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Cover Page Footnote

Belk Distinguished Professor in the Humanities at the University of North Carolina-Asheville. Ph.D., University of Michigan, Political Science, 1985; J.D. Villanova Univ. School of Law, 1977; B.A., Boston College, Political Science, 1974. Special thanks to my dear friends at the Danish Centre for Human Rights.

UNITED STATES' RESPONSIBILITY FOR GROSS LEVELS OF HUMAN RIGHTS VIOLATIONS IN GUATEMALA FROM 1954 TO 1996

MARK GIBNEY*

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I. INTRODUCTION

After decades of brutal civil war, which brought about the killing of up to 200,000 unarmed civilians, the arrest and torture of tens of thousands, and the forced displacement of more than a million people, Guatemala is now attempting to achieve some measure of peace.[1] Culminating in an agreement signed December 29, 1996, government officials and guerrilla forces have entered into a series of peace accords ranging from the guarantee of Indians' rights to the reform and reduction of the country's armed forces and the resettlement of refugees and displaced persons.[2]

As severe as the war has been, it is likely that any efforts at peace will also be a battle. Undoubtedly, the most controversial aspect of the peace process has been the amnesty law passed by the Guatemalan Congress in mid-December 1996, which exempts both soldiers and guerrillas from prosecution for the killings, kidnappings, and acts of torture committed during the conflict.[3] Beyond questions of truth and accountability, however, Guatemala will struggle to achieve any form of stability because the same phenomena that brought about the civil conflict in the first place, particularly the enormous differences between rich and poor, remains entrenched.[4]

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1. *See* Susanne Jonas, *Dangerous Liaisons: The U.S. in Guatemala*, FOREIGN POL'Y 144, 146 (1996).

2. *See* Larry Rohter, *Guatemala Braces for Complications of Peace*, N.Y. TIMES, Dec. 29, 1996, at A1.

3. *See* Larry Rohter, *Huge Amnesty is Dividing Guatemala as War Ends*, N.Y. TIMES, Dec. 18, 1996, at A1.

4. To get some sense of these extremes, it would be useful to quote at length from Susanne Jonas, perhaps the world's leading authority on Guatemala:

One of the questions that remains unanswered (more accurately, unasked)[5] is what role the United States will play in achieving peace

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> The central social characteristic of Guatemala remains increasing concentration of wealth amid pervasive poverty. All of the countries in Central America share this characteristic, but Guatemalan poverty is particularly extreme, on several counts. First, *the inequality of resource and income distribution is greater* and has increased very sharply during the 1980s. The percentage of the population living below the poverty line jumped from 79 percent in 1980 to 87 percent in 1987. . . . Additionally, . . . the percentage living in extreme poverty (unable to afford a minimum diet) increased from 52 percent in 1980 to over two-thirds of the population in 1987, and up to 72 percent by 1990. . . .
>
> Income distribution, always very unequal, worsened significantly from 1970 to the mid-1980s: The wealthiest 20 percent of the population, which had received 47 percent of national income in 1970, absorbed 57 percent of national income by 1984; and the wealthiest 10 percent increased its share from 41 percent in 1980 to 44 percent in 1987. Meanwhile, the poorest 50 percent fell from receiving 24 percent of national income in 1970 to 18 percent in 1984.
>
> Guatemala's land distribution is the most unequal in Latin America. The largest 2 percent of Guatemala's farms cover 67 percent of usable land, while 80 percent of farms account for 10 percent of the land. . . . In another indicator of the worsening situation, in 1976 50 percent of peasant income came from cultivation of land; by 1988, this had dropped to 25 percent. Yet Guatemala is the only Central American country that has not adopted any land redistribution law.

SUSANNE JONAS, THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER 177-78 (1991). Jonas then describes some of the human consequences of this poverty:

> The second particularity of Guatemalan poverty is *the number of social indicators on which it ranks worst*. According to a 1987 UNICEF report, "Guatemala has the worst illiteracy rate in Central America, the highest number of infants with low birth weight, and the lowest percentage of pupils enrolled in the education system."

Id. at 178 (quoting JAMES PAINTER, GUATEMALA: FALSE HOPE, FALSE FREEDOM (1987)). Finally, Jonas describes the ethnic and gender bias behind Guatemala's terrible poverty:

> The third particularity of Guatemala is *the ethnic component of poverty*. By virtually all indicators, statistics for the indigenous population are far worse than the national average. Life expectancy for Indians is sixteen years lower than for ladinos, malnutrition is far worse among Indian children, and only 39 percent of the Indian population is literate, compared to 61 percent for ladinos. Guatemala's infant mortality rate of 80 per 1000 reaches 160 per 1000 in the highlands Indian areas . . . . Poverty is also being *feminized*, as most social indicators are worse for women.

Id. at 179 (citations omitted).

5. There have been a few exceptions. For example, Anthony Lewis recently began an article by asking this question: "What responsibility should Americans feel when our Government, for policy reasons, imposes on another country a regime that reduces it to misery?" Anthony Lewis, *Costs of the C.I.A.*, N.Y. TIMES, Apr. 25, 1997, at A19. The primary focus of Lewis' article was U.S. support for the Zairian dictator Mobutu Sese Seko, but he also drew a parallel with U.S. policy in Guatemala.

In his seminal study of United States human rights policy in Latin America, Lars Schoultz raised this same issue:

> To provide military aid to a government that bases its existence upon the repression of its citizens' human rights is to support the repression of human rights, since any government sustained primarily by threats of physical force is obviously strengthened by the acquisition of greater amounts of force or, in the case of military training, by the acquisition of the skills necessary to employ coercion.

LARS SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 247 (1981).

in Guatemala. In answering this question, one must focus on both the degree to which the United States Government bears some responsibility for Guatemala's decades of horror, and whether American involvement in the affairs of this afflicted country should prompt special measures to help the Guatemalan people achieve some measure of peace, security, and justice.

These questions are not familiar to us because, quite simply, we do not think this way.[6] The way we do think, instead, is to presuppose that countries (and particularly our own country) are allowed to pursue what they consider to be their own "national interests" in other countries, notwithstanding how corrupt, repressive, or genocidal the governments of allied countries happen to be.[7] Thus, under the system of international "order" that presently exists, country A can align itself with country B, which is experiencing gross levels of human rights abuses, without being held responsible for the atrocities occurring in country B, despite the fact that A has provided massive amounts of economic and security assistance, trained B's military and security forces, etc.[8]

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6. One of the few scholars who has addressed the question of the sharp demarcation between domestic moral standards and those that are applied in the international realm is Lea Brilmayer in her brilliant work JUSTIFYING INTERNATIONAL ACTS (1989). Brilmayer's thesis is that "horizontal" interactions between nation-states, the focus of international relations theory, have been studied very separately from the "vertical" relations between individuals and their national government, the focus of political theory. The consequence of this is that international politics has completely ignored the "diagonal" relationship between one government and citizens of a foreign country. The focus of the present article is on this "diagonal" relationship between the U.S. Government and the people of Guatemala from 1954 to the present. *See* LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).

7. One reason why we might think this way is that our law allows us to do so. Under the sovereign immunity provisions of the Foreign Claims Act, 10 U.S.C. § 2734 (1988) and the Federal Tort Claims Act, ch. 753, 60 Stat. 843 (1946) (codified as amended in scattered sections of 28 U.S.C.), only under rather extraordinary circumstances can the U.S. Government be sued for the human consequences of its pursuit of foreign policy objectives in other countries. For an interesting analysis of, and challenge to, this principle see Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation*, 58 LAW & CONTEMP. PROBS. 139 (1995); *see also* Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261 (1996-97).

8. It needs to be said at the outset that I am not suggesting that the United States has purposely attempted to support regimes responsible for committing gross levels of human rights abuses. However, as Lars Schoultz points out, there are a host of competing values and interests that ultimately take precedent over human rights concerns:

> The subject of United States policy toward human rights in Latin America is a difficult one to investigate dispassionately. Not only have human rights been frequently and intensively violated by a variety of Latin American governments during the past two decades but in several cases the United States government created, helped create, encouraged, or at least applauded the creation of the physical apparatus of repression and the ideological climate that encouraged its use. It would not be difficult for a study of United States policy toward human rights to become a diatribe. To avoid this I began to work with a number of rudimentary assumptions. I took it for granted that, other things being equal, citizens and their policy makers would prefer not to support repressive governments. But

Guatemala, however, should challenge these misguided beliefs. To begin, there is evidence that the CIA-backed overthrow of President Jacobo Arbenz Gutman in 1954, "started the cycle of Government-sponsored violence and repression."[9] The United States not only set the wheels of repression in motion, it helped to perpetuate the violence. In 1966, the United States sent hundreds of Green Berets to Guatemala, thereby playing a crucial role in training and reorganizing what it had viewed as an inefficient army.[10] This was the origin of the killing machine that became the Guatemalan army.[11] As Susanne Jonas has written:

> It was in Guatemala that Latin America first saw such phenomena as death squads and "disappearances," which subsequently became standard operating procedure in counterinsurgency wars throughout the hemisphere. U.S. military advisers were involved in the formation of the death squads, and the head of the U.S. military mission publicly justified their operations.[12]

In addition to military training, the United States also provided hundreds of millions of dollars in economic and security assistance, although the latter was ostensibly cut-off between the years 1977 to 1983 because of the negative publicity surrounding human rights violations in Guatemala.[13] Still, behind the scenes it was business-as-usual, and U.S. aid proceeded virtually unabated, whether in the form of collaboration on counterinsurgency plans or economic support provided by covert CIA operations.[14]

> I also assumed that other things rarely if ever are equal in foreign policy making, and while with occasional but notable exceptions foreign policy officials are honorable people, these officials frequently find it impossible to pursue simultaneously humanitarian concerns and the host of other values they hold in common with the citizens and the interests they represent.

SCHOULTZ, *supra* note 5, at xi-xii.

9. Rohter, *supra* note 2, at A1.
10. *See* Jonas, *supra* note 1, at 147.
11. *See id.*
12. *Id.*
13. *See* JONAS, *supra* note 4, at 4.
14. Lisa L. Martin and Kathryn Sikkink describe the scenario of events:

> After the U.S. State Department released a March 1977 report on human rights abuses in Guatemala, but also noting that President Laugerud appeared to be improving the situation, Guatemala rejected all U.S. military aid. Congress then eliminated all military aid to Guatemala for fiscal year 1978. . . . However, military supplies already in the pipeline continued to flow, and the administration continued shipments of military supplies by reclassifying them as nonmilitary items. Foreign Military Sales (FMS) credits totaled 2.8 million dollars in 1977, 2.5 million in 1978, and 3.6 million in 1979. Commercial sales to the Guatemalan government and private businesses were the primary means Guatemala used during this period to obtain military equipment and technology from the United States. These export sales were licensed by either the Department of Commerce or the State Department; the Commerce Department approved licenses during this

What has been described thus far, unfortunately enough, does not differ much from U.S. relations with a number of other countries, such as Angola, Argentina, El Salvador, and Indonesia, which have also experienced gross levels of human rights abuses. What makes Guatemala somewhat unique, however, is what is now known about U.S. operations in that country, namely, that the U.S. Government employed assets who were known human rights abusers,[15] thus going far in blurring any distinction that might otherwise exist between Guatemalan human rights violations and our own.

Part II provides an overview of U.S. relations with Guatemala. Suffice it to say that U.S. support for the various Guatemalan governments (nearly all of them military) from 1954 on was part of a larger political goal of fighting communism in the Western Hemisphere[16] and elsewhere. Part III of this note focuses on the question of U.S. responsibility for the gross levels of human rights abuses that have occurred in Guatemala since the time of the Arbenz coup in 1954. This section first addresses the broader question of whether a country that has pursued foreign policy objectives in another country, particularly when this other country has experienced the brutalities that a country like Guatemala has, bears some of the responsibility for these horrors. It then focuses on the Intelligence Oversight Board's 1996 report on the CIA's activities in Guatemala, which essentially found that the Agency employed intelligence operatives in Guatemala who were known to be responsible for committing egregious human rights practices. Finally, Part IV of this note addresses the issue of whether the United States owes a special duty to assist in the reconstruction of Guatemalan society, and what that duty might entail.

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period for the sale of shotguns, handcuffs, and military aircraft to Guatemala. Economic aid continued unabated. In October 1979 and May 1980 the United States voted against two Multilateral Development Bank (MDB) loans to Guatemala on human rights grounds, but approved five others during this period.

LISA L. MARTIN & KATHRYN SIKKINK, *U.S. Policy and Human Rights in Argentina and Guatemala, 1973-1980*, *in* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 336-37 (Peter B. Evans et al. eds., 1993)(footnotes omitted).

15. *See id.* at 3.

16. *See* JONAS, *supra* note 4.

II. AN OVERVIEW OF UNITED STATES/GUATEMALAN RELATIONS

A direct product of a 450-year process that began with the Spanish invasion in 1529,[17] Guatemala is one of the poorest and most underdeveloped countries in the Western Hemisphere.[18] The Spanish conquest represented the violent clash of two socioeconomic systems and two cultures, with the forced integration of the indigenous Indian population into Western Civilization resulting in an unmitigated calamity of genocidal proportions.[19] The colonial experience, which lasted until independence in 1821, was marked by political priorities established by the Spanish crown and by the Spanish ruling classes. The dominant sector in Guatemalan society was the criollo, or landed classes, which was totally dependent upon forced Indian labor.[20] In fact, the violent abuse of the indigenous population became the essential means of perpetuating this exploitative class system, which in turn was exacerbated by racial differences.[21] Independence itself did little to change the basic patterns of underdevelopment.[22]

United States involvement in Guatemala began in the economic sphere, but soon spread to the political sphere. The pivotal player in U.S. and Guatemalan relations was the United Fruit Company, which began exporting bananas from Guatemala in 1870.[23] By the turn of the century, the United Fruit Company owned 212,394 acres of land in the Caribbean and Latin America, of which only 61,263 acres were actually producing fruit, with the rest lying fallow.[24] Guatemala was United Fruit's centerpiece. During the course of the 19th century, United Fruit's economic and political power in Guatemala grew in tandem. Within this time period, the company enjoyed almost unimaginable benefits including: unlimited use of much of the country's best land, complete access to Guatemala's resources, exemption from nearly all taxes and duties, and unlimited profit remittances.[25] It is not an exaggeration to say that United Fruit essentially ran Guatemala, as there was a very strong alliance between the Guatemalan oligarchy and American business interests,

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17. *See id.* at 13.
18. *See id.*
19. *See id.* at 14.
20. *See id.*
21. *See id.* at 15.
22. *See id.* at 16.
23. *See* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA 65 (1982); *see also* RICHARD H. IMMERMAN, THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION (1982).
24. *See* SCHLESINGER & KINZER, *supra* note 23, at 67.
25. *See* JONAS, *supra* note 4, at 19.

and the latter were well represented at the highest ranks of the United States Government.[26]

It was not until World War II that Guatemala began to emerge from its feudal past. In October 1944, two months after the removal of the El Salvador dictatorship, the U.S.-supported Guatemalan dictator, General Jorge Ubico, was forced to step down from office in the face of a social, economic, and political upheaval.[27] Ubico appointed Federico Ponce as provisional president, but Ponce was quickly deposed in an army coup when it became apparent that he intended to pursue the repressive policies of his predecessor.[28] An interim junta was named, consisting of two army officers, Francisco Arana and Jacobo Arbenz, and a civilian, Jorge Toriello. This was the genesis of what became known as the "October Revolution."[29]

During this time, Guatemala experienced its first real taste of democratic governance in the form of congressional and democratic elections, with Juan Jose Arevalo winning the presidency with eighty-five percent of the vote.[30] Arevalo immediately moved to reaffirm democratic principles. Universal suffrage was granted to all adults except illiterate women, and the new constitution guaranteed basic freedoms of speech and press.[31] Arevalo also embarked on a fairly extensive social welfare program,[32] and he established a new Labor Code which, for the first time in Guatemalan history, protected the rights of workers.[33] Still, Arevalo neglected to directly threaten the real power in Guatemala, the economic and political power wielded by United Fruit. This was left to his successor.

Jacobo Arbenz, Arevalo's Defense Minister, won the 1950 presidential race after his main rival, Francisco Arana, head of the armed forces, was assassinated under suspicious circumstances.[34] Upon taking power in 1951, Arbenz attempted to create a new relationship with foreign investors. "Arbenz's strategy was to limit their previously unchecked power, not by nationalizing them, but by competing with them and forcing their compliance with national laws."[35] The centerpiece of this new policy was the 1952 Agrarian Reform Law under which the government expropriated unused land from

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26. *See id.*
27. *See id.* at 22.
28. *See id.*
29. *See id.*
30. *See id.* at 23.
31. *See id.*
32. *See id.* at 24.
33. *See id.*
34. *See* SCHLESINGER & KINZER, *supra* note 23, at 44.
35. JONAS, *supra* note 4, at 26.

large landholders, with compensation in the form of government bonds.[36] "During the eighteen months the program was in operation, some 100,000 families received a total of 1.5 million acres."[37] President Arbenz and his family were among those whose property was confiscated.[38]

To put things mildly, the land reform program was not well received by either United Fruit or by the U.S. Government, although it was difficult to demarcate where one ended and the other one began.[39] Outwardly, the U.S. Government responded by cutting Guatemalan aid.[40] Secretly, however, United Fruit and the U.S. Government had already started plotting Arbenz's removal. In early 1953, the CIA initiated contact with Guatemalan exiles under the leadership of Carlos Acastillo Armas, and began providing funds for the training, equipment, and payment of a mercenary force.[41] The pretext for overt American action occurred with the discovery of a small cache of Czech arms on the Swedish ship *Alfhem*.[42] The U.S. Government responded by increasing its shipment of arms to conservative governments in Honduras and Nicaragua, and by increasing its propaganda effort against Arbenz on Radio Liberty.[43] "At the March 1954 Inter-American Conference of the Organization of American States (OAS) in Caracas, the United States [in the person of Secretary of State John Foster Dulles] twisted enough arms to secure passage of a resolution directed against Guatemala, calling for hemispheric unity and mutual defense against 'Communist aggression.'"[44]

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36. Aside from the entire issue of the expropriation itself, there were sharp differences on how much the land was worth. With respect to the United Fruit property, the Guatemalan Government used the valuation rates that it had used for tax purposes which was $2.99 per acre (for land purchased at $1.48 per acre). United Fruit, however, insisted on being paid $75 per acre. *See* SCHLESINGER & KINZER, *supra* note 23, at 76.

37. *Id.* at 55.

38. *See id.*

39. There were a number of relationships that existed that tied together the U.S. Government and United Fruit. For example, one of the corporation's presidents had been Thomas Cabot who was the brother of John Moors Cabot, the Assistant Secretary of State for Inter-American Affairs just before the 1954 coup. Senator Henry Cabot Lodge of Massachusetts, who owned substantial amounts of stock in United Fruit, was one of the leading critics of the October Revolution. Thomas Corcoran, one of Roosevelt's original brain-trusters, was a long-time lobbyist for United Fruit. But perhaps the most important government-business tie was the fact that both Allen Dulles (director of the CIA) and John Foster Dulles (Secretary of State) were partners in the New York law firm of Sullivan & Cromwell, which represented the Guatemalan government.

40. *See* JONAS, *supra* note 4, at 28.

41. *See id.* at 29.

42. *See id.*

43. *See* SCHLESINGER & KINZER, *supra* note 23, at 167-69.

44. JONAS, *supra* note 4, at 29.

One final piece in the puzzle was to recall the stately Rudolf Schoenfeld as U.S. Ambassador and replace him with the tough-talking war consul, John Peurifoy.

On June 18, 1954, Operation Success opened when Castillo's mercenary army launched an invasion from Honduras.[45] To the surprise of American analysts, however, no popular uprising took place.[46] Because of this, the CIA was forced to take a far more active role in the coup. The "CIA, manned by U.S. pilots, began regular bombardment of the capitol and other cities."[47] In the face of increasing military and political pressure, nearly all of it from the United States, Arbenz was forced to step down.

With the direct assistance of the United States, Armas immediately began to reverse the October Revolution. Nearly all of the land that had been expropriated was returned,[48] and literacy programs and other social welfare initiatives halted.[49] More importantly, the reign of terror that was to afflict Guatemala for the next four decades began immediately, with as many as 8,000 peasants being murdered in the first two months of Armas' rule.[50] Communists were specially targeted for removal. The United States played a vital role in this action, with Secretary of State Dulles providing Armas with lists of names of individuals who were to be murdered.[51]

Attempting to make the Guatemala counter-revolution a showcase for democracy, the United States poured in large amounts of aid. In fact, for a time more assistance was provided to Guatemala than to the rest of Latin America combined. For the first years of the counterrevolution, the United States provided Guatemala with $80-90 million in donations, which was considerably more than the $60 million provided for the rest of Latin America.[52]

Formal U.S. counterinsurgency assistance began as early as 1960, and U.S. Special Forces set up a secret military training base in Guatemala in 1962.[53] This program became massive in 1966. In fact, the winner of the presidential election that year, Mendez Montenegro, was not allowed to assume office until after he had signed a pact, brokered by the American Embassy, that guaranteed the Guatemalan army (and their American allies) free reign in

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45. *See id.*
46. *See id.* at 30.
47. *Id.*
48. *See id.* at 42.
49. *See id.*
50. *See id.* at 41.
51. *See id.* at 42.
52. *See id.* at 58.
53. *See id.* at 69.

counterrevolutionary operations against the small band of leftist guerrillas.[54] The result was a further intensification of the conflict, as "U.S. training, bomber planes, napalm, radar detection devices, and other sophisticated technology . . . were decisive in smashing the insurgency."[55] In addition to these forms of military assistance, substantial evidence exists that U.S. advisers played a direct role in the formation of paramilitary death squads.[56]

By the 1970s, U.S. Government directed activity in Guatemala subsided, due in large part to the fact that the Army's reign of terror, which protected American security and economic interests, was sufficient to the task. It was during this period of time, however, that any hopes for compromise and peace were dashed. Instead, an entire generation of moderate leaders was removed from Guatemalan political life.[57] Still, things would get much worse before they would become better.

The period 1980-83 represents the most gruesome period in Guatemalan history. Susanne Jonas described this period as a "silent holocaust": "What is most striking is the unity and single-minded determination of all those involved in the campaign against *la subversion*. Inherent within this vision was the assumption that the planned genocide that left 100,000-150,000 civilian casualties was necessary to establish social peace. . . ."[58]

Most of the genocide occurred through the Army's scorched earth policy in the Highlands, where over 440 villages were entirely destroyed, and one million people displaced, in addition to the killing of hundreds of thousands of civilians.[59] Of the role of the United States, Jonas writes:

> Although the United States technically assumed no responsibility for Guatemala's dirty war, since Congress had cut off military aid in the late 1970s on human rights grounds, in fact the Reagan administration tried to get around human rights concerns and

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54. *See id.* at 70.
55. *Id.*
56. Jonas writes:
> Although the United States claimed that its training would "professionalize" the Guatemalan security forces, there is substantial evidence of the direct role of U.S. military advisers in the formation of death squads: U.S. Embassy personnel were allegedly involved in writing an August 1966 memorandum outlining the creation of paramilitary groups, and the U.S. military attaché during this period publicly claimed credit for instigating their formation as part of "counterterror" operations.

JONAS, *supra* note 4, at 70 (citation omitted).
57. *See id.* at 62.
58. *Id.* at 148.
59. *See id.* at 149.

> urged renewal of lethal military aid precisely during the worst years of the holocaust.[60]

Reflecting on U.S. relations with Guatemala, Jonas writes:

> We know now that the legacy of that intervention has been Latin America's longest and dirtiest war. Even today [1991], after thirty years and up to 200,000 civilian casualties, the United States and the Guatemala army are no closer to "pacifying" the country on a lasting basis. Guatemalans live in much worse conditions than ever. But once having glimpsed the possibility of a better life, during the 1944-1954 Revolution, many people have refused to accept a "fate" of misery and repression and have continually sought redress for their grievances. This is why issues of social revolution remain on the agenda.[61]

Finally, Jonas offers this view of what might have occurred in Guatemala and in the rest of Latin America:

> But let us suppose that the Eisenhower Administration had decided to leave the Arbenz Government in place in 1954. What would have ensued? Not communism, but capitalist industrialization and modernization. Land reform had to be part of that process, but it would have served primarily to rationalize Guatemalan capitalism, to stabilize the country by bringing its dispossessed majority into the economy. Not only Guatemala but perhaps all of Central America might have undergone a nonviolent modernization process, if the Guatemalan example had been permitted to survive and even to spread.[62]

III. SUPPORTING AN UNJUST REGIME

In some rather perverse and puzzling way, the question of state responsibility for human rights abuses committed by an ally has seldom been raised.[63] I believe that there are at least two reasons why this issue of state complicity has received so little attention. First, Americans are unable, or perhaps unwilling, to make any substantive connection to our past actions. Consider the overthrow of President Arbenz discussed earlier. While it was reported in the New York Times[64] and elsewhere that the U.S. backed coup helped to set off the decades-long civil war in Guatemala, what is missing from such reports is any indication that the United States might

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60. *Id.* at 197.
61. *Id.* at 240.
62. *Id.* at 240-41.
63. *See* Lewis, *supra* note 5.
64. *See* Rohter, *supra* note 2.

thereby share some of the responsibility for the atrocities that ensued.

Instead, our involvement in helping to set off this imbroglio is mentioned almost as a historical artifact. Or perhaps the previous role of the United States in Guatemalan affairs is done simply to entice readers into believing that there is some relevance to their own lives in a story about an otherwise obscure Central American country. Whatever the reason, while there has been rather frank public admission that the U.S. Government played a vital role in setting in motion the horrible events that Guatemala suffered, there certainly has been no attempt to accept any type of responsibility for the events that subsequently unfolded in that country.

The second reason why the issue of state responsibility has not been raised is that we are unable, or unwilling, to make any connection between our own actions and the human consequences that result from these actions. Thus, while we readily admit to pursuing foreign policy objectives in other countries, we are immune to the potential consequences of our behavior. One reason for our perspective is that we do not actually see American actors harming others. Instead, we readily accept the notion that while the United States provided substantial amounts of assistance to the Guatemalan Government throughout the civil war, it did not directly order or incite the gross levels of human rights abuses that were carried out. Instead, the Guatemalan Government is treated as a completely autonomous entity, while the U.S. Government, notwithstanding the fact that it provided hundreds of millions of dollars in aid and assistance, is treated as completely divorced from Guatemalan atrocities.

What is ironic about all this is that U.S. foreign policy is purportedly founded on normative principles. This is, after all, why we waged the Cold War against Communism. And it is also why there are federal statutes designed to prevent U.S. military and economic assistance from going to countries experiencing gross levels of human rights abuses.[65]

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65. *See* 22 U.S.C. § 2304(a)(2) (1986). Section 502B of the Foreign Assistance Act, 22 U.S.C. § 2304 (1986) provides that: "Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." *Id.* The development of Section 502B to its present form provides a good indication of how human rights concerns have been simultaneously accepted, and rejected, by policy makers. The predecsessor to Section 502B was Section 32 of the 1973 Foreign Assistance Act, Pub. L. No. 93-189, 87 Stat. 714, 733 (1973). Section 32 recommended that the President "deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." In 1974, Section 502B of the Foreign Assistance Act, Pub. L. No. 93-559, 88 Stat. 1795, 1815 (amended 1976) was added. Both

Yet, what the Cold War actually allowed us to do was to remove much of the moral component from our conduct of international affairs. Rather than weighing the costs and benefits of both our ends and means, and instead of examining the nature of the regimes with which we were aligning ourselves, we blindly assumed that our actions were legitimate, and so were our means. This way of thinking, in turn, placed the U.S. Government in alliance with a host of regimes that systematically violated human rights. The litmus test was simply whether or not the regime rejected communism. As surreal as it sounds today, nearly a decade after the end of the Cold War, if these regimes shared this ideological trait with us, we would align ourselves with them, no matter how repressive or genocidal they happened to be. Guatemala was simply one of the worst manifestations of this "morality".

What does morality dictate? When one government supports an unjust regime in another country, it shares responsibility for the crimes and human rights abuses committed by that other government. How much responsibility is difficult to determine in the abstract, but it would depend upon at least three factors: (1) the level of support that is provided to the unjust regime, (2) the efforts, by both the sending and the receiving country, to prevent human rights violations from occurring, and (3) the evil that might occur if assistance was withheld from the unjust regime, and it was replaced by one that would carry out even greater levels of atrocities.

The record in the case before us indicates rather strongly that the United States shares a substantial responsibility for the human rights abuses committed in Guatemala from 1954 to 1996. Although by the time of the Arbenz coup the Guatemalan people had suffered

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Section 32 and Section 502B were only statements of the "sense of Congress," and therefore were not binding on the President. After these provisions were essentially ignored by the Nixon administration, Congress took steps to make these provisions legally binding. Congress included language in both the 1975 International Development and Food Assistance Act, Pub. L. No. 94-161, Sec. 310, 89 Stat. 849, 860 (1975), and a Section 502B amendment in the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, Sec. 301(a), 90 Stat. 729, 748 (1976), requiring aid to be withheld if a nation had a record of gross violations of human rights. President Ford vetoed the original, binding version of Section 502B of the 1975 Foreign Assistance Act, in which Congress deleted the "sense of Congress" language. In early 1976, Ford signed a compromise bill which replaced the "sense of Congress" language with an introduction stating that a rights-aid linkage was the "policy of the United States." *See* International Security Assitance and Arms Export Control Act of 1976, Pub. L. No. 94-329, Sec. 301(a), 90 Stat. 729, 748 (1976). The human rights language was strengthened in 1978 so that security assistance is now prohibited absent "extraordinary circumstances" to any government with a pattern of gross human rights violations, 22 U.S.C. § 2304(a)(2) (1986). Congress has also mandated a rights-aid linkage for multilateral and economic assistance as well. *See* International Financial Institutions Act, Pub. L. No. 95-118, Sec. 701, 91 Stat. 1067, 1069 (1977) (current version at 22 U.S.C. § 262d (1982)).

through literally hundreds of years of exploitation and terror[66] (and thus, this state of affairs could almost seem as inexorable), there is little doubt that "but for" the actions of the U.S. Government, the October Revolution would have brought about substantial changes.[67] Not only were the Guatemalan people enjoying the fruits of democratic rule for the first time in their history, but the country itself was experiencing a social and economic revolution that was in the process of removing the feudal conditions that had marked Guatemala from the time of the Spanish conquest.

Perhaps, if the Arbenz coup had somehow been an isolated incident of U.S. meddling we would not attribute so much blame. However, as outlined earlier,[68] this was not an isolated incident. The United States' involvement essentially created an army that systematically violated human rights.[69] The United States also provided military and economic assistance to a string of Guatemalan military dictatorships, again, knowing full well the massive levels of human rights violations that were being carried out.[70] Furthermore, the U.S. Government was directly implicated in the form of employing assets who were known human rights abusers.[71] Essentially, this means that there was a very thin line between the Guatemalan atrocities and those committed by the United States.

On March 30, 1995, President Clinton] directed the Intelligence Oversight Board (IOB) to conduct a government-wide review concerning allegations regarding the 1990 death in Guatemala of US citizen Michael DeVine, the 1992 disappearance of Guatemalan guerrilla leader Efrain Bamaca Velasquez, who was the husband of Jennifer Harbury, an American citizen and related matters. Under terms of reference issued on April 7, 1995, the scope of the IOB inquiry was to cover any existing intelligence bearing on the torture, disappearance, or death of US citizens in Guatemala since 1984 . . . .[72]

On June 28, 1996, the IOB issued its report (hereinafter Report), the publication of which was without precedent.[73] The Report listed U.S. policy objectives in Guatemala as follows: "supporting the transition to and strengthening of civilian democratic government, furthering human rights and the rule of law, supporting economic

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66. *See supra* text accompanying notes 17-22.
67. *See supra* text accompanying notes 30-38.
68. *See supra* text accompanying notes 48-56.
69. *See supra* note 56.
70. *See* Allen Rairn, *C.I.A. Death Squads*, THE NATION, Apr. 17, 1995, at 511.
71. *See id.*
72. *See* Anthony S. Harrington, *Report on Guatemala Review*, INTELLIGENCE OVERSIGHT BOARD, June 28, 1996, at 1 [hereinafter *Report*].
73. *See id.*

growth, combating illegal narcotics trafficking, combating the communist insurgency, and advancing the current peace process between the government and the guerrillas."[74] While the Report reaffirmed these goals, it also found that:

> [A]chieving them and maintaining influence in Guatemala required that the CIA deal with some unsavory groups and individuals. The human rights records of the Guatemalan security services were widely known to be reprehensible, and although the CIA made efforts to improve the conduct of the services, probably with some limited success, egregious human rights abuses did not stop.[75]

The Report continues:

> [W]e found that several CIA assets were credibly alleged to have ordered, planned, or participated in serious human rights violations such as assassination, extrajudicial execution, torture, or kidnapping while they were assets—and that the CIA's Directorate of Operations (DO) headquarters was aware at the time of the allegations.[76]

Using a domestic analogy, the Report addressed the question of the appropriateness of employing certain intelligence operatives.

> US national interests, with respect to Guatemala and elsewhere, can in some cases justify relationships with assets and institutions with sordid or even criminal backgrounds. We believe that a careful balance must be struck on a case-by-case basis between the value and uniqueness of contributions from the relationship, on the one hand, and the seriousness and credibility of the allegations of abuse, on the other. We note that in carrying out law enforcement activities in the United States, the FBI, the police, and other authorities regularly weigh such considerations in establishing informant relationships with persons having criminal backgrounds.[77]

The Report then goes on to list the potential costs to be considered in continuing or establishing relationships with foreign assets who are known human rights abusers: "the moral implications, the damage to US objectives in promoting greater respect for human rights, the loss of confidence in the intelligence community by the Congress and the American people, and the effect of such relationships upon the ethical climate within US intelligence agencies."[78]

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74. *Id.* at 2.
75. *Id.*
76. *Id.* at 3.
77. *Id.* at 3-4.
78. *Id.* at 4.

Turning to specific cases involving U.S. citizens, the Report found[79] "that the widely publicized allegation based on a CIA intelligence report that US citizen Michael DeVine was killed in the presence of Guatemalan Colonel Alpirez [a CIA operative] was, by the clear preponderance of evidence, not true."[80] The Report did find, however, that Alpirez was involved in a broad cover-up of Guatemalan involvement, a cover-up that also involved several other CIA assets and liaison contacts.[81]

With respect to another widely publicized allegation based on a CIA intelligence report, that Colonel Alpirez was responsible for the death of guerrilla leader Efrain Bamaca Velasquez, the IOB Report concluded that this finding was contradicted by numerous other intelligence reports and accounts.[82] The Report did find, however, that Alpirez had participated in at least part of Bamaca's interrogation.[83] In addition, there were strong indications that Bamaca had been tortured, and evidence to conclude that CIA assets and liaison contacts were involved in, or knew about, Bamaca's interrogation, torture, and killing.[84] Finally, with respect to "the death, abduction, or torture of other US citizens in Guatemala . . . the [IOB Report] found no evidence that CIA assets or liaison contacts were implicated."[85]

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79. It should be noted that many of the conclusions reached by the IOB Report (particularly relating to the complicity of Colonel Alpirez as well as the U.S. Embassy in Guatemala), have been disputed by other sources. *See* Allan Nairn & David Corn, *C.I.A. Death Squads*, THE NATION, Apr. 17, 1995, at 511; Allan Nairn, *Murder as Policy*, THE NATION, Apr. 24, 1995 at 547; Tim Weiner, *Guatemala Death Led to a Cover-Up at Top, U.S. Says*, N.Y. TIMES, Mar. 24, 1996, at A1; Tim Weiner, *For the U.S., A Bad Bedfellow in Guatemala*, N.Y. TIMES, May 12, 1996, at E4. Because the present analysis focuses on U.S. complicity, and there is enough no matter which conclusions are used, this article will accept the IOB's more sanguine findings.

80. *Report, supra* note 72, at 7.

81. *See id.* at 16.

82. *See id.* at 7.

83. *See id.*

84. *See id.* at 8.

85. *Id.* One case that the IOB did not investigate, due to an ongoing Department of Justice investigation, involved the case of Diana Ortiz, an American nun who taught school in Guatemala. In her complaint, Sister Ortiz claimed to have been abducted, raped, and otherwise tortured by Guatemalan security and military forces. She also alleged that during her ordeal, a man whom she believed to be a North American arrived and cursed her tormentors telling them to leave her alone. Sister Ortiz believed that the North American came to her defense only because her abduction had been given worldwide press attention. Further, Ortiz claimed that this person then took her outside, asked for her forgiveness for the "mistake" that had been made, and began to drive her away to a "friend" at the U.S. Embassy. Recognizing that she was in the capital city, Ortiz jumped out of the car while it was stopped for traffic and fled. She was out of the country within 48 hours.

Ortiz's claim against former Defense Minister Hector Gramajo, another CIA intelligence asset, was joined in a suit brought by nine Guatemalans who claimed a myriad of human rights abuses, either to themselves or to members of their family. In 1995, a federal district court in

The Report criticized two aspects of CIA behavior. The first was the finding that insufficient attention had been given to allegations of serious human rights abuses made against several station assets or liaison contacts.[86] Secondly, the Report found that the CIA had failed to provide enough information on this subject to policy makers and the Congress to permit proper policy and Congressional oversight.[87] The authors of the Report were "disturbed" that until the recent Guatemalan inquiries, the CIA did not have any agency-wide written guidance with respect to the appropriateness of using assets who were suspect because of their criminal and/or human rights practices.[88] Anticipating this criticism, in February 1996 the CIA issued guidance for dealing with serious human rights violations or crimes of violence by assets and liaison services.[89] These guidelines generally bar such relationships; however, the guidelines do permit senior CIA officials to authorize them in special cases when national security interests so warrant.[90] Although the Report was replete with various aspects of wrongdoing by the United States, what was totally ignored was any sense of responsibility or any measures of restitution for this wrongdoing. Thus, while the IOB Report found the human rights record of the Guatemalan security services to be "reprehensible,"[91] and while it also found that this fact had not stopped the U.S. Government from employing a number of "unsavory groups and individuals,"[92] still, the Report failed to even mention what measures the U.S. Government might, or should, take to attempt to rectify its past practices, except, of course, not to do them again. In essence, then the Report reads: In our Guatemalan operations we were in bed with some pretty awful characters, so let's not do that again—unless national security dictates.[93] This is a

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Massachusetts issued a $47.4 million default judgment against Gramajo. *See* Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

One of the more interesting questions raised by these suits, for present purposes, is whether the U.S. government could (or should) be held legally liable as well. That is, while Gramajo was an officer of the Guatemalan government, and thus could be sued on the basis that his actions were done under color of state law, he was also in the employ of U.S. intelligence agencies as well. The principle of *respondent superior* would suggest that the actions of Gramajo should be imputed to his employers—both of them.

86. *See Report, supra* note 72, at 7.

87. *See id.*

88. *See id.* at 4.

89. *See id.*

90. *See id.*

91. *Id.* at 2.

92. *Id.*

93. It is ironic that one of the very few "profiles in courage," Richard Nuccio of the State Department, a man who publicly admitted to lying to Congress about the Alpirez affair, had his security clearance revoked, effectively ending his diplomatic career. *See* Tim Weiner, *Secret*

totally unacceptable response. If we are going to talk about following moral principles—and at several junctures the Report does in fact invoke morality—we are going to have to do much more than this.

IV. A SPECIAL DUTY OWED TO GUATEMALA

Rather than walking away from Guatemala now that the Cold War is over, or worse, re-arming the country in order to fight our drug war,[94] the U.S. Government and the American people need to reflect on our complicity in the horrors that have afflicted this country. We assassinated Guatemala's democratically elected President, thereby bringing to a complete halt a social, economic, and political revolution that was in the process of transforming Guatemala from the Middle Ages. We then created one of the most brutal armies in the world, and we continued to do business with Guatemala even during the "silent holocaust" period from 1981 to 1983 when in a period of two years more than 150,000 civilians were killed.[95] We willingly and knowingly employed intelligence operatives who were known human rights abusers.[96] Yet, perhaps the most remarkable thing about all of this is that we feel absolutely no connection between our own actions and the atrocities that have taken place in Guatemala over the past four decades.

What should the United States do? First, the United States should begin to assist the Guatemalan people in learning and understanding who was responsible for the horrors that took place. Because of the sweeping amnesty, there is every indication that the truth will never become known and/or publicly acknowledged.[97] The United States, however, knows this truth, or at least a substantial part of it, and should begin to make this information known to the Guatemalan people.

Additionally, the United States should admit to its own complicity in these horrors. The President should publicly acknowledge what has been freely reported in the American press: that the United States was the motivating force behind the removal from office of Jacobo Arbenz, the democratically elected President of Guatemala.

Disclosed Imperils the Career of State Dept. Aide, N.Y. TIMES, Nov. 16, 1996, at A1; Tim Weiner, *C.I.A. Chief Punishes Aide in State Dept.*, N.Y. TIMES, Dec. 6, 1996, at A12.

94. *See* Larry Rohter, *Whew! That War's Over. Ready for Another?*, N.Y. TIMES, January 5, 1997, Sec. 4 at 1.

95. *See* JONAS, *supra* note 4.

96. *See* Rairn, *supra* note 70.

97. This is not to suggest that some headway has not been made. Since 1995, the Project to Recover Historical Memory, sponsored by the Catholic Church's human rights office, has been attempting to compile a comprehensive record of the decades-long terror. *See* Larry Rohter, *Guatemalan Rights Group Tracing Abuses in War*, N.Y. TIMES, Apr. 7, 1997, at A3.

The United States should also recognize its role in the Guatemalan genocide. The United States should publicly affirm its role in training and equipping one of the most brutal armies in the world. Finally, the United States should do more than simply remove human rights abusers from the American payroll.[98] We need to acknowledge the fact that in working with such people we are implicated in their actions.

Furthermore, the American people should also engage in some measure of self-examination. Americans need to wrestle with the fact that we have aligned ourselves with a series of utterly ruthless and genocidal regimes, and not just in Guatemala. Perhaps the answer to the question of why the United States participated in such events is that we had to do this to fight the scourge of the communist menace. But perhaps this will make us reflect on the regimes we have aligned ourselves with, and what this says about our conduct of foreign policy.

Finally, and most important of all, the United States needs to begin to help rebuild Guatemala. This does not mean rebuilding the Guatemalan army;[99] it does not mean priming Guatemalan society for American-based multinational corporations; it does not mean using Guatemala to fight our drug war; and it certainly does not mean perpetuating the incredible economic inequalities that exist in Guatemala where fully eighty-seven percent of the population lives in poverty.[100] What it does mean, instead, is that for the very first time, we recognize and honor the Guatemalan people for their humanity, and not merely as means to our own ends.

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98. *See* Tim Weiner, *C.I.A. Breaks Links to Agents Abroad*, N.Y. TIMES, Mar. 3, 1997 at A1; *The C.I.A. Cleanses Itself*, N.Y. TIMES, Mar. 4, 1997 at A14.

99. For an excellent discussion of this issue see generally Jonas, *supra* note 1.

100. Lars Schoultz concludes his seminal study this way:

> There will be neither peace nor stability in Latin America until the basic needs of the people are met, not by another welfare program reminiscent of the Alliance for Progress, but by a fundamental restructuring of privilege, so that the right of the minority of Latin Americans to spend their vacations at Disneyworld is made subordinate to the right of peasants to eat. That is the truth with which United States policy makers must become acquainted. Until they do, human rights activists must fight a two-front war. Not only must they continue their efforts to force the United States government to cease supporting Latin American political groups that use repression to thwart change, they must fight tooth and nail against future efforts by private interests or the U.S. government to harass progressive Latin American political movements whose policies are designed to meet basic needs.

SCHOULTZ, *supra* note 5, at 379.