Denver Journal of International Law & Policy

Volume 28
Number 2 *Spring*

Article 5

May 2020

# What Does It Mean to Say I'm Sorry - President Clinton's Apology to Guatemala and Its Significance for International and Domestic Law

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

MARK GIBNEY & DR. DAVID WARNER*

## I. INTRODUCTION

President Clinton's recent apology for the role of the United States in supporting the Guatemalan military during Guatemala's brutal civil war should have enormous consequences for both international and domestic law. In large part responding to the findings of an independent Guatemalan truth commission,[1] Clinton was unequivocal in his condemnation of U.S. policy during Guatemala's decades-long conflict that cost upwards of 200,000 civilian lives:

> For the United States, it is important that I state clearly that support for military forces and intelligence units which engaged in violence and widespread repression was wrong, and the United States must not repeat that mistake. We must, and we will, instead, continue to support the peace and reconciliation process in Guatemala.[2]

At a press conference at the end of the summit, Clinton reiterated the apology in the following manner.

> [W]hat I apologized for has nothing to do with the fact that there was a difference between the policy of the administration and the Congress in previous years, going back for decades, and including administrations of both parties. It is that the policy of the Executive Branch was wrong. And what we're doing here is in the open, it's not a secret.[3]

---

* Professor Mark Gibney, Belk Distinguished Professor of Humanities, University of North Caroline at Asheville. N.C. Dr. David Warner, Deputy to the Director for External Relations and Special Programs, Graduate Institute of International Studies, Geneva.

1. Mireya Navarro, *Guatemala Study Accuses the Army and Cites U.S. Role*, N.Y. TIMES, Feb. 26, 1999, at A1.

2. Remarks by the President in Roundtable Discussion on Peace Efforts, National Palace of Culture, Guatemala City, Guatemala, 35 WEEKLY COMP. PRES. DOC. 395 (March 10, 1999).

3. Remarks by the President at Signing Ceremony and Summit Closing Statements,

This comment begins with the notion of state responsibility across borders, and asks what effect, if any, the Clinton apology might have to that end in international law. This comment then examines United States domestic law to see how President Clinton's admission of wrongdoing might effect potential claims that could be brought by Guatemalans in U.S. courts.

## II. INTERNATIONAL LAW OF STATE RESPONSIBILITY

### A. *Transnational State Responsibility*[4]

Since World War II, there have been enormous changes in the notion of "state sovereignty." Prior to this time, events taking place within the territorial jurisdiction of a particular state – no matter how gruesome these policies and practices happened to be – were seen and treated as mainly "internal affairs". After World War II, this particularly limited conception of state sovereignty has evolved, and we now hold states responsible for violations of international law that they have committed, at least theoretically. This responsibility is notwithstanding the fact that the violations have occurred solely within the territorial boundaries of the state.

State sovereignty still serves to protect against many forms of state responsibility. However, now it is far more likely that countries will invoke the sovereignty of *another* state in order to remove *themselves* from any and all responsibility for causing an act or for assisting an outlaw state.[5] For example, a state that provides security and military aid to a country that engages in human rights violations may argue that it is not violating international law because it never actually "pulls the trigger". To put this another way, the state that provides the aid maintains that it cannot be held responsible for the actions of the receiving state.

This extremely limited notion of transnational state responsibility is evident in the International Court of Justice's (ICJ) decision in *Nicaragua v United States*,[6] as well as in the work of the International Law Commission.

The *Nicaragua* case addressed two forms of transnational state responsibility. The first was whether the United States was responsible

---

Casa Santo Domingo, Convention Center, Antigua, Guatemala, 35 WEEKLY COMP. PRES. DOC 403 (March 11, 1999).

4. Although transnational usually refers to non-state activities, this note will use it to refer to relations between States as well.

5. *See generally*, Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267 (1999).

6. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

for its own actions in Nicaragua that contravened international law, and the second was whether the United States was responsible for the contra rebels' acts. The ICJ readily answered the first question in the affirmative.[7] As to the second question, the ICJ refused to hold the U.S. government responsible for violations committed by the contra rebel forces, a paramilitary group that had received substantial support from the United States. In terms of responsibility, the Court focused on the question of "control" and arrived at the following conclusion: "In light of the evidence and material available to it, the Court is not satisfied that *all* the operations launched by the contra force, at *every* stage of the conflict, reflected strategy and tactics *wholly* devised by the United States."[8]

The *Nicaragua* case seems to set the bar so high concerning operational control that it is nearly impossible to imagine a situation where a state that provides military and security assistance to another state, or to an entity such as a guerrilla force, would be held legally responsible for the manner in which such aid was used.

The International Law Commission takes a slightly different approach, but the results are similar. Article 27 of the Draft Articles on State Responsibility entitled "Aid or assistance by a State to another State for the commission of an internationally wrongful act" reads:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.[9]

In the commentary accompanying the article, the authors stress that in order for there to be legal responsibility for aiding or assisting another state, the sending state must intend that the receiving state engage in internationally wrongful conduct.

> [I]t is not sufficient that aid or assistance provided without such inten-

---

7. The International Court of Justice held that the United States breached a number of customary international law obligations. Among these violations were the following: By training, arming, equipping, financing and supplying the contra rebel forces the United States had violated the obligation not to intervene in the affairs of another state. Through its actions in armed attacks at various locations in Nicaragua, the U.S. had breached its obligation not to use force against another State. And in laying mines in the internal or territorial waters of Nicaragua, the United States was in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce. *Nicaragua*, 1986 I.C.J. at ¶ 194.

8. *Id.* ¶ 106 (emphases added).

9. *Report of the International Law Commission on its Thirtieth Session* [1978] V.II, pt. 2 Y.B. INT'L L. COMM'N 99.

> tion could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed," as the article emphasizes, it must be "established."[10]

In sum, the status of transnational state responsibility as it presently stands requires that a state that provides aid and assistance to another state must exercise almost complete control over the receiving state in order to be held responsible for any human rights violations carried out by the second state. Under the changes proposed by the International Law Commission, the law would only change slightly, with state responsibility arising when the sending state intends that the receiving state will use this assistance in order to carry out internationally wrongful acts.

### *B. President Clinton's Apology and International Law*

Notwithstanding the very close that existed relationship between the United States and the various military dictatorships in Guatemala,[11] the U.S. was seemingly not in violation of international law – at least as it stands at present. This is because there is no indication that the U.S. government exercised anywhere near the level of "control" over the Guatemalan government seemingly demanded by the ICJ in the *Nicaragua* case. Similarly, notwithstanding the egregious human rights record of the Guatemalan government and its military, there is absolutely no indication that the intent behind the practice of providing military and security assistance was such that Guatemala would use this material to commit internationally wrongful acts.

Still, the President's statement that the policy of the United States was "wrong" is an unequivocal condemnation of actions taken by the U.S. government in the past. This begs the question, what effect does the apology have under international law?

In the *Nuclear Tests Judgment*, the ICJ held that declaratory statements by Government officials can have the force of legal obligation.[12] In addition, 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: "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

---

10. *Id.* at 104.

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

12. Nuclear Test Cases (Australia vs. France), 1974 I.C.J., 253 ¶ 43.

undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."[13]

It is clear from the President's statement that he is speaking for the United States, as opposed to speaking in a personal capacity. His apology about his relationship with Monica Lewinsky, for example, was obviously a personal statement.[14] On the other hand, his apology for the syphilis study done in Tuskegee was clearly an apology for past Governmental actions with specific future steps outlined by the Government.[15] Both the apologies for the Tuskegee incident and the United States' actions in Guatemala were policy statements.

What is not so clear in the Guatemala apology, however, is whether or not he considers his statement to have a binding effect, creating a legal obligation on the United States, or whether the statement is some kind of moral pronouncement. Our reading of the President's statement is that the apology was intended to have *both* legal and moral implications. The moral implications of the *mea culpa* are self-evident and need no further discussion. But there wouldn't *be* any moral implications if there was no force of law behind them. Otherwise, the President could simply declare U.S. actions "wrong", but then continue to carry out these very same actions without any concern with the legal implications of doing so. This would not only be a very strained (and strange) version of morality, but it would constitute a very odd conception of law as well.[16] The very purpose of the President's statement must be more than just a personal or national apology; there is more going on here. Simply because he stated moral responsibility does not void the apology of legal consequences.

Assuming, then, that President Clinton truly intended to issue a serious apology, several questions remain about the implications of the apology. One is specific to Guatemala. If U.S. policy constituted a violation of international law, is a mere apology sufficient? What kinds of

---

13. *Id.*

14. *See e.g.* Dan Balz & Guy Gugliotta, *Even Critics Are Cautious in Wake of President's Speech*, WASH. POST, Aug. 19, 1999, at A12.

15. *See* Remarks by the President in Apology for Study Done in Tuskegee, 33 WEEKLY COMP. PRES. DOC. 719 (May 16, 1997).

> (A)nd finally say on behalf of the American people, what the United States government did was shameful, and I am sorry . . . The legacy of the study at Tuskegee has reached far and deep, in ways that hurt our progress and divide our nation. We cannot be one American when a whole segment of our nation has no trust in America. An apology is the first step, and we take it with a commitment to rebuild that broken trust. We can begin by making sure that there is never again another episode like this one. . .Today I would like to announce several steps to help us achieve those goals." \

*Id.*

16. On the relationship between moral and law in terms of responsibility, see generally DANIEL WARNER, AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS 61-81 (1991).

obligations does the apology entail? Another question is where else in the world is an apology (or more) by the United States warranted? The President's apology was for past U.S. policy decisions, but are there analogous practices in any other countries at present? And how will this change the conduct of American foreign policy in the future? Apart from the United States, will the President's apology have any influence upon the practices of any other state for purposes of establishing customary international law concerning the recognition of aiding and assisting a wrongdoer? And finally, what will the President's apology mean in terms of the recent development of transnational state responsibility more generally?

## III. UNITED STATES DOMESTIC LAW

In addition to its importance for international law, President Clinton's apology also has enormous implications in terms of U.S. domestic law. In particular, the admission of wrongdoing should play a key, and likely dispositive, role in lawsuits attempting to hold the U.S. government liable for its actions in Guatemala. What weighs against this liability, of course, is the lack of real success foreign nationals have had in United States courts on human rights issues. Notwithstanding the apparent willingness of the American judiciary to hear suits brought by foreign nationals against other foreign nationals for human rights abuses occurring in other countries,[17] many of these same courts have readily dismissed such suits brought by foreign nationals alleging human rights abuses by the U.S. government and top ranking government officials.[18] Whether alleging direct or indirect harm, the results have all been the same. The U.S. has shown a strong domestic tendency to reduce state immunity and the Act of State doctrine when agents of foreign governments or, in some cases, foreign governments themselves, are brought before U.S. Courts on the basis that they have violated international human rights law. However, these same courts still give absolute import to the Act of State doctrine when an act of the U.S. government is in question. The question we raise is the extent to which the President's admission of wrongdoing in Guatemala will change the law in this area.

---

17. The line of cases that have been developed are generally known as *Filartiga* cases, named after the case that first enunciated this principle, Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980). Jurisdiction in these cases is premised on 28 U.S.C. § 1350, a statute passed by the very first Congress in 1789. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1789). *See also* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 20-24 (1996).

18. *See generally*, Mark Gibney, *U.S. Courts and the Selective Protection of Human Rights*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? (Mark Gibney & Stanislaw Frankowski eds., 1999).

### *A. Avoiding State Liability in United States Courts*

One of the first cases that sought to hold the United States responsible for the human consequences of American foreign policy was *Sanchez-Espinoza v. Reagan*.[19] In this case there were three groups of plaintiffs: twelve Nicaraguan civilians, twelve members of the U.S. House of Representatives, and two residents of the state of Florida. The Nicaraguan civilians based their suit on allegations that the United States was providing support for the contra rebels who, in turn, were committing terrorist activities in Nicaragua. Despite recognizing the "gravity and complexity of the plaintiffs' claims,"[20] the district court dismissed the case on the basis of the political question doctrine. The court stated, "[i]n order to adjudicate the tort claims of the Nicaraguan plaintiffs, we would have to determine the precise nature of the United States government's involvement in the affairs of several Central American nations, namely, Honduras, Costa Rica, El Salvador and Nicaragua."[21]

The Court of Appeals affirmed the lower court's dismissal, but on the basis of the doctrine of sovereign immunity. In the words of then-Judge Scalia, "[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States."[22]

Notwithstanding the protections of sovereign immunity, Judge Scalia suggested that the plaintiffs might receive some compensation. However, in his view, any relief would have to come from the political branches and not from the judiciary.

*Saltany v. Reagan*[23] was a suit brought by a group of fifty-three Libyan plaintiffs (all civilians), who sued for personal and property damage from the U.S. military air strikes in April, 1986. The U.S. air strikes were in retaliation for the alleged Libyan bombing of a disco in West Berlin earlier that month that had killed two American servicemen. The district court readily conceded that the conduct would have been "tortuous" if it were judged by civil law standards. However, the court did not employ *any* legal standards. Instead, it justified dismissal of the case on the basis that the defendants had exercised "discretion in a myriad of contexts of utmost complexity and gravity, not to mention

19. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983) *aff'd*, 770 F. 2d 202 (D.C. Cir. 1985).

20. *Id.* at 601.

21. *Id.*

22. *Sanchez-Espinoza*, 770 F. 2d at 207 (citations omitted) (emphasis in original).

23. Saltany v. Reagan, 707 F. Supp. 319 (D.D.C. 1988).

danger."[24] And in a manner just as curious, the district court further noted that the defendants had "acted, as duty required, in accordance with the orders of the commander-in-chief or a superior order."[25] Apparently, based on the reasoning that the operation involved great complexity and danger, and that it was carried out through the government's chain of command, the district court held that the defendants were immune from suit.

What was obviously irksome to the court was the mere fact that the suit was brought in the first place. Taking particular aim at the plaintiffs' attorney, former U.S. Attorney General Ramsey Clark, the court described the case as "audacious."[26] Yet, in its haste to dismiss this audacious lawsuit, the court overlooked several things. First, there was, and continues to be, serious dispute as to whether the Libyan government was behind the West Berlin bombing. That is, Libyan civilians were killed based on evidence that many of our allies questioned. Second, the retaliatory raids violated international law. Article 25 of the Hague Regulations of 1907 states: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended, is prohibited."[27] Third, the court never explained why the lawsuit – based on harm to innocent civilians – was not warranted.

The December, 1989 invasion of Panama brought about the deaths of between 200 and 2000 civilians. Yet, all attempts to seek compensation have so far proven unsuccessful. In *McFarland v. Cheney,*[28] a lawsuit was brought on behalf of a group of Panamanian civilians who suffered personal injury, property loss and the death of loved ones during the American invasion. It is interesting to note that many of the petitioners in the case had filed administrative service claims with the U.S. Army Claims Service seeking compensation for their losses and injuries, attempting to rely upon a precedent used to compensate civilians harmed in the 1983 invasion of Grenada.[29] However, the Army Claims Service rejected all of the Panamanian compensation claims on the ground that the various injuries occurred during U.S. combat operations (although this was true in Grenada as well). The district court upheld this administrative finding and the judgment was affirmed on appeal. While the Panamanian government has received assistance from the United States, none of these funds have been set aside for the victims of the invasion.

---

24. *Id.* at 322.

25. *Id.*

26. *Id.*

27. Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Art. 25, Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

28. McFarland v. Cheney, 1991 WL 43262 (D.D.C. 1991) *aff'd*, 971 F. 2d 766 (D.C.Cir. 1992) *cert. denied*, 506 U.S. 1053 (1993).

29. Jeffrey Harris, *Grenada – A Claims Perspective*, 1986 ARMY LAW. 7.

Finally, the downing of Iran Air Flight 655 over the Persian Gulf by missile fire from the U.S.S. Vincennes, killing all of the passengers and crew aboard, has also been the subject of litigation in the United States. In *Nejad v. United States*,[30] the plaintiffs were the families and economic dependents of four passengers. The defendants were the U.S. government and twelve defense contractors that had supplied the ship with military equipment. The district court quickly and easily dismissed the plaintiffs' case, evincing complete deference to the political branches (as well as spurious reasoning) that has seemingly become the norm in this area. "It is indubitably clear that the plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are [sic] constitutionally committed to the President as Commander in Chief and to his military and naval subordinates."[31]

*Koohi v. United States*[32] was based upon the same set of facts, and the disposition of the case – dismissal – was predictable enough. There are, however, a number of noteworthy (and disturbing) aspects of this case on appeal. The most noteworthy is that the court went out of its way to hold that the case was justiciable.[33] The defendants had tried to argue for dismissal on the basis of the political question doctrine, but the court held that government operations are traditional subjects of damage actions.[34] Furthermore, the court held that the judiciary is "capable of reviewing military decisions, particularly when those decisions cause injury to civilians."[35] Finally, the court took note of the fact that the plaintiffs were merely seeking money damages, and not any form of injunctive relief, which might prove to be far more intrusive into ongoing government operations.

Yet, despite all this, the court then upheld dismissal of the case on the basis of the Federal Tort Claims Act,[36] which makes an exception to the waiver of sovereign immunity for "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war."[37] Notwithstanding the fact that there had been no declaration of war, and although the events in question had long preceded what eventually came to be the Persian Gulf War, the court felt

30. Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989).

31. *Id.* at 755.

32. Koohi v. United States, 967 F. 2d 1328 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).

33. *Id.* at 1331.

34. *Id.*

35. *Id.*

36. 28. U.S.C. § 1346(b). The Federal Tort Claims Act gives jurisdiction to federal district courts for claims against the United States for personal injury or death caused by negligent or wrongful acts or omissions of any employee of the government while acting within the scope of his or her office or employment.

37. 28 U.S.C. § 2680 (j).

that there were important policy considerations for maintaining sovereign immunity. More specifically, the court held that tort liability is based on the theory that the prospect of liability makes an actor more careful. However, in the court's view, Congress did *not* want U.S. service personnel to exercise great caution "when bold and imaginative measures might be necessary to overcome enemy forces."[38] And, in the most extreme language to be found in any of these cases protecting against liability of the U.S. government, the court held that "the result would be no different if the downing of the civilian plane had been deliberative rather than the result of error."[39]

### *B. The Apology and Domestic Law*

What effect, if any, will President Clinton's apology have in terms of domestic law, particularly with respect to claims that might be brought by Guatemalan civilians? Notwithstanding the enormous degree of judicial deference exhibited above, it is difficult to believe that the apology will not have *any* legal effect. After all, to use a criminal law analogy, the apology is similar to an admission of guilt. How, then, could domestic courts deny relief to Guatemalans after the President of the United States has publicly admitted that the American policy in Guatemala was "wrong?"[40]

Other questions remain. What about situations where U.S. policy was similar to the Guatemalan policy – longstanding support for a government that carried out gross and systematic human rights abuses against its civilian population – but where no Presidential apology has been forthcoming? How should the American judiciary (or Congress, for that matter) respond to these kinds of situations, particularly now that the fighting in a number of countries has ended? In other words, what is the difference between an admission of wrongdoing and actual wrongdoing?

---

38. Koohi, 967 F.2d. at 1334-35.

39. *Id.* at 1335.

40. Remarks by the President in Roundtable Discussion on Peace Efforts, *supra* note 2 (emphasis added). But never underestimate the deference of the American judiciary in matters pertaining to foreign affairs. In justifying dismissal of the plaintiffs' case in Committee of United States Citizens Living in Nicaragua v. Reagan, the District Court for the District of Columbia indicated the level of abuse it might take to involve the judiciary: If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy *might* well be subject to challenge in domestic court under international law. *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 940 (D.C. Cir. 1988) (emphasis added).

## IV. CONCLUSION

Despite the collective shrug that it has been met with so far,[41] President Clinton's apology for the role played by the U.S. in Guatemala's civil war should not be viewed as mere political rhetoric. Nor should the apology be treated as a theoretical issue in terms of law. Rather, the President is publicly admitting that the government that he represents was complicit in the brutal practices of another government. From the perspective of international law, this apology should serve to substantially change the manner in which transnational state responsibility has been treated. No longer should a government be able to absolve itself from responsibility and liability merely because it was not the entity that ultimately "pulled the trigger."

What the Clinton apology does is to lower the bar of responsibility established in the *Nicaragua* case. The actions of the United States were wrong not because the U.S. was somehow able to "control" the actions of the Guatemalan government, nor because it provided aid and assistance with the "intent" that the Guatemalan government would use it to commit internationally wrongful acts. Instead, the actions of the U.S. government were wrong, and presumably illegal, simply because the U.S. was aware of the gross and systematic human rights abuses that were being carried out in Guatemala, yet the U.S. persisted in supporting this government.

Similarly, President Clinton's apology should also have enormous consequences in terms of domestic law. U.S. courts have rushed to offer a wild assortment of defenses whenever foreign plaintiffs have sought compensation for the human consequences of American foreign policy. Most of those defenses have given tremendous deference to executive policy. But it remains to be seen whether the judiciary can continue to deny justice now that the President has publicly admitted wrongdoing for helping and abetting Guatemalan military and intelligence forces engaged in widespread repression.

41. For example, the New York Times carried the story on page 12, see John M. Broder, *Clinton Apologizes for U.S. Support for Guatemalan Rightists*, N.Y. TIMES, Mar. 11, 1999, at A12.