particular individuals or groups, a solely state-to-state apology, without more, may be remote from and have little meaning for those harmed, who, indeed, may be long dead.

How can a wronged state "accept" an apology or grant "forgiveness" ? Again, issues arise of the authority and mandate of representatives of a wronged state to decide for and speak on behalf of that state in reaction to a proffered apology--particularly if the conduct involved has harmed individuals or groups not participating in the decision to accept the apology.

Questions like these suggest that state-to-state or governmental apologies may, at least in many contexts, be very different in character and function from other kinds of apologies, and that analogies or hypotheses drawn from interpersonal apologies should be drawn with caution. Thus, Tavuchis suggests that "the principal function of . . . all *463 collective apologizing. . . has little to do with sorrow or sincerity but rather with putting things on a public record." [FN58] And Lazare notes that:

The role of sincerity in expressing remorse seems to be generally less important in public apologies, in which proper acknowledgment that a social or moral contract was violated has great social value regardless of sincerity. . . .

That these apologies are sometimes insincere does not detract from their social value as public endorsements of the rules of conduct between nations. . . . [FN59]

However, such differences should not be exaggerated. As Lazare and other commentators point out, even interpersonal apologies may in some cases be insincere, pro forma or ritualistic, solely for public relations purposes, or designed only to avoid retribution or liability--yet still be effective in creating a context in which the parties can dispose of the issue, achieve reconciliation, and move on. [FN60]

VI. Why Do the Governments of States Apologize--or Not Apologize?

States, or, more accurately, their governments or ruling elites, would usually not apologize if they did not think that

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apologies served their national or governmental interests. Depending on circumstances, state-to-state or governmental apologies may serve a variety of state interests and purposes, which may, however, differ from those usually served by interpersonal apologies.

What are some reasons why the government of a state might choose to apologize? [\[FN61\]](#)

***464** First, we should recognize that a government may decide to apologize to the government or people of another state because it genuinely believes that it is the right thing to do. That is, a government or particular official, reflecting the view of many or most of the state's citizens, may: (1) truly believe that its acts or omissions, accomplished through its agents, have been wrongful and caused harm to another state or its citizens; (2) be genuinely sorry for and regret that conduct; and (3) wish to show empathy for, make amends to, be forgiven by, and restore good relations with the other state and its people. And, conceivably, this apology may in fact reach the people who were injured, be accepted by them, and result in their forgiveness, reconciliation and a resumption of good relations. This model of state-to-state apology is, of course, closely analogous to that of an authentic and successful interpersonal apology. [\[FN62\]](#) As with interpersonal apologies, the useful functions of such an authentic state-to-state apology can include: (1) demonstrating remorse for the wrongful or harmful action or inaction and respect for the wronged state and any victims; (2) negating any intent to cause harm; (3) preventing escalation of the dispute; (4) providing a basis for settlement negotiation; (5) repairing the damaged relationship and effecting reconciliation; and (6) affirming relevant international norms and international community interests. [\[FN63\]](#) The United States' (and Commander Waddle's) apologies in the 2001 Ehime Maru incident may approximate this model.

Second, a government may apologize because it believes that an apology will enhance, preserve, or restore its self-image and international reputation. A nation's and government's reputation for decency and respect for legal and moral norms is an important national asset that can strongly affect its internal and external influence and ability to achieve its aims. The U.S. apologies for abuse of Iraqi prisoners at Abu Ghraib prison were clearly influenced by such self-image and reputational concerns--as one may assume was also the case regarding many of the previously-noted U.S. and other government apologies for long-past historical injustices.

Third, a government may apologize in compliance with the binding judgment of an international court or of an arbitral tribunal, as in the *I'm Alone* and *Rainbow Warrior* cases. Here, the apology simply ***465** implements a judicially-ordered remedy of "satisfaction," and the apology may, but need not, be authentic. The reaffirmation of the relevant norm, labeling of the apologizing state's conduct as wrongful and vindication of the wronged state results primarily from the judicial tribunal's decision rather than from any initial belief or conclusion of the apologizing state itself. Implementation of the judgment requiring an apology settles the legal dispute, strengthens the relevant norm and may have some future deterrent effect, but may or may not satisfy those injured and resolve underlying grievances or differences.

Fourth, it is conceivable--though I believe unlikely--that a government might render an apology for particular conduct in hope that its apology will contribute to establishing or reinforcing some desired customary law rule or treaty interpretation. That is, the state's apology may be intended primarily to signal and communicate to another state or the international community that it has changed its position with respect to the legality or appropriateness of such conduct; remedial, redemptive or restorative consequences of its apology may have no or only secondary importance in its decision to apologize.

Fifth, a government may make a pro forma apology simply as an accepted, low-cost, and time-honored way of resolving or defusing an incident or contretemps involving some alleged--perhaps relatively minor--invasion of or harm to another state's rights or interest. As previously indicated, many state-to-state apologies have been for conduct ostensibly violating another state's "sovereignty," "honor" or "dignity"--for example, insults to its flag, minor violations of its territory, insults to or injury to its diplomats and so forth. Absent apology, the "wronged" state may feel compelled, perhaps by public sentiment, to defend its "honor" by retaliating, thus risking escalation of the situation. Japan's apology for the 1964 attack in Tokyo on the U.S. Ambassador and NATO's and President Clinton's 1999 apologies for the bombing of China's Belgrade embassy are perhaps examples. In such cases, the apology may be less an expression of genuine remorse than a pragmatic calculation of political expediency--a face-saving technique or ritual through which both states can restore mutually useful relations, move on and put the incident behind them.

Sixth, a government may deliberately attempt to use apology as a tactic for avoiding the consequences of its intentionally wrongful conduct. That is, it may decide to risk doing what it wants, plan to then say it is sorry, and hope to "get away with it" and escape retribution, assuming that the wronged and injured state will find it more difficult to justify retaliation ***466** in

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the face of even a hypocritical apology. Richard Armitage, who has recently served as U.S. Deputy Secretary of State, is quoted as saying, "I learned one lesson that never served me wrong: that forgiveness is easier to get than permission." [\[FN64\]](#) Japan's apology for its 1937 apparently deliberate bombing of the USS Panay is perhaps an example. [\[FN65\]](#)

Seventh, a government may apologize simply because it is coerced to do so and has no other practical option. This may be the case even if it believes it has done nothing wrong and that the other state is bullying it into apologizing in order to humiliate it. That is, the apology is forced upon the apologizing government as a symbolic surrender and token of its powerlessness and inferiority. Of course, such a coerced apology may itself become a source of resentment and animosity, disturbing rather than smoothing future relations between the countries concerned. As indicated, the International Law Commission was aware that apology had historically often been used for this purpose and consequently included apology as a formal remedy in its Draft Articles only with some reluctance. [\[FN66\]](#) Interestingly, in the 1968 Pueblo incident, North Korea--the weaker state--forced the United States--the stronger state--to apologize as a condition of North Korea's release of the Pueblo's crew. Clearly, North Korea had no illusion that the U.S. apology would be authentic or result in restoration of North Korean-U.S. relations; its purpose in requiring the apology was simply to humiliate and embarrass the United States.

Finally, a government's--or a particular official's--apology or expression of regret may be intended primarily as a public relations gesture, directed principally at a domestic or international audience other than the state or people actually wronged, and designed to win public approval--currently, perhaps, by the government's participation in a supposedly now fashionable "culture of contrition." This cynical perspective is reflected in Jay Rayner's recent satiric novel, *The Apologist*; the novel's protagonist is so good at expressing remorse and begging forgiveness that he is hired as its chief apologist by the fictional "U.N. Office of Apology and Reconciliation," with the job of going around the world saying how "sorry" the U.N. is for a variety of present *467 and past injustices and atrocities. [\[FN67\]](#) Certainly, there has been some skepticism expressed as to the sincerity and motivation of at least certain of the current rash of government apologies for past wrongs.

But it may also be useful to suggest some reasons why the government of a state may decide not to apologize.

First, a government may refuse to apologize because it genuinely does not believe that it has done anything to apologize for. Thus, it may challenge the alleged facts involved or the existence of an international norm it is alleged to have violated, or it may argue that its conduct was in any event excused or justified. For example, the United States in the Pueblo and Iranian Air Flight 655 incidents and Israel in the Liberty incident took this position. [\[FN68\]](#)

Second, a government may refuse to apologize because it is concerned that an apology may be regarded as an admission of its responsibility in the matter and thus weaken its legal position and possibly disadvantage or expose it to liability or a demand for reparation in future negotiations or litigation. Certainly, foreign office legal advisers will always see this as a concern. [\[FN69\]](#) Alternatively, the government may decide to make a "safe" or "partial" apology or statement of "regret," being careful to make sure that its statement is so phrased as to not be capable of being construed as an admission of legal responsibility. [\[FN70\]](#) And it may also ensure that any payment it may make *468 for the harm caused is described solely as an ex gratia or "humanitarian" payment rather than as compensation or reparation. Again, the Israeli government, in its expressions of regret in the Liberty incident, was careful to make clear its position that the attack was an accident--a reasonable and excusable mistake on its part--for which it believed the United States at least shared responsibility.

Third, a government may be concerned with the possible precedential effect of a particular apology as regards other allegedly similar cases. Thus, the U.S. government's apology and payment of reparations to Japanese-American citizens interned during World War II has clearly spurred subsequent and ongoing demands for U.S. government apologies and payment of reparations for slavery, mistreatment of Native Americans and other alleged historical wrongs.

Fourth, a government may conceivably be concerned that an apology will weaken a particular customary rule or treaty interpretation it supports or lend support to one it opposes. For example, President Eisenhower's refusal to apologize to the Soviet Union in the U-2 incident may have been partly because the United States was then proposing an "open skies" policy which would recognize a right of overflight for arms control inspection purposes. Apart from other political considerations, an apology might have weakened U.S. efforts to establish such an international legal "right."

Fifth, a government may refuse to apologize because, under the circumstances, it regards such an apology as demeaning and damaging to its honor or international prestige, or because it fears domestic criticism or political cost if it makes such an apology. This may particularly be the case where the proposed apology is to an enemy or rival state. [\[FN71\]](#)

*469 Finally, a government may refuse to apologize, even if it believes it has acted wrongfully, simply because it sees no political need to do so and no disadvantage from not doing so. Thus, a powerful state may see no reason to apologize to a much weaker state, a state which is in no position to effectively retaliate, or a state with which it has no desire to maintain good relations.

VII. Are State-to-State Apologies Likely to Play a Major Role in Resolving Current International Differences?

Despite the current "apology phenomenon" and supposed emergence of a "culture of contrition," it seems likely that apology will continue to play only a relatively limited role in the adjustment of most present-day international incidents and differences. It is true, as indicated, that there have recently been an unusual number of state apologies for long-past historical injustices. [FN72] These apologies, however, have typically been cast primarily as expressions of general regret rather than as genuine admissions of fault and responsibility, and are rarely coupled to commitments to effective reparation. Further, their effectiveness in dissipating tensions and restoring good relations remains unclear. Otherwise, there seems to be little evidence that diplomats or international lawyers are now more inclined to resort to apology as a way of resolving current international problems than they have been in the past.

*470 Indeed, it seems still to be the case that, with respect to more significant international disputes, particularly those involving substantial harm to another state's nationals, property, or interests, apology alone is rarely enough. In these more serious incidents, while apology may often be a necessary and important component of settlement, the eventual resolution of the matter will typically require more concrete forms of reparation and adjustment, such as restitution, the payment of money damages, or assurances of non-repetition. [FN73] And, as is common experience with respect to interpersonal apologies, an insincere, incomplete, or highly conditional apology or "quasi-apology" may not only be ineffective but may sometimes make matters worse.

Of course, much of this is speculation. There is relatively little empirical data concerning either the use or consequences of apology in diplomatic practice and international affairs and many questions remain unanswered. Are state-to-state governmental apologies really successful in resolving grievances and disputes and how can we measure such success? Are people injured aware of such governmental apologies and do they really feel better and more forgiving because of them? Do such apologies affect reconciliation or healing between countries and peoples and how can we measure such reconciliation? Are such apologies more likely to help a nation's reputation and self-image or, instead, to *471 diminish and damage them? Does it make any difference whether such apologies are authentic? Do the answers to these sorts of questions differ as among different kinds of transgressions and perhaps different cultures? Do apologies have the effect of diminishing or--as government attorneys often fear--of encouraging, strengthening, and increasing demands for monetary compensation? And what accounts for the recent surge in government and other apologies for historical injustices? Hopefully, further studies will cast light on some of these questions.

If a government decides to apologize, how, when, and to whom should it do so? There is extensive discussion in the literature of the practical aspects and problems involved in making an effective apology. [FN74] In a recent essay, Sir Arthur Watts, an eminent former Legal Adviser to the British Foreign Office and highly experienced diplomat, addresses more particularly "The Art of Apology" in international diplomatic settings--discussing, inter alia, the delicate balancing of interests involved in negotiating diplomatic apologies and "quasi-apologies," as well as the gradations of language and often deliberate ambiguity that can be deployed to achieve viable compromises. [FN75] He comments that:

In international relations apology lies at the crossroads of the diplomatically commendable and the legally dangerous. In international life as in private life, saying "sorry" does much to neutralize the diplomatic fallout from an unfortunate incident; but saying "sorry" may also imply an admission of legal liability. The art lies (from one point of view) in achieving the diplomatic benefits while avoiding the legal risks: but (from the other point of view) it lies in maximizing the legal gain while not wholly negating the diplomatic achievement. [FN76] *472 He concludes that an apology's "value, diplomatically, lies in its flexibility, but it depends ultimately upon the attitude of the States concerned as to its sufficiency in any given set of circumstances." [FN77]

Does apology deserve a more important place in international law and diplomacy, and should we try to increase its role? There is currently considerable discussion regarding various proposals by U.S. lawyers and academics--particularly those interested in issues of restorative justice-- concerning the desirability of and possibilities for increasing the availability and role of apology as a dispute settlement technique and remedy within the U.S. legal system. [FN78] Some of these

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commentators suggest that there are a variety of situations--for example, motor vehicle accidents, alleged medical malpractice, victim-offender mediation, and alternative dispute settlement more generally--where an apology might resolve the matter, avoid or facilitate the settlement of litigation or otherwise help to achieve reconciliation. However, under existing U.S. law, potential defendants may be reluctant to apologize for fear that the apology will be taken as an admission of responsibility, exposing them to liability. [FN79] Consequently, reformers have, inter alia, proposed legislation providing for certain kinds of so-called "safe-harbor" apologies that could not be used in court as admissions of liability. They have thus far succeeded in obtaining such legislation in Massachusetts, Texas and California. [FN80] Might similar efforts to *473 encourage resort to apology in an international context be useful and likely to succeed?

It seems unlikely that many countries would currently find such proposals of interest. First, governments now seem generally content with the present range of available dispute settlement techniques and may see no particular need for--or interests to be served by--an increased resort to apologies. Second, as we have seen, there are many reasons why governments are reluctant to apologize; concern for exposure to potential legal liability is only one--and probably not the most important--of these reasons. Third, as indicated, the International Law Commission's just-completed Articles on State Responsibility, adopted after many years of study and debate and presumably reflecting the prevailing current attitudes of both governments and the "invisible college" of international lawyers, clearly opt for a primarily remedial and reparation-oriented model of justice, relegating "satisfaction" and apology to a relatively secondary role; it seems unlikely that the international legal or diplomatic community will soon be eager to reconsider this approach.

However, even if apology seems likely to be only an auxiliary technique for the resolution of international difficulties and differences, it remains a useful tool in a diplomat's or international lawyer's toolbox. As indicated, the ritual of apology has long been an accepted way of defusing awkward and potentially troublesome incidents--particularly those involving relatively minor or unintended harms or supposed insults to another state's honor or dignity. In such cases, apology permits the wronged state to maintain that its interests have been respected and for the governments involved to put the matter behind them and move on. Perhaps equally important, apology can also serve the important function of reaffirming and signaling the continued validity of significant international norms, thus reinforcing the integrity of the international legal order. Consequently, it behooves international lawyers and diplomats to remain alert to situations where apology may help resolve international differences, as well as to learn more about when and how such apologies can be used most effectively.

[FNal]. Foley & Lardner-Bascom Emeritus Professor of Law, University of Wisconsin Law School. This Article develops a paper presented at a conference on "The Age of Apology: The West Faces Its Own Past," held at the University of North Carolina, Chapel Hill, October 22-23, 2004. The conference papers have been collected in a projected volume edited by Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud, and Niklaus Steiner, tentatively titled *The Age of Apologies: The West Confronts Its Past*, infra note 1, which has been submitted to a publisher for consideration for publication. Contemplating eventual publication of that volume, I refer to several useful essays which will appear in it.

[FN1]. See generally, e.g., *The Age of Apologies*, supra note *; Aaron Lazare, *On Apology* (2004) [hereinafter Lazare, *On Apology*]; Roy Brooks, *The Age of Apology*, in *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* (Roy Brooks ed., 1999); Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000); Mark Gibney & Erik Roxstrom, *The Status of State Apologies*, 23 *Hum. Rts. Q.* 911 (2001); Nicolaus Mills, *The New Culture of Apology*, 48 *Dissent* 113 (2001); Michael Cunningham, *Saying Sorry: The Politics of Apology*, 70 *Pol. Q.* 285 (1999); Lee Taft, [Apology Subverted: The Commodification of Apology](#), 109 *Yale L.J.* 1135 (2000); Karl E. Meyer, *Just How Sorry Can You Get? Pretty Sorry*, *N.Y. Times*, Nov. 29, 1997, at B7; Hilary Appelman, *New Diplomacy? Nations Take Apologetic Turn in '93*, *Capital Times* (Madison, Wisc.), Dec. 31, 1993, at 1.

Explanations for the recent "apology phenomenon" include: (1) a substantive shift in international morality and growing acceptance of the ideology of human rights; (2) the increasing importance of reputation in a more globalized and multicultural world; (3) shifting power constellations which have increased the influence of previously colonized, discriminated-against, or exploited peoples; and (4) a currently fashionable culture of guilt, confession, and "political correctness," particularly in developed western countries. See, e.g., Trudy Govier & Wilhelm Verwoerd, *Taking Wrongs Seriously: A Qualified Defence of Public Apologies*, 65 *Sask. L. Rev.* 139 (2002) [hereinafter Govier & Verwoerd, *Taking Wrongs Seriously*]; Erin Ann O'Hara & Douglas Yarn, [On Apology and Consilience](#), 77 *Wash. L. Rev.* 1121 (2002).

An extensive list of more than 250 political apologies--almost all since 1948--is available at Graham G. Dodds, *Political Apologies: Chronological List*, <http://reserve.mg2.org/apologies.htm> (last visited Apr. 4, 2006). Other recent political apologies and related materials are available at Rhoda E. Howard-Hassmann, *Political Apologies and Reparations*, <http://political-apologies.wlu.ca> (last visited Apr. 4, 2006).

[FN2]. For general information, see the sources cited supra note 1. On German apologies and reparations for the Holocaust and World War II atrocities, see, for example, Brooks, supra note 1, at Part II, and Barkan, supra note 1, ch. 1. In a famous incident, West German Chancellor Willy Brandt, in a dramatic act of contrition, dropped to his knees before the monument to the Warsaw Ghetto uprising of 1943 during a December 1970 visit to Poland. See, e.g., Willy Brandt's Silent Apology, <http://facinghistorycampus.org/campus/memorials.nsf/0/DC396F572BD4D99F85256FA80055E9B1> (last visited Apr. 4, 2006). A speech by West German President Richard Weizacker in the Bundestag, May 8, 1985, commemorating the fortieth anniversary of the end of the war in Europe and acknowledging German responsibility, is discussed in Lazare, On Apology, supra note 1, at 253-54; Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* (Pub. Affairs Press 2004) (2003) (discussing German reparations payments); Michael Bazyler, *Holocaust Justice* (2003) (discussing same).

Japan has repeatedly apologized for certain World War II actions. See, e.g., John W. Dower, *Japan Addresses Its War Responsibility*, 3 U. Mich. J. Int'l Inst. 1 (1995), available at <http://www.umich.edu/~iinet/journal/vol3no1/jpnwar.html> (last visited Apr. 29, 2006). In August 1995, Prime Minister Tomichi Murayama expressed his "deep remorse" and "heartfelt apology" to mark the fiftieth anniversary of the end of World War II. Most recently, on August 15, 2005, the sixtieth anniversary of Japan's surrender, Prime Minister Junichiro Koizumi said: "Our country has caused tremendous damage and pain to the peoples of many countries, especially Asian countries, through colonial rule and invasion. Humbly acknowledging such facts of history, I once again reflect most deeply and offer apologies from my heart." Norimitsu Onishi, *Koizumi Apologizes for War; Embraces China and South Korea*, N.Y. Times, Aug. 16, 2005, at A4. Earlier, on April 22, 2005, Koizumi apologized for Japan's wartime activities in Asia during a speech at the Asia-Africa Summit Conference in Indonesia, in terms similar to those in his later apology described above. See Raymond Bonner & Norimitsu Onishi, *Japan's Chief Apologizes for Wartime Misdeeds*, N.Y. Times, Apr. 23, 2005, at A3; David J. Lynch, *Bad Blood Hard to Get Past for China*, Japan, USA Today, May 12, 2005, at 9A; see also, e.g., Nicholas D. Kristof, *Japan Apologizes Forcefully for Its Occupation of Korea*, N.Y. Times, Oct. 9, 1998, at A3; *Japan Offers Official Apology to POWs*, Fin. Times, Jan. 13, 1998, at 1; *World Briefing: Apology for Dutch P.O.W.'s*, N.Y. Times, May 3, 2005, at A13 (reporting an apology by Japan's Prime Minister for suffering Japan's military inflicted on thousands of Dutch prisoners in World War II). But see infra note 71 (discussing recent tensions over allegations by China and others that Japan has failed to offer more specific apologies and show genuine remorse for its prewar and wartime behavior regarding China).

The U.S. Congress has issued several such apologies. In 1988, Congress enacted legislation apologizing and providing compensation for Japanese-Americans interned by the U.S. government during World War II. See Civil Liberties Act of 1988, [Pub. L. No. 100-383, 102 Stat. 903 \(1988\)](#); see also, e.g., Brooks, supra note 1, 157-228; Barkan, supra note 1, ch. 2; Eric K. Yamamoto et al., *Race, Rights and Reparation: Law and the Japanese-American Internment* (2001). In 1993, Congress offered an apology to Native Hawaiians for the overthrow of the Kingdom of Hawaii, Act of Nov. 23, 1993, [Pub. L. No. 103-150, 107 Stat. 1510 \(1993\)](#) (discussed in Barkan, supra note 1, ch. 9). In 2005, the U.S. Senate issued a formal apology for its repeated failure, despite the requests of seven U.S. Presidents, to make lynching a federal crime. See, e.g., Sheryl Gay Stolberg, *Senate Issues Apology Over Failure on Lynching Law*, N.Y. Times, June 14, 2005, at A15.

There is a great variety of other recent apologies for historical wrongs. See, e.g., *The Age of Apologies*, supra note 1 (discussing, inter alia, apologies by New Zealand to Maoris, by Canada to indigenous Canadian "First Peoples," by Belgium for its colonial policies in Rwanda and Burundi, by Germany for its colonial policies in Namibia, and by the Pope for the church's policies regarding the Jews); *World Briefing: Former Foes Exchange Apologies*, N.Y. Times, Sept. 11, 2003, at A6 (reporting the apologies by the Presidents of Serbia and Croatia for their citizens' actions during the 1990s war); *Calling for Forgiveness, Serbia Leader Apologies to Bosnia for War*, N.Y. Times, Nov. 11, 2003, at A3; *Croatia Apologizes to Jews for Nazi-Era Crimes*, N.Y. Times, Aug. 23, 1997, § 1, at 14; Anthony DePalma, *Canada's Tribes Receive Formal Apology*, N.Y. Times, Jan. 8, 1998, at A3; John F. Burns, *In India, Queen Bows Head Over a Massacre in 1919*, N.Y. Times, Oct. 15, 1997, at A6 (reporting Queen Elizabeth's silent homage at the site of the Amritsar massacre of some 1000 Indians protesting an extension of World War I detention laws); Gustav Niebuhr, *Mea Culpa: The Pope Apologizes for His Church*, N.Y. Times, Mar. 12, 2000, § 4, at 3 (reporting Pope John Paul II's apology in a special mass for historical transgressions by Roman Catholics in the church's name); Roger Cohen, *French Church Issues Apology to Jews for Silence in Holocaust*, N.Y. Times, Oct. 1, 1997, at A1; Appelman, supra note 1 (citing, inter alia, Russian apology for Soviet abuse of Japanese prisoners and South African apology for apartheid); Press Release, High Commissioner on Human Rights, *Acknowledgment of Past, Compensation Urged by Many Leaders in Continuing Debate at Racism Conference*, U.N. Doc. RD/D/24, at 13-15 (2001), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/1F17511A50A2BE0F41256ABD00591612> (last visited Apr. 29, 2006) (reporting that at the September 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in South Africa, some European states expressed regret for participation in the slave trade); Annan Apologizes for Rwanda Genocide, *China Daily*, Mar. 27, 2004, available at <http://www.chinadaily.com.cn>

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www.chinadaily.com.cn/english/doc/2004-03/27/content_318581.htm (last visited Apr. 29, 2006); World Briefing: U.N. Aide Apologizes, N.Y. Times, Jan. 1, 2000, at A15 (reporting the East Timor U.N. administrator's apology for U.N. failure to predict and prevent a wave of violence after the territory's overwhelming vote for independence from Indonesia). As an indication of the broad reach of the current "culture of apology," see World Briefing: A Postprandial Apology, N.Y. Times, Oct. 15, 2003, at A6, and World Briefing: Apology Accepted, N.Y. Times, Nov. 14, 2003, at A6, reporting that villagers of a tiny settlement in Fiji wept as they apologized to descendants of a British missionary killed and eaten by their ancestors 136 years ago; contemporary accounts quoted one villager as saying: "We ate everything but his boots."

[FN3]. See, e.g., The Age of Apologies, *supra* note 1; Brooks, *supra* note 1; Barkan, *supra* note 1; Lazare, On Apology, *supra* note 1; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998); *Politics and the Past: On Repairing Historical Injustices* (John Torpey ed., 2003); sources cited *infra* notes 8, 12. For an interesting critique of such public apologies for historical injustices, see, for example, Govier & Verwoerd, *Taking Wrongs Seriously*, *supra* note 1, suggesting, *inter alia*, that such apologies: (1) are without responsibility since the wrongdoers are dead; (2) are too late; (3) incorrectly apply present day values to the past; (4) are one-sided and lack reciprocity; (5) will not satisfy victim groups and will instead foster a sense of victimhood; (6) are empty gestures since they are too easy and mere words; and (7) cannot in any case satisfy the potential demand since there are simply too many past wrongs which could be addressed.

[FN4]. But see Sir Arthur Watts, *The Art of Apology*, in *International Responsibility Today* (Maurizio Rogazzi ed., 2005) 107-16 (discussed *infra* notes 75-77).

[FN5]. I will not here address in depth either the role of apology in seeking to rectify long-past historical injustices or its role in interpersonal, nongovernmental, or noninternational contexts--topics which, as indicated, are extensively discussed in the references cited *supra* note 1 and *infra* note 8. As will be apparent in this Article, I suggest that it is useful to distinguish between the role of apology in trying to resolve recent or current diplomatic incidents and differences, and its potential role in trying to deal with massive past historical injustices.

[FN6]. *American Heritage Dictionary of the English Language* 86 (4th ed. 2000).

[FN7]. *Id.* at 1720; see also *The Oxford English Dictionary* 553 (2d ed. 1989) (defining "apology" as here relevant as "3. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgment of the offence with expression of regret for it, by way of reparation," and defines "apologize" as "in modern usage: To acknowledge and express regret for a fault without defence, by way of reparation to the feelings of the person affected.")

[FN8]. Lazare, *On Apology*, *supra* note 1, at 1. For fuller discussions of the meaning, modalities, functions and implications of the concept of apology see generally Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (1991); Lazare, *On Apology*, *supra* note 1; Eleazar Barkan & Alexander Karn, *Taking Wrongs Seriously: Apologies and Reconciliation* (2005); Susan Alter, *Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations: Final Report for the Law Commission of Canada* (May 1999), available at http://www.lcc.gc.ca/research_project/ica/pubs/apology/toc-en.asp (last visited Apr. 29, 2006); Deborah Levi, Note, *The Role of Apology in Mediation*, 72 *N.Y.U. L. Rev.* 1165, 1174 (1997); O'Hara & Yarn, *supra* note 1; Taft, *supra* note 1; Govier & Verwoerd, *Taking Wrongs Seriously*, *supra* note 1; Trudy Govier & Wilhelm Verwoerd, *The Promises and Pitfalls of Apology*, 33 *J. Soc. Phil.* 67 (2002); *The Age of Apologies*, *supra* note 1.

[FN9]. See, e.g., Dinah Shelton, *The World of Atonement: Reparations for Historical Injustices*, 50 *Neth. Int'l L. Rev.* 289, 298 (2003) [hereinafter Shelton, *World of Atonement*].

[FN10]. See, e.g., Tavuchis, *supra* note 8, at 16.

[FN11]. See Matt James, *Wrestling with the Past: Apologies, Quasi-Apologies, and Non-Apologies in Canada*, in *The Age of Apologies*, *supra* note 1. For a suggested list of other criteria of an "effective" political apology, see Gibney & Roxstrom, *supra* note 1, at 927-37. Of course, few public apologies-- particularly diplomatic apologies--may meet all of these criteria. See also Aaron Lazare, *Go Ahead, Say You're Sorry*, 28 *Psych. Today*, Jan./Feb. 1995 at 44 (suggesting that a successful apology must meet the needs of the offended party including: "restoration of self-respect and dignity, assurance that both

parties have shared values, assurance that the offenses were not their fault, assurances of safety in their relationships, seeing the offender suffer, reparation for the harm caused by the offense, having meaningful dialogue with the offender") [hereinafter Lazare, Say You're Sorry].

[FN12]. Lazare, On Apology, supra note 1, at 86. For extensive literature on forgiveness, repentance, reparation and reconciliation, see generally Brooks, supra note 1; Barkan, supra note 1; Politics and the Past, supra note 3; Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs (George Ulrich & Louise Krabbe Boserup eds., 2003); Minow, supra note 3; Solomon Schimmel, Wounds Not Healed By Time: The Power of Repentance and Forgiveness (2002); Ninth Annual Stein Center Symposium on the Role of Forgiveness in the Law, 27 Fordham Urb. L.J. 1347 (2000) [hereinafter Role of Forgiveness]; Lazare, On Apology, supra, note 1; Shelton, World of Atonement, supra note 9; Pablo DeGrieff, The Role of Apologies in National Reconciliation Processes, in The Age of Apologies, supra note 1.

[FN13]. See, e.g., International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, art. 37, in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 234 n.633 (2002) (citing the joint note presented to the Chinese government in 1900 following the Boxer uprising, the demand by the Conference of Ambassadors against Greece in the "Tellini" affair in 1923, and C. Eagleton, The Responsibility of States in International Law 187-88 (1928). The Draft Articles with commentaries are also available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Apr. 30, 2006).

[FN14]. While this Article focuses principally on apologies in comparatively recent incidents, apologies and demands for apology have figured significantly in earlier U.S. history as well. See, for example, the 1861-1862 "Trent Affair," in which, during the first year of the U.S. Civil War, a U.S. gunboat stopped the British mail steamer Trent on the high seas, removing and seizing two Confederate diplomats whose mission was to enlist Great Britain in the war against the North. The British government composed an ultimatum demanding an apology and return of the diplomats. The incident, which brought the U.S. and Great Britain close to war, was finally resolved by the Union's release of the diplomats and payment of reparations, although without the formal apology as Great Britain had demanded. See, e.g., U.S. Dep't of State, The Trent Affair, <http://www.state.gov/r/pa/ho/time/cw/17612.htm> (last visited Apr. 6, 2006); Lazare, On Apology supra note 1, at 217; Gordon H. Warren, Fountain of Discontent: The Trent Affair and Freedom of the Seas (1981); Norman D. Ferris, The Trent Affair: A Diplomatic Crisis (1977).

Great Britain never officially apologized for the depredations during the American Civil War of the Confederate raider Alabama, which was built and allowed to leave Great Britain in what was later determined to be a violation of Great Britain's neutral duties. However, in the subsequent famous 1871-1872 Alabama Claims arbitration, one scholar comments that "Britain's expression of regret for the escape of the cruisers was widely seen as the confession...." Tom Bingham, *The Alabama Claims Arbitration*, 54 Int'l Comp. L.Q. 1, 23 (2005). See also A. Cook, *The Alabama Claims* (1975); 1 John Bassett Moore, *History and Digest of International Arbitrations to Which the United States Has Been a Party* 495-678 (1898).

In 1929, the *I'm Alone*, a rum-runner of Canadian registry, was pursued from U.S. waters and finally sunk by a U.S. Coast Guard vessel 200 miles off the U.S. coast in international waters. The matter was submitted to arbitration by two Commissioners who determined that, since the "act of sinking the ship was an unlawful act," the United States ought formally to acknowledge its illegality and to apologize to His Majesty's Canadian Government, as well as pay a certain amount in compensation to the Canadian government and the captain and members of the crew. In 1935 the U.S. government tendered an apology and a check for the amount in question. See *The I'm Alone Arbitration* (Can. v. U.S.), 3 R.I.A.A. 1609 (Can.-U.S. Spec. Joint. Comm. 1935); Green Hackworth, 2 *Digest of International Law* 703-08 (1941). See also the earlier *Kellett* case (U.S. v. Siam, 1897) in which an arbitral commission declared that "His Siamese Majesty's Government shall express its official regret to the United States Government." 5 John Bassett Moore, *International Law* 43-44 (1906), 1862-64.

In the 1937 Panay incident, Japanese aircraft sank the U.S. gunboat Panay and three American vessels in the course of Japanese hostilities with China. Japan subsequently expressed its "profound regret" at the incident, presented "sincere apologies," promised indemnification for all losses, and undertook to deal appropriately with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future. See, e.g., 1937 Documents on International Affairs 757-67 (Stephen Heald, ed. 1937).

See also the U.S. apologies and payment of substantial reparations to Switzerland for accidental bombings of Switzerland--particularly the city of Schaffhausen--in the final years of World War II. In early 1945, General Marshall sent Air Force General Spaatz on a special mission to Switzerland to offer U.S. apologies for these incidents. See Jonathan E. Helmreich, *The Diplomacy of Apology: U.S. Bombings of Switzerland During World War II*, Air U. Rev. May-June 1977, at 19; Detlev Vagts, *Neutrality Law in World War II*, 20 *Cardozo L. Rev.* 459, 464 (1998). Interestingly, the initial favorable Swiss reception to the prompt high-level U.S. apologies and acceptance of full responsibility for the bombing of Schaffhausen was

shortly negated by the U.S. Air Force's subsequent release of a statement understating the size of the attack and blaming it on bad weather (although the weather was in fact exceptionally clear), to which the Swiss press reacted angrily.

For many other examples of demands for or the use of apologies and statements of regret--particularly those in which the United States was involved--see Marjorie M. Whiteman, 5 Digest of International Law 155-59, 165-81 (1965); 7 id. at 387; 8 id. at 743-48, 890-93, 898-99; Marjorie M. Whiteman, 1 Damages in International Law 12-13 n.21, 139, 140, 141, 154, 157, 318, 702-03, 714 n.257, 758 n.391; (1937); id. at 31 n.47, 288, 290, 553, 590, 714-16, 723, 729 n.295, 764, 769 (apology demanded); id. at 140, 327, 733 (expressions of regret).

[FN15]. See, e.g., Report of the International Law Commission on the Work of Its Forty-fifth Session, [1993] 2 Y.B. Int'l L. Commission 76-77, U.N. Doc. A/48/303 (commenting on Article 10, Satisfaction). See also infra note 37 and accompanying text (discussing the Commission's commentary on Article 37 of its Draft Articles on Responsibility of States for Internationally Wrongful Acts).

[FN16]. For an excellent discussion, with full citations, see Quincy Wright, Legal Aspects of the U-2 Incident, 54 Am. J. Int'l L. 836 (1960). See also, e.g., Michael R. Beschloss, *Mayday: Eisenhower, Khrushchev and the U-2 Affair*, ch. 11 (1988); Summit Conference Breaks Up in Dispute; West Blames Khrushchev's Rigid Stand; He Insists on Eisenhower Spying Apology, N.Y. Times, May 18, 1960, at 1.

[FN17]. Crawford, supra note 13, at 77 (citing Chronique, 68 Revue Generale de Droit Int'l Pub. 736 (1964)).

[FN18]. See generally A. Jay Cristol, *The Liberty Incident: The 1967 Israeli Attack on the U.S. Navy Spy Ship* (2002); Ken Ringle, *The Attack on Liberty*, Wash. Post, Feb. 1, 2003, at C01; John Omnicinski, *Israel's Attack (USS Liberty) a 'Tragic Mistake'*, Gannett News Service, Aug. 6, 2001.

[FN19]. Cristol, supra note 18, at 172.

[FN20]. Id. at 200, 272 n.8 (citing 1980 diplomatic notes).

[FN21]. For full discussions, see Mitchell Lerner, *The Pueblo Incident* (2002); Release at Panmunjon of Crew of USS Pueblo, 63 Am. J. Int'l L. 682, 682-85 (1969); Perspectives for International Legal Development: Panel: The Pueblo Seizure: Facts, Law, Policy, 63 Am. Soc'y Int'l L. Proc. 1, 1-30 (1969).

[FN22]. [Ruling on the Rainbow Warrior Affair between France and New Zealand](#), 26 I.L.M. 1346 (U.N. Secretary-General 1987); *Rainbow Warrior (N.Z. v. Fr.)* 74 I.L.R. 241 (U.N. Secretary-General 1986). For a subsequent phase of the dispute, submitted to an arbitration tribunal, see *Rainbow Warrior (N.Z. v. Fr.)* 20 R.I.A.A. 217 (U.N. Secretary-General 1990).

[FN23]. President William Clinton, Remarks Honoring Genocide Survivors in Kigali, Rwanda, 34 Weekly Comp. Pres. Doc. 479, 495 (Mar. 25, 1998); President William Clinton, Remarks in a Roundtable Discussion on Peace Efforts in Guatemala City, 35 Weekly Comp. Pres. Doc. 395 (Mar. 10, 1999). See also Gibney & Roxstrom, supra note 1 (discussing both incidents extensively); Mark Gibney & David Warner, [What Does It Mean To Say I'm Sorry? President Clinton's Apology to Guatemala and Its Significance for International and Domestic Law](#), 28 *Denv. J. Int'l L. & Pol'y* 223 (2000); James Bennet, Clinton Declares U.S., With World, Failed Rwandans, N.Y. Times, Mar. 26, 1998, at A1, John M. Broder, Clinton Apologizes for U.S. Support of Guatemalan Rightists, N.Y. Times, Mar. 11, 1998, at A12; Ellis Cose, We're So Terribly Sorry, Newsweek, Apr. 6, 1998, at 31.

[FN24]. For full discussion, with citations, see [Agora: Downing of Iran Air Flight 655](#), 83 Am. J. Int'l L. 318-41 (1989). See also, e.g., Will Rogers & Sharon Rogers, *Storm Center: The USS Vincennes and Iran Air Flight 655* (1992); George C. Wilson, Navy Missile Downs Iranian Jetliner over Gulf, Wash. Post, July 4, 1988, at A01; President Ronald Reagan, Statement on the Downing of an Iranian Jetliner by the United States Navy in the Persian Gulf, 24 Weekly Comp. Pres. Doc. 896 (July 3, 1988); Nancy Cooper et al., Tragedy in the Gulf: Seven Minutes to Death, Newsweek, July 18, 1988, at 18; Gordon Mott et al., Judgment on Flight 655, Newsweek, July 25, 1988, at 49.

Compare also President Saddam Hussein's conveyance of "deepest regret" at the "unintentional," "tragic" incident on May 17, 1987, when the guided missile frigate USS Stark, while deployed in the Persian Gulf, was struck by two Exocet missiles fired by an Iraqi Air Force aircraft. The government of Iraq subsequently agreed to pay \$27 million to some fifty-eight Navy personnel killed and injured in the attack. See [Marian Nash Leich, Contemporary Practice of the United States Relating to](#)

[International Law, 83 Am. J. Int'l L. 558, 562 \(1989\)](#); Andreas F. Lowenfeld, [Looking Back and Looking Ahead, 83 Am. J. Int'l L. 336 \(1989\)](#).

[FN25]. The incident is fully discussed, with citations and excerpts from relevant diplomatic notes, in Sean Murphy, [Contemporary Practice of the United States, 94 Am. J. Int'l L. 102, 127-28 \(2000\)](#). See also, e.g., Craig Whitney, Belgrade Is Spared Bombing for a Night, N.Y. Times, May 10, 1999, at A9 (reporting the NATO apology); Jim Abrams, Clinton Apologizes Anew for Embassy Bombing, Assoc. Press, May 10, 1999; Chinese Embassy Airstrike: China Demands Apology, Investigation, CNN Early Edition (CNN television broadcast May 10, 1999); David E. Sanger, Apologizing to China for Bombing Is a Delicate Undertaking, N.Y. Times, June 9, 1999, at A11; William Safire, Editorial, Cut the Apologies, N.Y. Times, May 17, 1999, at A25 (criticizing President Clinton's apology).

[FN26]. See, e.g., Letter from U.S. Ambassador Joseph Prueher to Chinese Minister of Foreign Affairs Tang (Apr. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/04/20010411-1.html> (last visited Apr. 30, 2006); David E. Sanger & Steven Lee Myers, Collision With China, N.Y. Times, Apr. 13, 2001, at A4; Peter Wonacott, China Set to Release Crew of Downed U.S. Spy Plane, Asian Wall St. J., Apr. 12, 2001, at 2; Robert Marquard, U.S. 'Sorry' Heard in Beijing as an Apology, Christian Sci. Monitor, Apr. 12, 2001, at 1; Mitch Frank, Bush's Big Test, Time, Apr. 16, 2000, at 26; Lazare, On Apology, supra note 1, at 214-16.

[FN27]. [LaGrand \(F.R.G. v. U.S.\) 2001 I.C.J. 466 \(June 2001\)](#); see [William J. Aceves, International Decisions, 96 Am. J. Int'l L. 210 \(2002\)](#). In a prior similar case, Application of the Vienna Convention on Consular Relations (Para. v. U.S.) (Order of Apr. 9, 1998), available at http://www.icj-cij.org/icjwww/idocket/ipaus/ipausorder/ipaus_iorder_090498.HTM (last visited Apr. 6, 2006), where the State of Virginia also executed a Paraguayan national, Angel Breard, despite a provisional order of the Court that it delay doing so, Paraguay discontinued the case after the United States issued a formal apology. See [International Decisions, 94 Am. J. Int'l L. 555, 561 n.38 \(2000\)](#). See also the U.S. apology in the subsequent similar Avena case. [Avena \(Mex. v. U.S.\) \(Judgment, Mar. 31, 2004\)](#), available at http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf (last visited Apr. 6, 2006) (discussed in Sean Murphy, [Contemporary Practice of the United States Relating to International Law: Settlement of Disputes: ICJ Decision Regarding Mexicans on Death Row in United States, 98 Am. J. Int'l L. 364 \(2004\)](#)).

[FN28]. [LaGrand, 2001 I.C.J. at 512](#).

[FN29]. See, e.g., Scott Waddle & Ken Abraham, The Right Thing (2002); Bush Apologizes for Japanese Trawler's Sinking, CNN.com, Feb. 13, 2001, <http://archives.cnn.com/2001/WORLD/asiapcf/east/02/13/japan.substrike.02/index.html>; Doug Struck, In Japan, Victim's Families Expect a Personal Apology, Wash. Post, Feb. 27, 2001 at A16; Elaine Sciolino, Sub Commander Apologizes More Directly to Families, N.Y. Times, Mar. 1, 2001, at A12; Suvendrini Kakuchi, Apologies Do Little to Ease Grief over Sea Tragedy, Asia Times, Mar. 7, 2001, available at <http://www.atimes.com/japan-econ/CC07Dh01.html> (last visited Apr. 30, 2006); see also Lazare, On Apology, supra note 1, at 210-13.

[FN30]. The Abu Ghraib incident has been very widely reported and commented on. See, e.g., Sean Murphy, [Contemporary Practice of the United States Relating to International Criminal Law: U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison, 98 Am. J. Int'l L. 591 \(2004\)](#); Richard B. Bilder & Detlev F. Vagts, [Speaking Law to Power: Lawyers and Torture, 98 Am. J. Int'l L. 689 \(2004\)](#). On apologies for the abuses at Abu Ghraib more particularly, see, for example, Mark Gibney & Niklaus Steiner, Apology and the War on Terror, in [The Age of Apologies](#), supra note 1; Aaron Lazare, Making Peace Through Apology, Greater Good, Fall 2004, at 16, 17; Thom Shanker & Eric Schmitt, Rumsfeld Accepts Blame and Offers Apology in Abuse, N.Y. Times, May 8, 2004, at A1; Thom Shanker & Jacques Steinberg, Bush Voices 'Disgust' at Abuse of Iraqi Prisoners, N.Y. Times, May 1, 2004, at A1; Elizabeth Bumiller & Eric Schmitt, President Sorry for Iraq Abuse; Backs Rumsfeld, N.Y. Times, May 7, 2004, at A1.

Gibney & Steiner note that, beginning in 2003, U.S. officials instituted a program to provide monetary compensation for civilians or their surviving family members who had been killed or had their property destroyed by U.S. forces in Iraq, and that these payments are accompanied by a brief apology. Gibney & Steiner, supra (citing Jeffrey Gettleman, For Iraqis in Harm's Way, \$5000 and 'I'm Sorry', N.Y. Times, Mar. 17, 2004, at A1).

[FN31]. Japan, where apology has an established role in dispute settlement and law, is at least one exception. See, e.g., Hiroshi Wagatsuma & Arthur Rosett, [The Implications of Apology: Law and Culture in Japan and the United States, 20 Law & Soc'y Rev. 461 \(1986\)](#); Dean C. Baunlund & Miho Yoshioka, Apologies: Japanese and American Styles, 14 Int'l J. of

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Cultural Relations 203 (1999). I have been told that this is also the case in China and Korea. In the United States, apology may be relevant in certain contexts, including mitigating damages in defamation suits or as an element in sentencing.

[FN32]. Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, arts. 28-41, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/589 (2001), reprinted in Crawford, *supra* note 13, at 61 et seq. Prior to adoption, the Articles were referred to as the "Draft Articles." I have drawn extensively on and will hereafter cite to Professor Crawford's useful compilation.

The Articles and accompanying commentary have been referred to the U.N. General Assembly with the recommendation that the General Assembly initially take note of and annex the text of the Articles in a resolution, reserving to a later session the question whether the Articles should be embodied in a convention on state responsibility. For the drafting history of Article 37 (initially Article 10 and then, at the First Reading in 1996, Article 45), see Crawford, *supra* note 13, at 327-28.

[FN33]. See Crawford, *supra* note 13, at 74.

[FN34]. It is noteworthy that the Articles treat the obligation to cease the wrongful act and, if circumstances require, offer appropriate assurances and guarantees of non-repetition, art. 30, *id.* at 67, as distinct from the obligation to make reparation, art 31, *id.* at 67, including satisfaction, art. 37, *id.* at 69.

[FN35]. The obligation to make full reparation for an internationally wrongful act was most clearly enunciated by the Permanent Court of International Justice in the *Chorzow Factory* case, (*Ger. v. Pol.*), 1927 P.C.I.J., (ser. A) No. 9, at 21 (July 26), where it held that "it is a principle of international law that the breach of an international engagement involves an obligation to make reparation in an adequate form." In a later phase of the case, *Chorzow Factory* 1928 P.C.I.J. (ser. A), No. 17, at 47, the Court added that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

For an earlier similar restatement of the relevant law, see Restatement (Third) Of The Foreign Relations Law of the United States pt. IX, introductory note (1987):

Remedies in international law are not as developed as remedies in the domestic law of most states, but both the principles and the modes of relief are similar. A state that has violated an international obligation is required to terminate the wrongful conduct and, in appropriate cases, to provide restitution, to restore the status quo ante, to render specific performance of an undertaking, or to pay compensation. See § 901. Acknowledgment of the violation and an apology are also a common remedy. For most injuries restoration is the preferred remedy, with compensation as an alternative.

Section 901 of the Restatement, "Redress for Breach of International Law," formally restates these principles. See also Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* § 155 (9th ed. 1992).

[FN36]. See Crawford, *supra* note 13, at 231.

[FN37]. *Id.* at 233-34 (citations omitted). It is also noteworthy, as Watts, *supra* note 4, at 110, points out, that Article 37 lists expressions of regret separately from apologies among the forms of satisfaction. See also United Nations Commission on Human Rights, Draft Report of the Commission, ch. XI, U.N. Doc. E/CN.4/2005/L.10/Add. 11 (Apr. 4, 2005). Section IX, on "Reparation for Harm Suffered," indicates that "full and effective reparation" should include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition," and that "22. Satisfaction should include, where applicable...(e) Public apology, including acknowledgment of the facts and acceptance of responsibility." United Nations Commission on Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. E/CN.4/2005/L.48 at 10-11 (Apr. 13, 2005).

[FN38]. Dinah Shelton, [Righting Wrongs: Reparations in the Articles on State Responsibility](#), 96 *Am. J. Int'l L.* 833 (2002) [hereinafter Shelton, *Righting Wrongs*]. See generally Dinah Shelton, *Remedies in International Human Rights Law* (1999).

[FN39]. Shelton, *Righting Wrongs*, *supra* note 38, at 844, 848-49.

[FN40]. On the concept of "restorative justice," see, for example, *Restorative Justice and Civil Society* (Heather Strong & John Braithwaite eds., 2001); Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002); David W. Van Ness & Karen Strong, *Restoring Justice* (2002).

[FN41]. [Gibney & Roxstrom, supra note 1, at 915.](#)

[FN42]. See, e.g., [Restatement \(Third\) of the Foreign Relations Law of the United States, § 102\(2\) \(1987\).](#)

[FN43]. International Law Association Committee on Formation of Customary (General) International Law, Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law 8 (ILA London Conference 2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> (last visited Apr. 7, 2006) [hereinafter ILA Committee Report].

[FN44]. Id.; see also [North Sea Continental Shelf \(F.R.G. v. Den.\), 1969 I.C.J. 3, 44 \(Feb. 20\).](#)

[FN45]. ILA Committee Report, supra note 43, at 14.

[FN46]. See, e.g., [Military and Paramilitary Activities In and Against Nicaragua \(Nicar. v. U.S.\) 1986 I.C.J. 14, 98 \(June 27\)](#), where the court noted:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

[FN47]. See ILA Committee Report, supra note 43, at 34.

[FN48]. Id. at 13.

[FN49]. Vienna Convention on the Law of Treaties art. 31, P 3, May 23, 1969, 155 U.N.T.S 331.

[FN50]. See, e.g., [Fisheries \(U.K. v. Norway\) 1951 I.C.J. 116, 137-38 \(Dec. 18\).](#)

[FN51]. [Nuclear Tests \(Austl. v. Fr.\) 1974 I.C.J. 253 \(Dec. 20\)](#). The Court said:

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound--the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference....

Id. at 267; see also [Legal Status of Eastern Greenland \(Nor. v. Den.\), 1933 P.C.I.J. \(ser. A/B\) No. 53, at 71 \(Apr. 5\)](#); [Frontier Dispute \(Burk. Faso v. Mali\), 1986 I.C.J. 554, 574 \(Dec. 22\).](#)

[FN52]. See generally, e.g., Dinah Shelton, Law, Non-Law and the Problem of 'Soft Law,' in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System 1* (2000); Christine Chinkin, Normative Development in the International Legal System, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, supra, at 21.

[FN53]. See, e.g., The Intertemporal Problem in Public International Law, in 56 *Ann. de l'Institut de Droit Int'l* 537 (1975) (resolution adopted by the Institute, stating in part: "Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it."); see also [Island of Palmas \(U.S. v. Neth.\) 2 R.I.A.A. 829 \(Perm. Ct. Arb. 1928\)](#); [Legal Consequences for States of the Continued Presence of South](#)

[Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, 31 \(June 21\).](#)

[FN54]. See, e.g., When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice, *supra* note 1; Barkan, *supra* note 1.

[FN55]. Tavuchis, *supra* note 8, at 48.

[FN56]. *Id.* at 104; cf. Janna Thompson, Apology, Justice and Respect: A Critical Defense of Political Apology, in *The Age of Apologies*, *supra*note 1.

[FN57]. For an extensive discussion of the issue of intergenerational responsibility for past wrongs, see Janna Thompson, *Taking Responsibility for the Past: Reparations and Historical Injustices* (2002).

[FN58]. Tavuchis, *supra*note 8, at 117.

[FN59]. Lazare, *On Apology*, *supra* note 1, at 118-19.

[FN60]. See, e.g., *id.* at 117.

[FN61]. For discussion of some reasons why people apologize--or do not apologize--see, for example, Lazare, *On Apology*, *supra* note 1, 136-69, and Peter H. Rehm & Denise R. Beatty, [Legal Consequences of Apologizing](#), 1996 *J. Disp. Resol.* 115, suggesting that:

People say "I'm sorry" for many different reasons. One of these is to apologize. According to a recent article, four basic motives for giving an apology are 1) to salvage or restore a damaged relationship; 2) to express regret and remorse in order to diminish pain and suffering; 3) to escape punishment; and (4) to relieve a guilty conscience.

Another reason some people say "I'm sorry," however, is to express sympathy or concern, even when they have done nothing wrong.

Id. at 115 (citing Lazare, *Say You're Sorry*, *supra* note 11) (other citations omitted).

[FN62]. Compare the suggested elements and objectives of an "authentic" apology indicated *supra* text accompanying notes 10-11.

[FN63]. *Id.*; see Jonathan Cohen, [Advising Clients to Apologize](#), 72 *S. Cal. L. Rev.* 1009, 1015-23 (1999) [hereinafter Jonathan Cohen].

[FN64]. James Mann, *The Rise of the Vulcans: The History of Bush's War Cabinet* 55 (Penguin Books 2004). See also O'Hara & Yarn, *supra* note 1, at 1159 (noting that "a truly strategic person understands that he can get away with cheating, defection and free-riding behavior by apologizing after the fact").

[FN65]. See *supra* note 14 and accompanying text.

[FN66]. See *supra* notes 15 & 37 and accompanying text.

[FN67]. Jay Rayner, *The Apologist* (2004). For the interesting London Observer review of this book, see Charlie Lee-Potter, Book Review, *A Very Sorry State of Affairs*, *Observer* (London), May 16, 2004, at 16; cf. The Secretary-General, Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda, delivered to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999); The Secretary-General, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, *The Fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999); Annan Apologizes for Rwanda Genocide, CNN.com, Mar. 26, 2004, available at <http://www.buzztracker.org/2004/03/26/cache/124777.html> (last visited Apr. 30, 2006); Terence Neilan, World Briefing, *East Timor: U.N. Aide Apologizes*, *N.Y. Times*, Jan. 1, 2000, at A15; Ralph Wilde, *Apologies by the United Nations and the Tensions between Collective and Individual State Responsibility in International Law*, in *The Age of Apologies*, *supra* note 1.

[FN68]. See also the March 4, 2005, incident in which U.S. troops in Iraq shot and killed an Italian intelligence agent carrying a released Italian journalist who had been held hostage by Iraqi insurgents. President Bush called Italian Prime

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Minister Berlusconi to express regret and Secretary of Defense Rumsfeld expressed "the sorrow of the American administration and his own personal sorrow." However, the U.S. government refrained from issuing an apology. See, e.g., Ian Fisher, U.S. Killing of Italian Officer Stokes Anger Against War, N.Y. Times, Mar. 7, 2005, at A11; Elisabeth Rosenthal, Military Clears U.S. Troops Who Killed Italian Agent, N.Y. Times., Apr. 27, 2005, at A3; Ian Fisher, Bush Phones Italy's Leader As Ire Lingers Over Killing, N.Y. Times, May 5, 2005, at A11.

[FN69]. See, e.g., Watts, *supra* note 4.

[FN70]. See, for example, the careful U.S. response regarding the April 2001 U.S. reconnaissance plane collision with a Chinese fighter jet, described *supra* note 26 and accompanying text. It is interesting, in an interpersonal context, to compare the careful statement of U.S. National Basketball Association (NBA) star Kobe Bryant in September 2004, following the dropping of criminal charges against him for sexual assault of a female employee of an inn in which he was staying in Colorado. In a statement from his attorney, Bryant apologized for his "behavior that night and for the consequences she has suffered in the past year." Jose Antonio Vargas & Joel Achenbach, A Case's Disagreeable Conclusion: Kobe Bryant's Apology Leaves Much Unresolved, Wash. Post, Sept. 3, 2004, at C01. He said that "[a]lthough I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did." *Id.*

[FN71]. See, e.g., Safire, *supra* note 25, at A21:

After a week of whipping up hatred of Americans by accusing us of deliberately murdering Chinese journalists in Belgrade, President Jiang Zemin deigned to accept a call from The Great Apologizer.

For the fifth time, President Clinton apologized, expressed regrets, sent condolences, kowtowed and groveled, begging to be believed that we did not bomb China's embassy on purpose.

But it is America that is owed an apology.

Refusals to apologize--presumably at least partly for reasons of national pride--have plagued recent Sino-Japanese relations. The Chinese government has long taken the view that Japan has never apologized properly for its brutal behavior in China before and during World War II, that Japanese officials continue to honor major Japanese war criminals buried at Japan's Yasukuni war memorial shrine, and that Japanese school textbooks continue to gloss over Japanese atrocities, including the Nanjing massacre. South Korea and other Asian nations have also criticized Japan's failure to apologize and perceived lack of real remorse over its militaristic past. See, e.g., Norimitsu Onishi, Koizumi Apologizes for War: Embraces China and South Korea, N.Y. Times, Aug. 16, 2005, at A4; Tepid Response Greets Japan's Apology to Region, Wall St. J., Aug. 16, 2005, at A4; A Collision in East Asia; China, Japan and the UN, Economist, Apr. 16, 2005, at 13-14; Norimitsu Onishi & Howard W. French, Ill Will Rising Between China and Japan as Old Grievances Fuel New Era of Rivalry, N.Y. Times, Aug. 3, 2005, at A1.

For an interesting case study of Japan's refusal to apologize to the prisoners of war it held during World War II, see Michael Cunningham, Prisoners of the Japanese and the Politics of Apology: A Battle Over History and Meaning, 39 J. Contemp. Hist. 561 (2004).

[FN72]. See sources cited *supra* note 2.

[FN73]. See, e.g., Minow, *supra* note 3, at 166 (noting that "[u]nless accompanied by direct and immediate actions (such as payments of compensation) that manifest responsibility for the violation, the official apology may seem superficial, insincere, or meaningless."). Compare the diplomatic imbroglio between Israel and Argentina concerning the kidnapping from Argentina by Israeli agents of Adolf Eichmann, the Gestapo official responsible for administering Nazi Germany's arrest, deportation, internment, and extermination of Jews during World War II. As described in the casebook, Jeffrey L. Dunoff et al., International Law: Norms, Actors, Processes 370-71 (2002):

Immediately after learning of the abduction, Argentina demanded "the restitution of Eichmann" and "the punishment of the individuals guilty of the violation of Argentine territory" and recalled its ambassador to Israel. [T]he June 1960 Security Council resolution on this matter requested that Israel make "appropriate reparation" to Argentina. In response, Israel stated that "the expressions of regret which we have already made directly to the Argentine Government constitute adequate reparations." Two weeks later, Argentina declared itself "not satisfied" with Israel's expressions of regret, and reserved the right to take appropriate action. Argentina then expelled the Israeli Ambassador to Argentina. In August 1960, the two states issued their joint communiqué declaring the incident "closed."

As indicated, Israel had officially expressed its regrets to Argentina twice in diplomatic notes and once publicly before the U.N. Security Council. However, the incident was eventually settled only after a personal visit to Argentina by the Israeli Legal Adviser and subsequent negotiations. For a full discussion, see Moshe Pearlman, The Capture and Trial of Adolf

Eichmann ch. 6 (1963). See also Attorney-General of the Government of Israel v. Eichmann, 36 I.L.R. 5 (Isr. 1962).

[FN74]. See generally Tavuchis, supra note 8; Lazare, On Apology, supra note 1; other references cited supra notes 1 & 8. Lazare and others point out that the making of a successful and effective apology may often involve a process of negotiation. Lazare, On Apology supra note 1, 204-27.

[FN75]. See Watts, supra note 4.

[FN76]. Id. at 107-08. The complexities that can afflict the negotiation and phrasing of such diplomatic apologies are illustrated, inter alia, by the Clinton Administration's apology to China regarding the U.S. bombing of China's Belgrade embassy. A New York Times article commented at that time:

One official said...the intelligence agencies, the State Department and the National Security Council are "still debating exactly what to say."

In fact, the Administration has tied itself in knots over who should deliver the mea culpa and exactly how detailed an accounting should be provided. And then there is the question of how to finesse Beijing's demand that those responsible be publicly identified and punished.

David Sanger, Apologizing to China for Bombing Is Delicate Undertaking, N.Y. Times, June 9, 1999, at A15.

[FN77]. Watts, supra note 4, at 116.

[FN78]. See generally Taft, supra note 1; Daniel W. Shuman, The [Role of Apology in Tort Law](#), 83 *Judicature* 180 (2000); Jennifer K. Robbennolt, [Apologies and Legal Settlement: An Empirical Examination](#), 102 *Mich. L. Rev.* 460 (2003); Stephanos Bibas & Richard Bierschbach, [Integrating Remorse and Apology into Criminal Procedure](#), 114 *Yale L.J.* 85 (2004); O'Hara & Yarn, supra note 1; Elizabeth Latif, [Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions](#), 81 *B.U. L. Rev.* 289 (2001); Jonathan Cohen, supra note 63; Steven Keeva, [Does Law Mean Never Having to Say You're Sorry?](#), 85 *A.B.A. J.* 64 (Dec. 1999); Levi, supra note 8; Rehm & Beatty, supra note 61; Stephen B. Goldberg, *Saying You're Sorry*, 3 *Negotiation J.* 221 (1987); Rachel Zimmerman, *Medical Contrition: Doctor's New Tool to Fight Lawsuits: Saying I'm Sorry*, *Wall St. J.*, May 18, 2004, at 1; see also *Role of Forgiveness*, supra note 12.

[FN79]. An apology may possibly be construed as an "admission against interest" or admissions of fault which under American evidentiary rules can be used at trial to help establish liability. See, e.g., [Fed. R. Evid. 801\(d\)\(2\)](#).

[FN80]. See [Mass. Gen. Laws, ch. 233, § 23D](#) (1999); [Tex. Civ. Prac. & Rem. Code Ann. § 18.061](#) (West 1999); [Cal. Evid. Code § 1160](#) (West 2000).

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