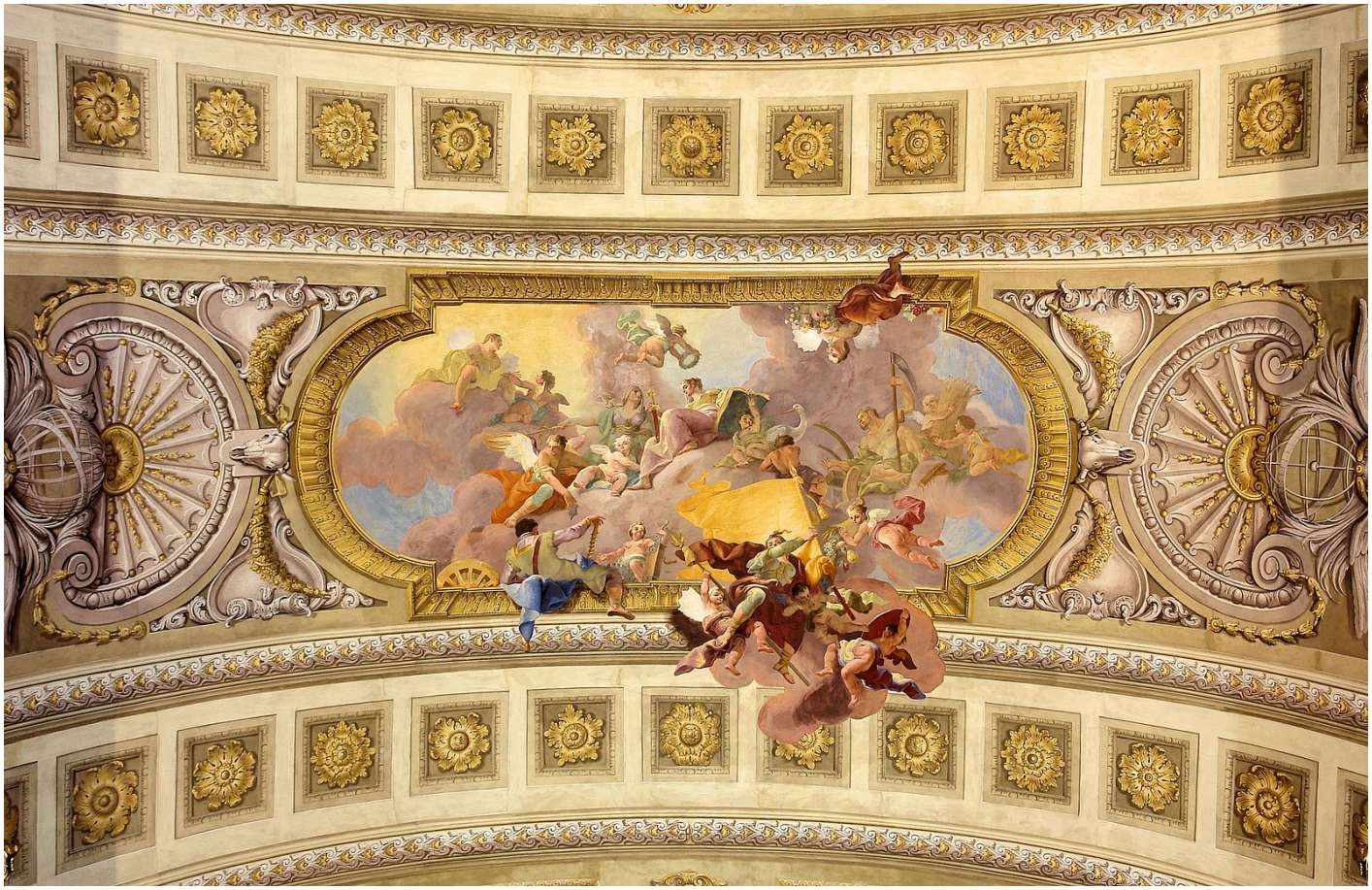
Self-inculpatory laws exist

Eric Heinze argues that states can and do proclaim their own past and present wrongdoings, even when international law does not strictly require it.



A great mistake of post-Enlightenment civilisation has been to equate ‘law’ with ‘code’ or ‘statute’. But law has never been a mere sum-total of discrete, black-on-white laws. Nor, then, do states shape public understandings of history solely, or even primarily, through explicit ‘memory laws’ officially published in government registers. Those certainly exist, but embedded always within the more complex, often ambiguous operation of entire legal systems. Constellations of intertwined norms and institutions often empower state agents in ways that formal, written laws can never reflect.

China has adopted no specific law penalising public outcry against the millions of victims of the Cultural Revolution, the Tiananmen Square massacre, and countless other abuses. But that gap scarcely renders Chinese law silent on the matter. Citizens who openly condemn those abuses risk imprisonment, loss of employment or educational opportunity, and harms to families and friends. The entire legal system empowers officials to impose such penalties, in addition to the

state's sweeping censorship of information about the past. In countries as varied as North Korea, Russia, Malaysia, Iran, Belarus, Saudi Arabia, or Turkey, law operates in similar ways; nor are democracies immune from such processes.

We often learn our first lessons in law from televised dramas, where breaking law means committing a crime. Yet most liability in law, including international law, does not involve criminal conduct. International human rights law and international criminal law certainly share crucial overlaps, but the two spheres are by no means identical. Much human rights law is promulgated only with reference to violations (wrongful conduct), without reference to states' criminal liability. As I argued some time ago in the *Journal of Comparative Law* (later reprinted online in *Diritto Penale Contemporaneo*), history certainly does suggest that the more abusive a regime, the less likely it is to self-inculpate. However, no serious study of law and historical memory could ever strictly limit itself to conduct incurring only formal international criminal liability.

Nor, then, is the scope of state self-inculpation limited to criminal violations. In June 2019 the Dutch Prime Minister Mark Rutte extended an apology to residents in the province of Groningen for earthquakes spurred by natural gas extraction. The Dutch parliament could certainly have passed a formal law to the same effect. Rutte's statement nevertheless carries legal force by virtue of the premier's empowerment to issue government pronouncements. His apology certainly does not equate with state self-inculpation for gross violations of international criminal law. However, in view of widely acknowledged rights to a safe environment, one could certainly plead to a Dutch court that Rutte officially confirms the state's self-inculpation for rights violations. Similarly, the Supreme Court inculpated the Dutch state in 2013 for humanitarian violations in Srebrenica. A senior government minister again responded with a formal apology.

West German, and then unified German policy on Holocaust commemoration has stood as the leading contemporary model of state self-inculpation for grave crimes against humanity, reflected in both formal and informal norms and practices. In a purely formal sense, such policy clearly does not amount to state self-inculpation. It has emerged only through post-war governments impugning a regime internally and internationally acknowledged as defunct. Successive governments have emphatically rejected formal continuity with the Nazi state, condemning its racist, militarist, repressive, and anti-Semitic policies and practices. In that sense, there are indeed grounds for speaking about two wholly different states, such that the present German state condemns a past state and not itself.

However, a further problem with strictly formalist constructions of 'Law as the sum-total of formal laws' arises from categorical conceptions of state responsibility. International obligations incurred by successor states in no way foreclose further steps that states may legitimately, and rightly, take beyond those obligations, with full internal legal force and international recognition. International law commonly sets floors, not ceilings. Nowhere could that observation be truer than within the sphere of state policy concerned with matters so culturally laden as histories of egregious rights violations. Having long assumed responsibilities to compensate victims financially and morally,

beyond any strictures imposed by the allied powers or under international law, those post-war German governments have repeatedly affirmed, as official state policy, an irrevocable strand of ethical continuity scarcely precluded by the purely formal laws of state succession, a view also widespread within post-war artistic and media culture. (A similar understanding animates the deferred acknowledgement of ongoing French ethical and cultural responsibility issued in 1995 by Jacques Chirac.)

Before unification the East German state did indeed define itself as a formally different state, absolved of legal and even moral responsibility. That regime – deflecting attention from the persecution of Jews at home, in the USSR, and in other Soviet-bloc states – shunned anything like the kind of Holocaust education pursued in West German primary schools and public life. East Germany's strictly formalist, indeed cynically legalist distancing from Hitler's Reich stands among scholars today as a monument of disgrace, not of historiographical fidelity.

In 1947, and for some time afterward, even the celebrated humanist Karl Jaspers could not altogether foresee later German policies or responses to them. It would be a sheer category error to suggest, then, that state self-inculpation for rights violations must necessarily imply the inheritability of guilt. Today that accusation is only really voiced on the far right. Any notion of criminal guilt without criminal penalties would be a purely symbolic one, yet Germany's self-inculpatory policies maintained over several generations clearly have entailed no collective penalties. Not even symbolically collective penalties can be said to have ensued from those policies.

It would be surprising, moreover, to suggest that the concept of self-inculpation can stand only if international law commands it. Once again, international law sets floors, not ceilings. To draw a simple analogy, nowhere does international law require states to plant flowers along roadways, but that hardly renders the effort either legally or pragmatically untenable. The fact that international instruments may not require state self-inculpation – for important tactical reasons – in no way suggests that self-inculpating laws, policies, or practices cannot exist. Finally, on a more technical point, the concept of self-inculpation surely could not, as a matter of sheer principle, be deemed to be weaker in instances where predecessor regimes had been non-state entities. That matter could only ever be assessed with reference to concrete fact patterns. It would indeed most likely prove true for some, perhaps many past precedents or future instances; but to posit it as an *a priori* precept would lack any foundation in contemporary international legal principle.

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For a response from Antoon De Baets, please see: Criminal regimes are never soft on history.

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