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MERGING INTERNATIONAL HUMAN RIGHTS LAW WITH PERSONAL INJURY LAW IN THE FIGHT AGAINST TERRORISM*

Allan Gerson[†]

The other day I walked past a Barnes & Noble bookstore. On the side walls were quotations, engraved in stone, from the great philosophers. The one which struck me was by Kierkegaard: “Life is lived looking forward, but understood looking backward.” In that spirit, I hope to look backward today to better understand what we are doing presently, and what the future portends. My own thinking about the intersection of personal injury and international law has evolved as I witnessed a merger of the two disciplines in their role in the war against terrorism.

Recently, at a cocktail party someone inquired: “What do you do?”

“I practice law” I responded. Then I felt compelled to add (because my specialty is a bit peculiar) “I represent victims of terrorism.” “Well,” he rejoined, “so you are a personal-injury lawyer.”

That remark made me feel, inexplicably at the time, rather uncomfortable.

Later, I reflected on my reaction. There is, after all, nothing wrong with being a personal-injury lawyer. Yet, the depiction bothered me. Perhaps, I thought it was because I had grown up in the elevated world of public international law. Indeed, the two bars have spawned very disparate cultures. International lawyers, especially those specializing in public international law (relations among States) generally get Masters in Law degrees; and some (like myself), go on for the rarified doctorate—JSD or SJD—degree. Public international lawyers talk about *jus cogens* (peremptory norms of international law). Discussion of human rights, self-determination, aggression, and self-defense is their mother’s milk. They tend to take a somewhat different view of life (aspirational) from their colleagues in the personal-injury bar (hard knocks reality). Still, was not

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my own practice the perfect example of how the two disciplines had increasingly converged?

My introduction to the merger of the two fields came in a baptism by fire. Michael Scharf, now a distinguished professor at Case Western Reserve University School of Law, recommended that Mark Zaid, then a law student at Albany Law School, invite me to a conference on the 1988 downing of Pan Am flight 103 over Lockerbie, Scotland. At the time (1991), I had just completed service as Deputy Assistant Attorney General and Counselor for International Affairs at the Department of Justice. I dealt with terrorism, among other matters. Having left government for the lure of the private sector, the last thing I wanted to do was to go to Albany for a student-run conference. But Mark persisted, and I acquiesced. As it turned out, it was one of the best run conferences that I had attended; with not only academics, but the families of the victims and their lawyers participating in the discussions.

Mark Zaid told me that I didn't need to say anything, I'd get a free lunch and dinner, and if I had an epiphany, I could share it. On that basis, I came. I listened to the families' lawyers talk about how they were going to get Pan Am; how Pan Am failed to comply with recent FAA regulations that required the identification of the luggage on the tarmac; how Pan Am was not only negligent, but worse, guilty of willful and wanton disregard for the lives and safety of those on board Pan Am 103. Clearly, Pan Am may have failed to act responsibly, with awful consequences. But surely, I reasoned, whatever they did was not nearly analogous to what Libya stood accused of: the masterminding of mass murder, as recounted in the joint U.S./UK indictments accusing Libya and its agents of the deliberate murder of the 270 people killed in the downing of Pan Am 103. "Why," I asked myself, "is not a single person mentioning Libya?"

So, I interjected, "This is not my field—I'm not a personal-injury lawyer, but it just strikes me as peculiar that no one here even raises Libya's responsibility and culpability, although Libya is named in the U.S. and UK criminal complaints." I had no axe to grind; I wasn't paid by anyone. One or two personal-injury lawyers present responded by taking me to task for presumably never having read the 1976 Foreign Sovereign Immunities Act, as it makes clear that foreign states are immune from suit by victims of personal injury or death unless, at the very least, the killing occurred in the continental United States.

I argued in rebuttal that since the 1976 Foreign Sovereign Immunities Act there has been a tremendous advent of human rights law, recognized by U.S. federal courts, which weakens that absolutist position. As a key example, I pointed to the landmark *Filartiga* decision in 1980, whereby the Second Circuit Court of Appeals affirmed the rights of individuals under

the Alien Tort Claims Act to hold perpetrators of grave human rights abuses accountable in U.S. courts.¹

“Why,” I asked, “can't you sue a foreign government if they do something as heinous as committing a crime which constitutes (I guess I had enough hubris to use the word) a *jus cogens* violation?”

The response was something like: “used coggins?” What is “used coggins?” The idea of suing Libya for Pan Am 103 seemed off the charts. Before long, it became clear to me that there were vested interests that may have influenced that judgment. The personal-injury bar present stood to gain a substantial amount from suing Pan Am; and that interest was jeopardized in making a jury aware that there might be another deep pocketed tort-feasor.

I decided to take my views to a wider and perhaps more sympathetic audience. On July 1, 1992 the *New York Times* ran my Op-Ed piece, “Hold Libya Accountable”. It was reprinted in the *International Herald Tribune* the next day where Bruce Smith, who had lost his wife on Pan Am 103, read it and then called. “You're saying what I have always said—This Pan Am litigation is a side show. I want to go after the killer of my wife. I don't want to be distracted by the Pan Am proceedings. The United States and the UK indicted Libya, and yet we aren't filing civil suits against Libya. I'm coming to hire you.” I thought he was joking. The next day, however, he showed up. The saga began.

The first revelation was that it was not only the personal-injury bar that was hostile to lawsuits against foreign sovereigns, but also the U.S. government. I had proceeded to bring a civil suit against Libya on behalf of Bruce Smith, and at the date of the initial court hearing, as Bruce Smith sat next to me in federal court in Washington, DC, the courthouse doors swung open to usher in a group of lawyers that I recognized as my former colleagues from the Justice Department. “Good news,” I said. “Really?” Bruce replied, “I don't think they're coming to our table, they're walking over to Libya's side.”

Apparently, I discovered, it doesn't matter if it is Libya or the United States: nations are united in not wanting to be held accountable, least of all by ordinary citizens pursuing private causes of action.

The case began with a common sense argument. As we didn't have the black-letter of the law on our side, we fell back on common sense. Judge Benjamin Cardozo's famous ruling in the *Lady Duff-Gordon* case became the lynch pin. Until Cardozo's ruling there was no such thing as an implied contract or warranty. Everything had to be express; otherwise one had no claim regardless of injury. Justice Cardozo held that in law as in life some things are necessarily implicit. Relying on that logic I argued that it is implicit that if one deliberately blows-up an airplane, killing everyone on board, that person or entity forfeits the privilege of sovereign immunity.

¹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

The judge felt differently, and thus Bruce Smith lost in the U.S. District Court, and in the U.S. Court of Appeals which affirmed the ruling below, and in the U.S. Supreme Court which denied his effort at *certiorari*, or review.

That would have been the end of his suit was it not for a terrible tragedy that happened in Oklahoma City, the 1995 bombing of the Federal Alfred Murrah Office Building. Strangely, it ended up being a boon to the Pan Am 103 families. Although Timothy McVeigh, and not a foreign agent, was held responsible for the bombing, legislators in Washington were spurred to legislation aimed at international terrorism. Here a union was forged between the Oklahoma and Pan Am 103 families-- the latter wanted a provision in the new anti-terrorism legislation which would also amend the 1976 Foreign Sovereign Immunities Act to lift immunity from private suits against State sponsors of terrorism; the former an effective death penalty against seemingly endless *habeas corpus* appeals.

The Pan Am 103 families offered to work in tandem with the Oklahoma families (of course, no one knew that Timothy McVeigh himself wanted the death penalty speedily enforced) in return for their support for amending the 1976 Sovereign Immunities Act to permit suits against state sponsors of terrorism. The result of this collaboration was the 1996 Anti-terrorism and Effective Death Penalty Act (ATEDPA), which would become the springboard for much that followed in the anti-terrorism field. And, attorneys in the personal injury bar that had disparaged efforts at holding Libya accountable for the downing of Pan Am 103 were the first to rush to the courthouse to file suit under the aegis of the ATEDPA.

However, who could be sued under the ATEDPA was conditioned by the provision in the act which permitted the State Department to decide which countries were deemed state-sponsors of terrorism. Predictably, if paradoxically, Libya's lawyers now argued that this provision constituted an unconstitutional delegation of power, as determination of state-sponsorship of terrorism properly belonged to the judicial and not the executive branch of government. It took nearly two years before the U.S. Court of Appeals for the Second Circuit would rule against Libya and hold that the 1996 Act was in fact constitutional.

In 2002 Libya decided to settle with the Pan Am 103 families for \$2.7 billion, or ten million dollars for each of the decedents' families. The first tranche was paid when the UN lifted economic sanctions. The second tranche was paid when the United States later lifted its unilateral economic sanctions. And the third and final tranche is to be paid if and when Libya is removed from the U.S. list of State Sponsors of Terrorism.

After the 9/11 attacks, several families of victims read the book I authored (with Jerry Adler of *Newsweek*) *The Price of Terror*, dealing with the Pan Am 103 families' struggle for justice. One called to say, "My family would like to do what the hero of that book, Bruce Smith, did with regard to Libya, to hold the perpetrators of 9/11 accountable. Can you

help?” Having no idea at the time which government might be implicated, I made inquiries with the intelligence community and others. They pointed to Saudi Arabia; specifically at the financing aspects. These leads and additional corroborating evidence led to the filing of a lawsuit on behalf of over two thousand 9/11 families. Ron Motley, a preeminent member of the personal injury bar who was successful in the massive tobacco litigation became my co-counsel and lead trial counsel in that effort.

Looking back at the events of the last decade, it becomes clear that the personal-injury and public international law bar have increasingly merged efforts in tackling the scourge of international terrorism. The common lodestar is accountability. Public international lawyers are no longer viewed as starry-eyed. The role international lawyers play in countering efforts to prevent State accountability is becoming increasingly appreciated. The skills of the international lawyer in weaving a path that allows for accountability while not interfering with the normal foreign policy prerogatives of governments has been shown to pay practical dividends. And, *jus cogens* has entered the lexicon of the personal injury bar. Working together, personal injury and international lawyers thus enable the courts to properly address the balance between the needs of justice and diplomacy, and thus assist the struggle against terrorism.

