EDITORIAL COMMENT

The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya

As three-month-old Khloud al-Oraiba slept in her home in a residential area of Benghazi, Libya, she was killed by shrapnel penetrating her chest. Her father, Hasan, 38, was killed by shrapnel to his skull. Many other bombs fell that night of April 15, 1986, on residential areas of Benghazi and Tripoli, and over two hundred civilians were killed or wounded. They were the victims of a clandestine attack by United States Navy and Air Force aircraft on a mission to assassinate Muammar el-Qaddafi, the head of state of Libya, and to encourage the civilian population to overthrow Qaddafi.

Spokespersons for the United States told the media that the attack was ordered by President Reagan to protect U.S. lives and property against terrorism. Allegations were made that Libya was responsible for the bombing of a West Berlin disco on April 5, 1986, in which two American soldiers were killed, among many other casualties.[1] However, West Berlin police officials and the Federal Republic of Germany publicly disputed the U.S. allegation that Libya was responsible for the bombing, and undertook prosecutions of persons with Syrian connections.[2] In May the Pentagon announced that the American bombers had erroneously and inadvertently hit civilian areas in the raid on Libya.

Forty of the wounded victims and the estates of fifteen deceased victims brought a complaint in federal district court in Washington, D.C., against the United States and other defendants. On the theory of negligence contained in the Pentagon's announcement, the plaintiffs asked for damages against the United States under the Federal Tort Claims Act.[3] On the con-

[1] In an article published in 1987, Vice President George Bush said that the action upon "selected targets in Libya" was "taken in retaliation against Libyan-sponsored attacks on Americans, particularly the Libyan-organized bombing of a Berlin nightclub several days earlier." Bush, *Prelude to Retaliation: Building a Governmental Consensus Against Terrorism,* SAIS REV., Winter-Spring 1987, at 1.

[2] As of this writing, the United States has not released any evidence challenging the position of West Berlin and the Federal Republic.

[3] 28 U.S.C. §1346(b) (1982). The Act contains sovereign immunity exceptions for acts of United States officials that involve the exercise of discretion, that arise from combatant activities in time of war, and that arise in a foreign country. 28 U.S.C. §2680(a), (j) and (k). Arguably, the claimed negligence negates the discretion exception, the fact that the United States was not at war with Libya negates the wartime exception, and the fact that the decisions were made in the United States and that only their operative effect occurred abroad negates the foreign-country exception. The latter argument has been characterized as "headquarters claims." *See* Beattie v. United States, 617 F.2d 91, 96–97 (D.C. Cir. 1979); Vogelaar v. United States, 665 F.Supp. 1295, 1300–02 (E.D. Mich. 1987).

In addition, the plaintiffs invoked the Foreign Claims Act, 10 U.S.C. §2734. The Act's regulations require the Air Force to "[p]ay claims arising from accident or malfunction of aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission." 32 C.F.R. §842.64(m).

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trary theory that the bombardment of civilian areas was deliberate, the plaintiffs named numerous additional defendants, including Ronald Reagan, Margaret Thatcher, Secretary of Defense Caspar Weinberger, various generals and admirals, and the United Kingdom and the United States of America. They alleged that the defendants were involved in the commission of war crimes resulting in the deaths and injuries to the plaintiffs.[4] Compensatory and punitive damages were demanded against them.

A federal district court dismissed the *Saltany* complaint on the ground that all the defendants had sovereign immunity.[5] On appeal, the Court of Appeals for the District of Columbia Circuit summarily upheld the dismissal and also imposed sanctions on counsel for the plaintiffs under Rule 11 for bringing a frivolous lawsuit.[6] The imposition of sanctions casts a serious chilling effect upon all attorneys who engage in international human rights litigation.

The circuit court gave two general reasons for imposing sanctions. First, it regarded the action as an attempt to use the federal courts to serve as a forum for public statements of protest—to the detriment of parties with serious disputes waiting to be heard. I would agree that courts do not exist as public forums, but the question is whether Ramsey Clark and Lawrence W. Schilling, counsel for the plaintiffs in this case, in fact attempted to use the court as a forum. There is no evidence in the record that they did so. The court of appeals, consisting of Judges James Buckley, Douglas Ginsburg and David Sentelle, apparently felt that the attorneys for the plaintiffs could not possibly have been motivated by any genuine concern for vindicating the human rights of the Libyan civilians wounded and killed by the U.S. bombardment of their homes. If this is indeed the attitude of the judges, it signifies the vast distance yet to be traversed between the routine conception of international human rights lawyers who regard every human being no matter where situated as entitled to fundamental rights, and the routine attitudes of federal judges whose preoccupation with domestic litigation perhaps insulates them psychologically against extraterritorial claims upon their attention.

The second reason for imposing sanctions was the finding by the district court, Judge Jackson presiding, that "[t]he case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it."[7] Although Judge Jackson

[4] The United Kingdom and its head of government, Margaret Thatcher, were named as co-conspirators in planning and carrying out the attack upon Libya for allowing U.S. planes headed for Libya to take off from U.S. bases in the United Kingdom and to fly over the airspace of the United Kingdom.

[5] Saltany v. Reagan, 702 F.Supp. 319 (D.D.C. 1988).

[6] Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989). Only defendant United Kingdom cross-appealed from the denial of sanctions by the district court. The court of appeals reversed, and imposed sanctions on counsel for the plaintiffs consisting of the costs and attorneys' fees of the United Kingdom.

[7] 702 F.Supp. at 322. The district court did not impose sanctions; it said that the case is not so much frivolous as it is audacious. The court of appeals, however, cited the finding below that the case offered no hope whatsoever of success, and held that such a finding necessitated a Rule 11 violation.

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did not impose sanctions, the court of appeals held that Judge Jackson's finding evidenced a Rule 11 violation and therefore sanctions were imposed at the appellate level.

It may very well be true that there was no hope of success in a case brought before these particular judges. The three-judge panel on appeal consisted of judges who had all been appointed by President Reagan. The complaint accused President Reagan of being a war criminal. It is not unreasonable to suppose that such judges would view the complaint with abhorrence and disgust.

Rule 11 sanctions, however, are supposed to be invoked not when a particular case offends a particular judge, but only when a complaint is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[8] It appears that the claim for damages under the Federal Tort Claims Act was well pleaded and reasonably sustainable under existing law. The court of appeals did not discuss the merits of this claim in its summary affirmance of the dismissal of the complaint and in its imposition of sanctions.

Apart from the Federal Tort Claims Act, were the allegations of war crimes in the complaint so unwarranted by existing law that they would justify the invocation of Rule 11 sanctions? This question raises two subsidiary ones: (1) whether the acts of the defendants constituted war crimes, and (2) whether the defendants were nevertheless clearly immune from liability.

(1) Article 25 of the Hague Regulations of 1907 provides: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended, is prohibited."[9] The United States is a party to the Hague Convention of 1907, and in any event the rules therein were found by the Nuremberg Tribunal to have entered into customary international law by 1939.[10] Although the Hague prohibition is unqualified, any defendant who is alleged to have committed such a war crime would be entitled to raise various defenses, some of which might be allowed by custom-

[8] FED. R. CIV. P. 11.

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

[10] The Nurnberg Trial, 6 F.R.D. 69, 130 (1946). Under Article 6(a) of the Charter of the International Military Tribunal at Nuremberg, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 82 UNTS 279, the term "war crime" is defined to include "murder"; Article 6(c) defines the term "crime against humanity" to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population."

It is hardly a defense to argue that war crimes can only be committed during wartime, and that the United States and Libya were not at war in 1986. Since Nuremberg, and especially since the Far East trials where the memory of the "sneak attack" by Japan on Pearl Harbor colored the entire proceedings, it has been clear that war crimes are acts of war irrespective of whether there has been a formal declaration of war. Indeed, the failure of the United States to announce that a state of war existed between it and Libya—as well as the failure to give notice to the inhabitants of Tripoli and Benghazi that they were about to be bombed—could itself be a violation of the Hague Convention relative to the Opening of Hostilities (No. III), Oct. 18, 1907, 36 Stat. 2259, TS No. 538, 205 Parry's TS 263.

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ary law, including superior orders, retaliation (for the West Berlin disco bombing), forcible countermeasures, *tu quoque,* self-defense, counterterrorism and military necessity. However, in the *Saltany* case, the district court, for the purpose of dismissing the complaint, assumed its allegations to be true. Hence, the availability *vel non* of customary law defenses is not relevant to the question of the sufficiency of the complaint. It appears that on the facts of *Saltany* as I recounted them at the beginning of this Editorial, the plaintiffs made out a solid *prima facie* case of war crime.[11]

(2) Is the defense of sovereign immunity available against a war crime allegation? Under international law, there would be no such thing as a war crime if that defense were available. The entire proceedings of the Military Tribunal at Nuremberg, the roughly three thousand trials of war criminals in various European courts at the time of Nuremberg, and the extensive decisions of the Military Tribunal of the Far East would all have been aborted if the defendants had been given immunity.[12]

The *Saltany* decision rests on the sole ground that the allegations of war crimes, although assumed to be well pleaded, must be dismissed on the basis of sovereign immunity. Is this a flat repudiation of the Nuremberg precedent? The answer depends on whether a connection exists between the international law of war and the domestic law of the United States.

Such a connection was established in the case of *In re Yamashita.*[13] General Tomoyuki Yamashita had been convicted by a U.S. military commission for failing to prevent war crimes by soldiers under his command in the Philippines.[14] He petitioned the U.S. Supreme Court for habeas review. The United States Government urged in the Supreme Court that military trials of war criminals are political matters completely outside the arena of judicial review.[15] The Court rejected this argument. It considered whether the charge preferred against General Yamashita was a violation of the law of war. The Court consulted for this purpose the Hague Regulations annexed to the fourth Hague Convention of 1907. It found that violations of those Regulations, amounting to war crimes, had been committed by the soldiers under Yamashita's command.[16] The Court said, "We do not make the laws

[11] To be sure, the complaint is in tort; the *Saltany* case is no criminal or military proceeding. Yet traditional tort doctrine allows for the recovery of damages for harm inflicted in violation of criminal law.

[12] Article 7 of the Charter of the International Military Tribunal at Nuremberg, *supra* note 10, is typical: "The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment." *See* 6 F.R.D. at 110. Although many of the defendants explicitly claimed sovereign immunity at their trials, these claims were rejected by the tribunals in every case.

[13] 327 U.S. 1 (1946). The *Yamashita* trial before the U.S. military commission is reported in 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).

[14] 4 UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 13. For a conceptual analysis, see D'Amato, *Superior Orders vs. Command Responsibility,* 80 AJIL 604 (1986); Levie, *Some Comments on Professor D'Amato's "Paradox,"* 80 AJIL 608 (1986).

[15] *See* 327 U.S. at 30 (Murphy, J., dissenting, calling this a "noxious doctrine").

[16] 327 U.S. at 14–16.

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of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."[17] The Court further found that the defendant was entitled to Fifth Amendment protection, and that the evidentiary standards applied in his trial—while looser than those in civil trials in the United States—were within the purview of the Fifth Amendment.[18]

Over a century earlier, the Supreme Court had held, in *Little v. Barreme,* that a captain of a U.S. warship acting directly under the President's orders could be held personally liable in trespass for seizing a neutral vessel on the high seas.[19] Chief Justice Marshall, for a unanimous Court, held that the commander of a ship of war, in obeying instructions from the President of the United States, acts at his peril.[20] If those instructions are not warranted by law, he is answerable in damages to any person injured by their execution. Damages were assessed in favor of the Danish owner of the seized vessel.[21] Since the seizure of a neutral vessel falls short of being a "war crime" even though it is a violation of the international law of war, the complaint in the *Saltany* case on this point makes out an a fortiori claim for tort liability.

The district court in *Saltany* did not say that the defendants had committed no war crime; rather, the court, in dismissing the complaint on sovereign immunity grounds, assumed that all the well-pleaded factual allegations of the complaint were true and that the plaintiffs were entitled to draw all favorable inferences from them. The decision therefore amounts to holding that the President, acting as commander in chief, may order and execute the commission of war crimes anywhere in the world, in war or in peace, and without congressional authorization, and that neither he nor his subordinates who carry out his orders can be held civilly accountable in any United States court. It is a bold decision, effectively reversing the combined effect of *In re Yamashita* and *Little v. Barreme,* and a host of related Supreme Court cases. If the court itself departed from these precedents, how could it legitimately impose sanctions on the plaintiffs' counsel for relying upon them?

The court of appeals focused upon defendants United Kingdom and its head of government, Margaret Thatcher, in levying sanctions under Rule 11. These defendants acted independently of the authority of President Reagan, and chose to allow British airspace to be used for the Libyan bombing mission.[22] At first glance, their immunity appears to be secured by the language of the Supreme Court in *Argentine Republic v. Amerada Hess Ship-*

[17] *Id.* at 16.

[18] *Id.* at 23. For elaboration and analysis of this point, see D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister,* 57 CALIF. L. REV. 1055, 1072–73 (1969), *reprinted in* 3 THE VIETNAM WAR AND INTERNATIONAL LAW 407 (R. Falk ed. 1972). *Cf.* Switkes v. Laird, 316 F.Supp. 358 (S.D.N.Y. 1970).

[19] 6 U.S. (2 Cranch) 170 (1804).

[20] In *Little v. Barreme,* the President acted without congressional authority. Similarly, the raid on Libya was ordered by President Reagan in his capacity as commander in chief, without leave of Congress.

[21] *Little v. Barreme* remains unimpeached in its authority. *See* Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579, 661 (1951); Butz v. Economou, 438 U.S. 478, 490 (1978).

[22] Other nations refused requests from the United States to participate in the attack or permit aircraft to fly over their territory for that purpose.

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ping Corp.,[23] holding that Argentina's use of military force on the high seas allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the Foreign Sovereign Immunities Act of 1976.[24] The Supreme Court said that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in our courts."[25] However, there have been many cases in many areas of the law where absolute language such as this was later qualified when an entirely different and hitherto uncontemplated issue came up.[26] An argument could be advanced that the allegation of a war crime (which itself could not exist if the defense of sovereign immunity were allowed) was not in the contemplation of Congress when it enacted the FSIA.[27] The FSIA itself was intended to cut back the scope of immunity that American courts had previously accorded foreign sovereigns.[28] Congress could hardly be presumed to have intended to broaden the scope of sovereign immunity so as to repudiate the historic precedent of Nuremberg when its attention was entirely preoccupied with limiting the scope of sovereign immunity for commercial litigation. Although the plaintiffs' argument that the FSIA was not intended to bar claims of damage resulting from acts that constitute war crimes might not have won the day in federal court, it is far from being unwarranted in existing law and even farther from being unwarranted by a good faith argument for the modification or reversal of existing law.

In filing the *Saltany* case, the plaintiffs' counsel, in my opinion, alleged a *prima facie* meritorious claim for relief under the Federal Tort Claims Act. With respect to the war crimes allegations, they were either courageous or foolhardy. Yet their clients' injuries were real—they were inflicted by bombs dropping at night in peacetime on civilian homes in residential areas. Under elementary principles of justice, the victims' rights were violated and they are entitled to a remedy. Their injuries are not sham injuries, and a complaint structured on the Nuremberg principles is not a sham case. If under the judicial system of the United States no remedy is found to be available, counsel for the victims should not be punished for asking.

It is perhaps understandable as a matter of human nature that American judges who were willing to accept the trial and capital punishment of foreign

[23] 109 S.Ct. 683 (1989).

[24] 28 U.S.C. §§1330, 1602–11 (1982) [hereinafter FSIA].

[25] 109 S.Ct. at 688.

[26] The quoted language from *Amerada Hess* is a holding with respect to the application of the Alien Tort Statute, but a dictum with respect to other issues not characterized by the facts before the Supreme Court.

[27] A war crime is qualitatively different from the violation of a typical international rule of law. International customary law typically is subject to free derogation by nations that enter into a treaty to act differently. Moreover, international customary law has traditionally allowed sovereign immunity as a defense to domestic litigation against foreign governmental action in alleged violation of that customary law. In this latter respect, *Amerada Hess* is a traditional case well within the contemplation of Congress in enacting the FSIA (*Amerada Hess* was innovative only with respect to its holding on the Alien Tort Claims Act, a separate issue).

[28] *See* 28 U.S.C. §1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . ."). Congress enacted the FSIA to allow United States courts to take full advantage of this restrictive view of sovereign immunity under international law.

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governmental and military leaders for the commission of international war crimes after World War II might today feel that American governmental and military leaders and their allies abroad are unaccountable under the same international law. There may be a double standard, but probably most judges in most courts in any country in the world today would do the same thing if their governmental and military leaders were sued on a war crimes charge. American judges neither lead nor lag behind the rest of the world in this respect. Although I have no admiration for the "political question" doctrine, it would have been understandable if the *Saltany* complaint had been dismissed on that vague ground. At least the invocation of political questions would have candidly indicated the court's sense of powerlessness over the adjudication of such issues, no matter how legally meritorious they might have been.

But by imposing sanctions on the attorneys who dared to represent the plaintiffs in the *Saltany* case, the court of appeals gave a retrogressive example for courts elsewhere in the world. It acted zealously and excessively to shield political interests and political sensibilities. Its decision imperils all lawyers who, in a shrinking and interdependent world, wish to bring any claim in our courts on behalf of aliens. What international attorney would not now feel constrained when asked to file an unusual or innovative case on behalf of foreign persons in a United States court? When the court of appeals refused to address the *Saltany* claim for administrative relief, and brushed aside without reflective consideration the well-pleaded war crimes allegations, it served notice on all attorneys that, irrespective of the language of Rule 11, whoever files a case that offends a judge risks severe professional sanction. In my opinion, this ruling deals a significant blow to the cause of freedom and the adversary system of a great nation.

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