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# The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations©\*

Linda A. Malone\*\*

*[T]he elders of the city who were near the slain victim who has been found (and it is not known who struck him down) "will wash their hands over the beheaded heifer in the valley and reply: our hands did not shed this blood and our eyes did not see." Deuteronomy 21:6-7, quoted in KAHAN REPORT at 12.<sup>1</sup>*

*The I.D.F. [Israeli Defense Force], its soldiers and commanders, have been performing for three months a wonderful operation in Lebanon, which has brought and will bring great security gains. Every movement of our soldiers was known to us and was reported immediately. That is the tragedy of the camps. We did not know exactly what was taking place. Former Defense Minister Ariel Sharon's address to the Israeli Parliament on September 22, 1982, in defense of the Israeli army's role in Lebanon.<sup>2</sup>*

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1. THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, 1983: FINAL REPORT (AUTHORIZED TRANSLATION), *reprinted in* Jerusalem Post, Feb. 9, 1983 (supplement) [hereinafter cited as KAHAN REPORT]. The Report may also be found at 31 I.L.M. 473 (May 1983). This article occasionally refers to government documents released in litigation under the Freedom of Information Act in the case of *Jabara v. Schultz*, Civ. No. 83CV3100 (E.D. Mich. filed July 28, 1983), a case seeking to obtain all government documents relating to the massacres not subject to exemption from release. These documents are hereinafter cited as FOIA DOCUMENTS and are on file with the UTAH LAW REVIEW. The documents contain two types of information particularly useful to this article: telegrams to the State Department in Washington, D.C., summarizing testimony before the Commission, and English translations of newspaper reports in Hebrew and Arabic.

2. N.Y. Times, Sept. 23, 1982, at A8, col. 2. Sharon's explanation to the Israeli Knesset only prompted outrage and fanned the outcry for an investigation. In the course of the presentation Sharon implied that when Shimon Peres, a sharp critic of Sharon, was Defense Minister, Israeli forces were involved in the massacre of "thousands" at the Tel Zaatar refugee camp in Lebanon in 1976. *Id.* See also Salpeter, *A Soldier's Record: Will Sharon Sur-*

*We have found, as has been detailed in this report, that the Minister of Defense bears personal responsibility [for the massacres]. In our opinion, it is fitting that the Minister of Defense draw the appropriate personal conclusions arising out of the defects revealed with regard to the manner in which he discharged the duties of his office—and if necessary, that the Prime Minister consider whether he should exercise his authority under Section 21A(a) of the Basic Law: the Government, according to which “the Prime Minister may, after informing the Cabinet of his intention to do so, remove a minister from office.”* Conclusion of the Kahan Commission as to Defense Minister Sharon’s personal responsibility for the massacres at the Sabra and Shatilla camps.<sup>3</sup>

On September 16, 1982, the Israeli Defense Forces (“IDF”) occupying Beirut as a result of Israel’s June invasion of Lebanon permitted the Phalangists, a Lebanese Christian militia, to enter the Palestinian refugee camps of Sabra and Shatilla. From approximately 6:00 P.M. September 16 until 8:00 A.M. September 18, the Phalangists, and perhaps other militia, massacred men, women and children including Palestinians, Lebanese, Iranians, Syrians, Pakistanis and Algerians. The exact number of those killed cannot be determined—bodies having been buried in the ruins, deposited in mass graves and carried from the site in truckloads. Estimates of those massacred have ranged from roughly 300 to as many as 3000 people.

On February 9, 1983, an Israeli commission of inquiry into the massacres concluded that the State of Israel and several individual Israelis, including Ariel Sharon, were “indirectly” responsible for the massacres. The report of the Commission, known as the “Kahan Report,” was publicized throughout the world. *Time* magazine in its cover story reported that a classified “Appendix B” to the Report revealed that Sharon had discussed with the Jemayel family, two days before the massacre, the need for the Phalangists to seek revenge for the assassination of Bashir Jemayel. Shortly

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*vive?*, 20 THE NEW LEADER 6-7 (Nov. 1, 1982) (discussing Sharon’s involvement in the Beirut massacres and his ability to place blame elsewhere). Before the Knesset, Sharon also said that Amin Jemayel had been “actively involved” in Tel Az-Zaatar. FOIA DOCUMENT No. 326, Dep’t of State Incoming Telegram. After this presentation, one of Sharon’s critics, Amos Elon, an Israeli writer and political commentator, stated that by Sharon’s own “confession” in the Knesset, he was “a war criminal.” N.Y. Times, Sept. 26, 1982, at A6, cols. 5-6.

3. KAHAN REPORT, *supra* note 1, at 22. See *infra* note 280 for the outcome of the Report’s conclusions on Sharon.

thereafter, Sharon sued *Time* for libel in a New York Federal District Court, alleging that the *Time* article charged him with intending that a massacre take place. On January 24, 1985, the jury concluded that *Time's* characterization of the information in Appendix B was false, but that *Time* had not published the misinformation with the knowledge or reckless disregard of its falsity required for libel. Sharon claimed the jury had found *Time* had "lied." *Time* conceded it had erred in attributing the information to Appendix B, but maintained the story itself was true. Sabra and Shatilla had become little more than a battleground for reputations and political aspirations.

### I. A NEED FOR JUSTICE

On September 28, 1982, the Israeli Cabinet resolved to establish a commission of inquiry pursuant to Israel's Commission of Inquiry Law of 1968.<sup>4</sup> International outrage over the massacres and the largest protest demonstration in Israel's history<sup>5</sup> compelled the Begin administration to establish the Commission, despite its obvious reluctance to do so.<sup>6</sup> The extent of Israel's involvement was only gradually revealed in the press after initial denials by the IDF and the Begin government of any role in the massacres.<sup>7</sup> By February 9, 1983, when the Kahan Report was released, the massacres had already been absorbed into the morass of tragedies that have occurred and still are occurring in Lebanon. Yet with the issuance of the Report, the controversy was rekindled on a new level—focusing on the individual responsibility of many high ranking Israeli officials, including former Prime Minister Begin, then Minister of Defense Sharon and then Foreign Minister Shamir.<sup>8</sup> A brief flurry of reprimands (to the extent they can be denominated as such) followed. Sharon, the most harshly criticized cabinet

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4. KAHAN REPORT, *supra* note 1, at 2; see also *The Times* (London), Sept. 29, 1982, at 1, cols. 5-6 (reporting Israeli Cabinet decision of September 28 to hold an official inquiry, in contrast to its earlier belief that such an inquiry would be "tantamount to an admission of guilt").

5. *N.Y. Times*, Sept. 21, 1982, at 6, col. 1; *The Times* (London), Sept. 27, 1982, at 4, col. 3. Other influential factors leading to the inquiry were the resignation of Energy Minister Yitzhak Berman in outrage at the Cabinet's failure to establish a commission of inquiry and President Yitzhak Navon's call for an inquiry. *The Times* (London), Sept. 23, 1982, at 5, col. 2.

6. *The Times* (London), Sept. 23, 1982, at 1, col. 8.

7. *N.Y. Times*, Sept. 20, 1982, at A1, cols. 2, 4 & 5; *id.* Sept. 21, 1982, at A1, col. 3; *id.* at A6, cols. 4-5; *The Times* (London), Sept. 24, 1982, at 6, col. 8.

8. *Jerusalem Post*, Feb. 13-19, 1983, at 1, cols. 1-2 (Int'l ed.).

member in the Report, remained in the cabinet but lost his portfolio.<sup>9</sup> The Report was heralded, in part by the Commission itself, as a triumph of democracy, a testing and reaffirmation of the principles upon which Israel and other democratic nations are founded. The conscience of a nation (or perhaps nations—including the United States) was appeased.

Was there justice for the Palestinians, Lebanese and other victims of the massacres? Did the Report appropriately place blame on the guilty parties and impose or demand punishment accordingly? From an international law perspective, the answer is no. A fundamental misconception of the Report is that it was a resolution of national and individual liability for the massacre under existing principles of international law. It was not, nor did it purport to be, such a resolution. For purposes of determining the issues of responsibility under international law, it is not necessary to scrutinize the Commission's factual assumptions. Even granting the correctness of those assumptions, clear, grave violations of international law were committed by investigated individuals and by Israel as a nation. Although the Report focused only on Israeli responsibility,<sup>10</sup> its findings raise serious questions of responsibility for other parties as well, including the United States.

Somewhat surprisingly, there has been little discussion or analysis of the ramifications under international law of the massacres at Sabra and Shatilla, notwithstanding the moral, humanitarian and legal need for such analysis. The regrettable frequency with which similar massacres occur in the Mideast<sup>11</sup> and elsewhere<sup>12</sup> and the desire to prevent future atrocities mandate an unflinching analysis of the responsibility and punishments dictated by international law. Although one may question whether there can be any retribution other than an eye for an eye in return for such wholesale loss of life, the goal of international law is not to provide justice in the sense of satisfaction, but to provide justice in the sense of order and ultimately peace. Perhaps more than anywhere else in the world, the Mideast demonstrates the hopeless-

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9. *Id.* cols. 3-5.

10. See *infra* notes 136-38 and accompanying text.

11. To cite just one example, there have been reports that hundreds of civilians were killed in September and October of 1983 in fighting between the Phalangists and the Druze in the Chouf Mountains. N.Y. Times, Oct. 18, 1983, at A1, col. 2, A10, col. 3.

12. See, e.g., S. KARNOW, VIETNAM: A HISTORY 44-45 (1983) (discussing activities perpetrated in Vietnam); N.Y. Times, May 16, 1984, at A1, col. 4 (discussing death squads in Indonesia).

ness and circular violence of retribution.

This article uses the Kahan Report to demonstrate the ability of international law to provide an alternative form of justice to retribution. First, the article will set forth the Israeli law pursuant to which the Commission was authorized. Second, it will review the facts as found by the Commission and compare the most essential of those findings to factual conclusions from other sources. An analysis then follows of the responsibility of Israel as a nation and of individual Israeli officials under international law, based on the facts found by the Commission and, to some extent, by other sources. Finally, the article will explore briefly the potential responsibility under international law of other nations and entities, including the United States and the Jemayel regime.<sup>13</sup>

## II. THE ISRAELI COMMISSION OF INQUIRY LAW OF 1968

The authorization under Israeli law for the Kahan Commission is the Commission of Inquiry Law of 1968, which empowers the Israeli government to set up a commission of inquiry whenever it appears "that a matter exists which is of vital public importance at the time and which requires clarification . . . ."<sup>14</sup> That broad authorization is limited only by the government's definition of the subject of inquiry.<sup>15</sup> For example, the Kahan Commission's charge was to inquire into "all the facts and factors connected with the atrocity carried out by a unit of the Lebanese forces against the civilian population in the Shatilla and Sabra camps" and to submit a report to the government.<sup>16</sup> Although a dissent may be filed, the

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13. This article focuses primarily on the responsibility of Israel and Israeli officials and military officers because ascertaining that responsibility was the Kahan Commission's task. Nevertheless, the magnitude and gravity of the atrocities mandate some discussion of the potential responsibility of other nations and parties for the massacres. The extent of discussion of any nation's or individual's responsibility is not intended to reflect in any way on the extent of the party's responsibility. Therefore, the extensive discussion of Israeli responsibility and the relatively shorter discussion of others' potential responsibility is not meant to indicate in any way that Israeli responsibility for the massacres is greater or less in proportion to that of any other parties or nations discussed. It is merely a reflection of the focus of this article on the Kahan Report itself.

14. Commissions of Inquiry Law of 1968, § 1, *translated and reprinted in Legislation: Commissions of Inquiry Law of 1968*, 6 IS. L. REV. 410 (1971) [hereinafter citation to the Commissions of Inquiry Law of 1968 will refer to the translated and reprinted version in the ISRAELI LAW REVIEW and will be cited as *Commissions of Inquiry Law*].

15. *Id.* § 2.

16. KAHAN REPORT, *supra* note 1, at 2. The "camps" actually consist of many one-room or two-room cement structures with several larger, mainly two-story buildings, all separated by alleyways. M. JANSEN, *THE BATTLE OF BEIRUT: WHY ISRAEL INVADED LEBANON* 97 (1983).

Kahan Report was unanimous in its findings and conclusions.<sup>17</sup> The Commission may prescribe its own procedures without regard to the judicial rules of procedure or the rules of evidence.<sup>18</sup>

The Kahan Commission held sixty sessions, heard fifty-eight witnesses and reviewed many documents.<sup>19</sup> The inquiry was not as complete as it could have been, however.<sup>20</sup> The Commission's first task was to hear witnesses, both those who had volunteered to testify and those whom the Commission summoned. Although the Commission published notices to the public inviting testimony or any other information on the massacres, the response was meager.<sup>21</sup> One Israeli journalist expressed his belief that Arab witnesses (who would necessarily include many of the survivors) did not come forward to testify from a fear of retribution or an unwillingness to lend credence to the Commission's inquiry.<sup>22</sup> The Report states that it did attempt to collect testimony from witnesses outside of Israel, but its requests "were not always honored."<sup>23</sup>

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17. A commission of inquiry ordinarily consists of three members, *Commissions of Inquiry Law*, *supra* note 14, § 3, at 410, in this case Yitzhak Kahan, President of the Israeli Supreme Court and Commission chairman, Abaron Barak, Justice of the Supreme Court, and Yona Efrat, Major General. For a brief biography of the three members of the Commission, see *N.Y. Times*, Oct. 10, 1982, at 6, cols. 1-2, 4-5. The President of the Supreme Court is responsible for appointing the chairman and other members of the commission. In accordance with the statutory requirement that the chairman be a judge of the Supreme Court or a judge of a district court, Kahan acted as chairman. There are no qualification restrictions on the appointment of the remaining members. *Commissions of Inquiry Law*, *supra* note 14, § 4, at 410.

18. *Commissions of Inquiry Law*, *supra* note 14, § 8, at 410. To obtain evidence, the chairman is empowered, with the "sanction of the commission," to (1) summon and resubmit a person to testify before the commission or "to produce documents or other exhibits"; (2) require a witness to testify under oath or affirmation; (3) compel the attendance of a person who, without satisfactory excuse has not obeyed a summons to appear; and (4) order the "taking of evidence abroad." *Id.* § 9(a), at 411. The chairman is also authorized to issue a search warrant "when it appears . . . that a search should be made . . ." *Id.* § 12, at 412. An individual who refuses to testify is subject to a fine and may be imprisoned for up to two years on a second refusal to testify. *Id.* § 11(c), at 412.

19. KAHAN REPORT, *supra* note 1, at 2. Under section 13(a) of the Commissions of Inquiry Law, which allows the chairman to assign a qualified person the task of collecting material necessary for the inquiry, the Commission appointed staff investigators who collected 180 statements from 163 witnesses. The Commission also "viewed television footage filmed near the time of the events at the camps and their surroundings." *Id.*

20. For example, the Commission visited Beirut but was not allowed to enter the area of the massacres (the Report does not specify who did not allow the Commission to enter). *Id.*

21. *Id.*

22. A. KAPELIOUK, SABRA AND SHATILLA, INQUIRY INTO A MASSACRE 81 (1984) [hereinafter cited as SABRA AND SHATILLA].

23. KAHAN REPORT, *supra* note 1, at 2. The Commission cites the example of the *New York Times* correspondent, Thomas Friedman, who published a widely disseminated article

The Commission's next task was to issue notices of harm under section 15(a) of the 1968 law. Section 15(a) requires the chairman of the Commission, when it appears that a particular person is likely to be harmed by the inquiry or the results thereof, to notify that person in what respect he or she is likely to be harmed and to place at his or her disposal the Commission's evidence relevant to the potential harm.<sup>24</sup> That person may attend the Commission in person or through counsel and argue, make statements, examine witnesses and present evidence in relation to the potential harm.<sup>25</sup> The Commission sent notices of potential harm to nine people—Prime Minister Menachem Begin, Foreign Minister Yitzhak Shamir, Minister of Defense Ariel Sharon, Chief of Staff Lieutenant General Rafael Eitan, Director of Military Intelligence Major General Yehoshua Saguy, the unnamed Head of the Institute for Intelligence and Special Projects (Mossad), G.O.C. Northern Command Major General Amir Drori, Division Commander Brigadier General Amos Yaron, and personal aide to the

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on the massacres that originally appeared in the *New York Times*. N.Y. Times, Sept. 20, 1982, at A1, col. 5. Mr. Friedman refused to testify on the grounds that such testimony would be contrary to his paper's editorial policy. KAHAN REPORT, *supra* note 1, at 2. The Report states that it "did not receive a satisfactory answer as to why the paper's publisher prevented its reporter from appearing before the commission and thus helping it uncover all the important facts." *Id.*

24. *Commissions of Inquiry Law*, *supra* note 14, § 15(a), at 413. Under the Commissions of Inquiry Law, a commission is required to sit in public unless it deems it necessary to conduct any hearing in whole or in part in camera in the interest of protecting "the security of the State, safeguarding morality or safeguarding the welfare of a minor." *Id.* § 18(a), at 413. Therefore, the Kahan Commission held many of its sessions in camera to protect "nation[al] security or foreign relations" when discussing intelligence operations, IDF commands and the United States' involvement. KAHAN REPORT, *supra* note 1, at 2, 4. Similarly, in accordance with section 20(a) of the Commission of Inquiry Law allowing a commission to refrain from publishing portions of the report if necessary to protect these same interests (e.g., state security, morality or the welfare of a minor), *Commissions of Inquiry Law*, *supra* note 14, § 20(a), at 414, the Commission did not publish an Appendix B to the Report to protect "the nation's security and foreign relations." KAHAN REPORT, *supra* note 1, at 2, 22. Appendix B became crucial to resolution of Ariel Sharon's libel suit against Time Magazine. See *infra* notes 207-10 and accompanying text.

For obvious political reasons, the Israeli government did not exercise its option under section 23 of the Commissions of Inquiry Law of obtaining the approval of the Foreign Affairs and Security Committee of the Knesset to have the subject matter and setting up of the Commission itself remain secret. See *Commission of Inquiry Law*, *supra* note 14, § 23, at 414. The right to examine transcripts of the closed sessions and unpublished Appendix B was given to all members of the Cabinet, all members of the Knesset Defense and Foreign Affairs Committee, the general staff the Israeli Defense Forces and any person or class of persons that may be determined by the Ministerial Defense Committee. The right to examine Appendix B was also given to those sent notices of harm and their representatives. See *infra* notes 25-26 and accompanying text.

25. *Commissions of Inquiry Law*, *supra* note 14, § 15(b), at 413.



Minister of Defense Ariel Sharon, Avi Duda'i.<sup>26</sup> The Commission limited its notices to those nine individuals, although "facts were uncovered that could be the *prima facie* basis for results that might cause harm to other persons as well," because the involvement of such other persons was "secondary" and would be better carried out by other tribunals or groups, such as the military authorities.<sup>27</sup>

### III. THE FACTUAL FINDINGS OF THE KAHAN COMMISSION

The Commission's factual inquiry focused on the events of September 16-18, 1982, when the massacres occurred.<sup>28</sup> In keeping with its task as delineated by the Cabinet resolution, the Commission did not investigate or deliberate matters which were indirectly or remotely connected with the massacres, and it "refrained . . . from drawing conclusions with regard to various issues connected with activities during the war that took place in Lebanon from 6 June 1982 onward or with regard to policy decisions taken by the Government before or during the war, unless those activities or decisions were directly related to the events" that were the subject of the investigation.<sup>29</sup> Nevertheless, the Commission did interpret its authorization broadly in one respect—the Commission did not assume, as did the resolution, that the atrocities were committed only by "a unit of the Lebanese forces" (which the Commission equates with the Phalangists), but investigated whether the massacres could have been perpetrated by any other parties.<sup>30</sup>

As the Commission conceded, "not a few contradictions" about the facts evolved from the testimony; they were resolved "in accordance with the usual criteria in judicial and quasi-judicial tribunals," a phrase left undefined.<sup>31</sup> The Commission did not pur-

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26. KAHAN REPORT, *supra* note 1, at 3. The Commission heard witnesses and accepted written summations and oral arguments by counsel on behalf of some of the nine.

27. *Id.*

28. *Id.* at 2. A chronological summary of the Report's findings is necessary for analytical purposes in several respects. Some factual foundation must be presumed in order to apply principles of international law and, as noted earlier, an analysis predicated on the Report's findings reveals grave violations of international law without recourse to less favorable factual scenarios that have been advanced. Moreover, the facts as found by the Report on the three days in question become confusing at times because they do not always appear in the Report in chronological order. Finally, the facts as found by the Commission have been largely eclipsed by the conclusions of individual responsibility in the Report and by the disturbing descriptions of the atrocities that occurred in the camps.

29. *Id.*

30. *Id.*

31. *Id.* at 3.

port to resolve all such contradictions, particularly those that "relate[d] to the content of conversations that took place between various people without the presence of witnesses, or when the witnesses' attention was not focused on the content of the conversation, and there [were] not exact notes on these conversations."<sup>32</sup> The Commission found such lapses in memory "only natural," claiming no "need to rule about those contradictions which surround unimportant details that do not influence the decision about points in controversy."<sup>33</sup> Surprisingly, some of the conflicts that the Commission did not resolve appear to be not only significant but crucial to determinations of responsibility. For example, one such unresolved conflict in testimony is whether Begin learned of irregularities in the camps from United States representatives on the morning of the eighteenth or possibly even earlier, rather than from a BBC broadcast on Saturday evening as he testified before the Commission.<sup>34</sup>

The Report ultimately concludes that the only group directly responsible for the massacres was a Lebanese Maronite Christian militia known as the Phalangists, or *Keta'ib*, founded by Pierre Jemayel and led by his son Bashir.<sup>35</sup> The Commission found that in 1982 the Phalangists were the primary power in the Lebanese Christian forces. The head of the Phalangists' intelligence division, Elie Hobeika, played a pivotal role in the events surrounding the massacre.<sup>36</sup>

The Report frankly acknowledges the symbiotic relationship between Israel and the Christian forces:

The link between the Christian forces and the State of Israel was formed shortly after the civil war. In the course of time, this link grew stronger, from both political and military standpoints. The Christian forces were promised that if their existence were to become endangered, Israel would come to their aid. Israel extended significant aid to the Christian armed forces, supplying arms, uniforms, etc., and also training and instruction.<sup>37</sup>

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32. *Id.*

33. *Id.*

34. See *infra* notes 106-17 and accompanying text.

35. For a brief history of the origins of the Maronite Christian religion, see J. RANDAL, *GOING ALL THE WAY: CHRISTIAN WARLORDS, ISRAELI ADVENTURERS, AND THE WAR IN LEBANON* 27-60 (1983). Bashir Jemayel was elected President of Lebanon and was assassinated shortly thereafter.

36. KAHAN REPORT, *supra* note 1, at 3; see *infra* notes 72-73 and accompanying text.

37. KAHAN REPORT, *supra* note 1, at 3. For a history of the Israeli-Phalangist relationship, see N.Y. Times, Oct. 10, 1982, at 6, cols. 2-3. As early as August of 1978, Begin secretly

The institute for Intelligence and Special Assignments (referred to in the Report as the Mossad and the Israeli equivalent of the Central Intelligence Agency) was responsible for maintaining "a rather close connection" between Israel and the Phalangist leadership.<sup>38</sup> The Report was less scrutinizing of the relationship between Israel and the military force in South Lebanon—the "Army of Free Lebanon"—under the command of Major Saad Haddad.<sup>39</sup> Soldiers of Major Haddad and the Phalangists wore uniforms provided by Israel "similar to those worn by the I.D.F."<sup>40</sup> More importantly, the Israelis exercised some degree of control over Haddad's forces. For example, pursuant to IDF orders (the only acknowledgment of Israeli control of Haddad in the Report), Haddad's army did not proceed north of the Awali River during the 1983 Israeli-Lebanon war.<sup>41</sup>

In numerous meetings between unnamed "Phalangist leaders

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committed to the Phalangists that the Israeli Air Force would defend them against any air attacks by Syria. *Id.*

The Phalangists' assistance to the IDF was politically if not militarily necessary. The Israeli public and IDF soldiers expressed dissatisfaction with fighting what appeared to them to be the Phalangists' battle for control of Lebanon. The dissatisfaction mounted in direct proportion to Israeli casualties in the drawn-out invasion. KAHAN REPORT, *supra* note 1, at 4. As early as June 15, 1982—nine days into the invasion—the Israeli Cabinet adopted a proposal by Prime Minister Begin that the IDF forces would not enter West Beirut but would leave the task to the Phalangists. *Id.* Nevertheless, it was the IDF that fought and shelled various targets to control West Beirut. *Id.*

38. KAHAN REPORT, *supra* note 1, at 3. Although the Mossad ordinarily was responsible for Phalangist-Israeli relations, the intelligence branch of the IDF, referred to as "Military Intelligence," also was obligated to submit ongoing evaluations of the Phalangists and their goals and operations. *Id.* at 4. The attitude of the two branches toward the Phalangists diverged considerably. The Mossad urged strengthening relations with the Phalangists, insisting that alleged Phalangist atrocities were "a thing of the past." *Id.* Military intelligence emphasized the danger inherent in relations with the Phalangists due to their lack of reliability, military weakness and other reasons not specified by the Commission. *Id.* at 3. The head of military intelligence, Yehoshua Saguy, was forced to resign after the Report was issued and ultimately resigned from the army in August of 1983.

39. See *id.* at 3. Before Israeli armed forces withdrew from Lebanon after their 1978 invasion of that country, they established a zone across southern Lebanon under the authority of the military forces of Saad Haddad, formerly a major in the Lebanese army. S. MALLISON & W.T. MALLISON, ARMED CONFLICT IN LEBANON, 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING 6 (1983). In January of 1984, Saad Haddad died of cancer. *The Search Goes on For a Lebanese Exit*, NEWSWEEK, Jan. 23, 1984, at 32.

40. KAHAN REPORT, *supra* note 1, at 3-4. The Phalangists' uniforms bore an emblem bearing the inscription "Keta'ib Lubnaniyeh" (Lebanese Phalangists in Arabic) and the drawing of a cedar on the shirt pocket. Haddad's forces had an emblem on the epaulet with "Army of Free Lebanon" in Arabic and a drawing of a cedar. The distinctions, or lack thereof, in the insignia became a crucial factor in the Commission's resolution of direct responsibility for the massacres. See *infra* pages 396-400.

41. KAHAN REPORT, *supra* note 1, at 4.

and Israeli representatives,”

the Phalangist leaders proposed removing a large portion of the Palestinian refugees from Lebanese soil, whether by methods of persuasion or other means of pressure. They did not conceal their opinion that it would be necessary to resort to acts of violence in order to cause the exodus of many Palestinian refugees from Lebanon.<sup>42</sup>

The Commission also remarked that Bashir Jemayel had declared that he would eliminate the Palestinian “problem” when he became president “even if that meant resorting to aberrant methods against the Palestinians in Lebanon.”<sup>43</sup> Even prior to the invasion of Lebanon, therefore, the intention of the Phalangist leaders in their alliance with Israel was to remove the Palestinians from Lebanon, by force if necessary.

The Report found that when word of Bashir Jemayel’s assassination reached Israel at approximately 11:00 P.M. on Tuesday, September 14, Prime Minister Begin, Minister of Defense Sharon and Chief of Staff Eitan decided that the IDF would enter West Beirut, without seeking a Cabinet resolution to that effect.<sup>44</sup> Chief of Staff Eitan testified that, at 8:30 P.M. on September 14, he and Defense Minister Sharon agreed on the entry of the Phalangists into the Sabra and Shatilla camps, setting in motion the events that would ultimately culminate in the massacres there.<sup>45</sup> The operating order for the entry into West Beirut provided in part: “The refugee camps are not to be entered. Searching and mopping up the camps will be done by the Phalangists-Lebanese army.”<sup>46</sup>

The Report then reached its most widely questioned finding:

The [Israeli] forward command post was located on the roof of a five-story building about 200 meters southwest of the Shatilla camp.

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42. *Id.*

43. *Id.*

44. *Id.* at 5. There was no prior consultation with the Cabinet; Foreign Minister Shamir was the only minister informed of this decision, which he endorsed. SABRA AND SHATILLA, *supra* note 22, at 14. In apparent contradiction, the Commission stated that no claim could be made that this decision was adopted by Begin and Sharon without convening a cabinet session. The Commission further concluded that no indirect responsibility for the massacres could be predicated on this decision because of the “extraordinary emergency situation” created by Bashir Jemayel’s assassination. KAHAN REPORT, *supra* note 1, at 13. The Lebanese army, it stated, could not have enforced order in all of West Beirut. *Id.* For a discussion of Israel’s entry into West Beirut as a violation of the PLO evacuation agreement, see *infra* note 228 and accompanying text.

45. KAHAN REPORT, *supra* note 1, at 5. The Commission concluded that Sharon and Eitan did not consult with Begin in reaching their decision. *Id.*

46. *Id.*

The two camps were essentially residential neighborhoods containing, in the area entered by the Phalangists . . . low permanent structures along narrow alleys and streets. From the roof of the forward command post it was possible to see the area of the camps but—as all the witnesses who visited the roof of the command post stated, and these were a good number of witnesses whose word we consider reliable—it *was impossible to see what was happening within the alleys in the camp from the roof of the command post, not even with the aid of 20 x 120 binoculars that were on the command post roof.*<sup>47</sup>

That finding, so crucial to the Report's approach and so soundly rejected by most authorities, is a regrettable weakness in the Report that to a large extent undermines its fundamental premises and validity.

Factual clarity is rarely a hallmark of international disputes and the massacres in Sabra and Shatilla are no exception. The purpose of this article is not to make independent factual findings, but rather to provide a framework for evaluating responsibility for such atrocities under international law and to apply that framework by way of example to the massacres in Sabra and Shatilla. Yet achieving that purpose (and keeping in mind that the facts of most international conflicts are disputed) requires evaluating with care the most controversial factual finding in the Report because the accuracy of that finding has a substantial bearing on determinations of responsibility under international law.

Jonathan Randal, senior foreign correspondent for the *Washington Post*, noted: "In its only obviously wrongheaded factual error, the Kahan Report insisted Israeli troops couldn't see into the camp's alleyways, even with giant telescopes on the command post roof. Journalists who climbed the seven-story building had no such difficulty with their own naked eyes."<sup>48</sup> In *Sabra and Shatilla: Inquiry Into a Massacre*, Israeli journalist Amnon Kapeliouk discredited this "serious mistake" based on his own visits to the site.<sup>49</sup> He says that a mass grave dug by the Phalangists southwest of Shatilla, 300 meters from the roof, was clearly visible. The bulldozers allegedly used to bury hundreds of victims were also within view. Kapeliouk quotes the military correspondents of *Yedi'ot Aharonot*, an Israeli newspaper, as saying that the Israeli army could not see what was happening "under their nose" but knew

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47. *Id.* (emphasis added).

48. J. RANDAL, *supra* note 35, at 20.

49. SABRA AND SHATILLA, *supra* note 22, at 81-82.

"the exact street, building and floor in Beirut on which every *Fedayeen* leader lived; and knew the exact thickness of the walls around the Baghdad nuclear reactor."<sup>50</sup> A *New York Times* article matter-of-factly remarked that from the rooftop of the Israeli observation post one could look down into the Shatilla camp.<sup>51</sup> This same article noted that from the Israeli observation posts "it would not have been difficult to ascertain [what was happening in the camps] not only by sight but from the sounds of gunfire and the screams coming from the camp."<sup>52</sup> A radio report by Loren Jenkins (the *Washington Post* Beirut correspondent) transcribed from the September 20, 1982, "All Things Considered" program on National Public Radio, perhaps best summarized the opinion of eyewitnesses as to visibility into the camps, particularly Shatilla. Jenkins responded to the question, "Do you have any doubt now of the complicity of the Israeli Defense Forces there?" as follows:

There is no doubt in my mind that Israel aided and abetted that whole operation! . . . The final proof to me was when I walked and found what was a mass grave in a part of the camp, that when you stand just on top of that, and you raise your head, and you look up at a seven story building, about 300 yards away, which is the Israeli army's main observation post, a place where before their own advance into the city, they had set up giant telescopes for spotting snipers. And as I stood there Saturday morning looking up, there were six Israelis looking straight down at me. They stood and watched throughout this whole horrible tragedy as people were brought here, shot, dumped in this grave and packed up!<sup>53</sup>

Shortly before 6:00 A.M. on September 15, 1982, the IDF began to enter West Beirut. Between 8:00 A.M. and 9:00 A.M. that

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50. *Id.* at 84.

51. N.Y. Times, Sept. 26, 1982, at A9, col. 2.

52. *Id.* In his own testimony, Yaron stated that the observation posts were not "good in visibility," but "you could hear noises" and sometimes "human voices" from them. N.Y. Times, Nov. 8, 1982, at A4, col. 2. The Report, to buttress its weakest finding that the Israeli soldiers could not see the massacres from the command post, stated that the doctors and nurses in the Gaza Hospital were not even aware a massacre was taking place. Yet the *New York Times* reported that doctors and nurses testified they heard constant shooting and shelling from Shatilla beginning Thursday and received the "first signal" that a massacre might be taking place Thursday evening when an eleven-year-old boy brought in with three gunshot wounds described how the militiamen shot his mother, father and three siblings in front of him. That evening they described the hospital as filled with Palestinians crying "We're going to die, wee going to die." N.Y. Times, Sept. 20, 1982, at A6, cols. 3-4. "By Friday afternoon it was clear to everyone in the hospital that they were in danger of being caught up in a massacre." *Id.*, col. 5.

53. Interview with Loren Jenkins, *Washington Post* Beirut correspondent, transcribed from *All Things Considered*, broadcast on National Public Radio (Sept. 20, 1982).

same day, Defense Minister Sharon met at the forward command post with Chief of Staff Eitan who reported on his agreement with the Phalangists for their entry into the camps.<sup>54</sup> Sharon approved the agreement and telephoned Prime Minister Begin from the roof of the command post, yet according to the Report, Sharon informed Begin only that there was no resistance in Beirut and that the operations were going well.<sup>55</sup> Also present on the forward command post were the Defense Minister's aide Avi Duda'i, the Director of Military Intelligence Yehoshua Saguy, a representative of the Mossad, Major General Drori, and Brigadier General Yaron, among others. Duda'i's notes of the meeting stated that the Phalangists were to be sent into the camps and that Sharon had spoken twice with the Prime Minister from the roof of the command post.<sup>56</sup> A document signed by Duda'i was issued later by the Defense Minister's office that summarized Sharon's instructions in two crucial, controversial sentences: "Only one element, and that is the IDF, shall command the forces in the area. For the operation in the camps the Phalangists should be sent in."<sup>57</sup>

At 11:30 A.M., the Israeli Prime Minister met with Morris Draper and other officials from the American embassy in Israel. Begin informed Draper that

I.D.F. forces had entered West Beirut beginning in the morning hours, that there were no real clashes, that the I.D.F. action was undertaken in order to prevent certain possible events, and that we were concerned that there might be bloodshed even during the night. The Prime Minister also said that the Phalangists were be-

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54. KAHAN REPORT, *supra* note 1, at 5. Sometime in the evening between September 14 and September 15, Chief of Staff Eitan met in Beirut with Major General Drori and with the commander of the IDF division. At 3:30 A.M. on September 15, Chief of Staff Eitan went to the Phalangists' headquarters and, according to his own testimony, "ordered the Phalangist commanders to effect a general mobilization of all their forces, impose a general curfew on all the areas under their control, and be ready to take part in the fighting." The Phalangist commanders asked for twenty-four hours to prepare. Eitan then asked that a Phalangist liaison officer come to the Israeli division's forward command post. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 6. The document was issued on September 16, and was directed to Chief of Staff Eitan, the Deputy Chief of Staff and the Director of Military Intelligence. *Id.* The witnesses were in disagreement as to whether this instruction signified that the Phalangist forces were to be directly under the command of the IDF. The Chief of Staff testified that he interpreted the instruction to mean the IDF, and no other Israeli element, was to command the forces in the area, but that did not mean the Phalangists were "under" the command of the IDF. However, the Director of Military Intelligence interpreted the instruction as meaning "that all forces operating in the area, including the Phalangists, will be under the authority of the I.D.F. and will act according to its instructions." *Id.*

having properly: their commander had not been injured in the assassination and was in control of his forces; he is a good man and we trust him not to cause any clashes, but there is no assurance regarding other forces. He added that the primary immediate task was to preserve quiet, for as long as quiet is maintained it will be possible to talk; otherwise there might have been pogroms, and the calm was preserved for the time being.<sup>58</sup>

This conversation, particularly Begin's references to the possibility of "pogroms," was a significant factor in the Commission's conclusion that Begin was aware of the volatility of the Phalangists and their penchant toward mass retribution.<sup>59</sup> At 6:00 P.M. Sharon spoke with Prime Minister Begin from his home, reported that "everything is in order" and reconfirmed his approval of the decision the previous night to enter West Beirut.<sup>60</sup> Also on the evening of September 15, Major General Drori met with the Phalangists and told them that they should enter the camps from the direction of Shatilla, which they did the following day.<sup>61</sup> Drori, whom the Report describes as "not at ease with the plan to send the Phalangists into the camps," earlier had failed to persuade the Lebanese army to enter the camps rather than the Phalangists.<sup>62</sup>

On Thursday, September 16, 1982, Chief of Staff Eitan returned to Tel Aviv in the early morning hours. He met at 10:00 A.M. with Sharon, the Director of Military Intelligence, Brigadier General Saguy and Mr. Duda'i, among others, and announced: "[T]he whole city is in our hands, complete quiet prevails now, *the camps are closed and surrounded*, the Phalangists are to go in at 11:00-12:00. Yesterday we spoke to them . . . . The situation now is that *the entire city is in our hands*, the camps are all closed."<sup>63</sup> Specifically referring to a map, Eitan stated that the Sabra and Shatilla camps were surrounded by IDF forces and that it was agreed the Phalangists would go in after a coordinating session with the Israeli officials.<sup>64</sup> Sharon stated he "would send" the

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58. *Id.* at 5.

59. *See infra* note 196 and accompanying text.

60. KAHAN REPORT, *supra* note 1, at 5. According to the Report, there was no discussion of authorizing the Phalangists to enter the camps. *Id.* at 14.

61. *Id.* at 5.

62. *Id.* After the massacre, Drori stated in an interview on Israeli television that he "begged him [the Lebanese army's deputy chief] in every language possible to take responsibility for the security situation in the camps . . . ." N.Y. Times, Sept. 20, 1982, at A10, col. 3.

63. KAHAN REPORT, *supra* note 1, at 5 (emphasis added).

64. *Id.*



Phalangists into the refugee camps.<sup>65</sup> During the consultation, Sharon telephoned Prime Minister Begin and informed him:

[T]he fighting has ended. The refugee camps are surrounded. The firing has stopped. We have not suffered any more casualties. Everything is calm and quiet. Sitting opposite me is the Chief of Staff, who has just come from there [West Beirut]. *All the key points are in our hands.* Everything's over. That's the situation as of now . . . .<sup>66</sup>

The first coordinating session for the Phalangists' entry into the camps was held at 11:00 A.M. on the sixteenth. Unnamed Phalangist commanders met with Major General Drori at the headquarters of one of the divisions. They agreed that a company of 150 fighters from the Phalangist force would enter the camps and coordinate their entry with Brigadier General Yaron on Thursday afternoon at the forward command post.<sup>67</sup> Yaron, apparently still apprehensive about the Phalangists' involvement, discussed with them purported terrorist locations in the camp and warned the Phalangist commanders not to harm the civilian population.<sup>68</sup> The Report then noted the safety checks on the Phalangists required by Yaron. Yaron set up lookout posts on the roof of the forward command post and on a nearby roof "even though he knew that it was impossible to see very much of what was going on in the camps from these lookouts."<sup>69</sup> An additional measure not specified in the Report and described only in the classified Appendix B to the Report was imposed to ascertain the actions of the Phalangist forces in the camps.<sup>70</sup> Yaron and the Phalangists also stipulated that a Phalangist liaison officer with a "communications set" would be present at all times on the roof of the forward command post with a Mossad liaison officer at the Phalangist headquarters.<sup>71</sup>

The Phalangist intelligence unit headed by Elie Hobeika<sup>72</sup> was

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65. *Id.*

66. *Id.* at 5-6 (emphasis added).

67. *Id.*; but see M. JANSEN, *supra* note 16, at 102 (stating that 1000-1200 militiamen "seem to have been involved, with about half of them actually in the area at any one time").

68. KAHAN REPORT, *supra* note 1, at 5-6.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Hobeika reportedly was the liaison between the Phalangists and the Mossad, and also between the Phalangists and the United States embassy in Beirut. Bashir Jemayel and Hobeika reportedly had regular contracts with the Central Intelligence Agency. N.Y. Times, Sept. 30, 1982, at A10, col. 6. According to the *New York Times*, Hobeika also led

assigned to enter the camps. According to the Commission, this unit was selected because the Phalangists had difficulty recruiting another appropriate force and the unit was considered to be specially trained in discovering terrorists.<sup>73</sup> The actors were chosen and the stage was set; the tragedy was about to begin.

At approximately 6:00 P.M. on Thursday, September 16, the Phalangists entered the camps, initially entering the Shatilla camp from the west and southwest.<sup>74</sup> Hobeika himself did not enter the camps but remained on the roof of the Israeli forward command post throughout the night of the sixteenth.<sup>75</sup> The Phalangists entered in two groups and, according to the Commission, their movements within the camps were not visible from the roof of the forward command post or from the observation sites on other roofs.<sup>76</sup> In response to a request from "G," the Phalangists' liaison officer to the IDF, the IDF provided mortar, and subsequently aircraft, illumination for the Phalangists in the camps throughout the night.<sup>77</sup>

Based primarily on these findings, the Commission concluded that Begin, Sharon, Eitan, Saguy and the head of the Mossad knew or should have known that a massacre was likely to result and were responsible to varying degrees for the massacres because they failed to take any action to prevent the Phalangists from entering the camps. In the Commission's opinion, however, individual responsibility for the massacres did not end with the failure to take

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the Tel Zaatar massacre. N.Y. Times, Oct. 10, 1982, at A6, cols. 5-6.

73. KAHAN REPORT, *supra* note 1, at 6.

74. *Id.* Other sources have since placed the exact time at 5:15 P.M. See, e.g., SABRA AND SHATILLA, *supra* note 22, at 30. The Report at this point in its analysis, in a marked departure from its generally unemotional tone, stated that there were "armed terrorist forces" in the camps whose extent they could not establish but whose arms were being used against the IDF. As noted in the Report, these hidden arms and terrorists never materialized. KAHAN REPORT, *supra* note 1, at 6-7. The Commission concluded that this terrorist force had not been evacuated for two reasons: to renew underground terrorist activity at a later period and to protect the civilian population that had remained in the camps because, given the hostility prevailing between the various sects and organizations, a population without armed protection was in danger of massacre. In a clear jab at the United States' failure to provide protection for the civilian population, the Commission added that during the evacuation negotiations, a "guarantee for the safety of the Muslims in West Beirut was given by the representative of the United States who conducted the negotiations, following assurances received from the government of Israel and from Lebanon." See *infra* note 218 and accompanying text. The author has purposely refrained from use of the term "terrorist" because it tends to be an inflammatory, meaningless term, particularly in the context of circular violence and retaliation in the Mideast.

75. KAHAN REPORT, *supra* note 1, at 6.

76. *Id.*

77. *Id.*; see also N.Y. Times, Sept. 20, 1982, at A6, col. 4.

preventive action. From the Phalangists' entry into the camps until they left the following Saturday morning, numerous Israeli officers and officials received reports of killings in the camps but failed to take steps to curtail the massacres. Among those receiving such reports were Sharon, Shamir, Eitan, Saguy, Drori and Yaron.

In one of the many ironies of this tragedy, as the first reports of the massacres were arriving at the Israeli command post in Beirut on Thursday, September 16, the Israeli Cabinet was meeting in Israel to discuss the situation in Lebanon after Jemayel's assassination.<sup>78</sup> Attending the meeting were the Prime Minister and the Cabinet Ministers, the Chief of Staff, the head of Mossad and the Director of Military Intelligence. Chief of Staff Eitan, describing his meetings with Phalangist personnel, said that he had told the Phalangist commanders to go in when they were told, that early that evening the Phalangists would begin fighting in Sabra, and that the Phalangists would go in there "with their own methods."<sup>79</sup> He described the camps as surrounded "by us," reiterated that the Phalangists would begin to "operate" that night in the camps, and said that "we could give them [the Phalangists] orders" whereas the Lebanese army was less malleable.<sup>80</sup>

In a horrifying foreshadowing of the tragedy to come, the Chief of Staff addressed the possible consequences of Bashir Jemayel's assassination:

A . . . thing that will happen—and it makes no difference whether we are there or not—is an eruption of revenge which, I do not know, I can imagine how it will begin but I do not know how it will end. It will be between all of them, and neither the Americans nor anyone else will be of any help. We can cut it down, but today they already killed Druze there. What difference does it make who or what? They have already killed them, and one dead Druze is enough so that tomorrow four Christian children will be killed; they will find them slaughtered, just like what happened a month ago; and that is how it will begin, if we are not there—it will be an eruption the likes of which has never been seen; I can already see in their eyes what they are waiting for.

Yesterday afternoon a group of Phalangist officers came, they were stunned, still stunned, and they still cannot conceive to themselves how their hope was destroyed in one blow, a hope for which

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78. KAHAN REPORT, *supra* note 1, at 7.

79. *Id.*

80. *Id.* After the massacres, Eitan told reporters: "We do not give the Phalangists orders and we are not responsible for them. The Phalangist are Lebanese and Lebanon is theirs and they act as they see fit." N.Y. Times, Sept. 20, 1983, at A6, col. 3.

they built and sacrificed so much; and now they have just one thing left to do, and that is revenge, and it will be terrible.<sup>81</sup>

In response to further questions, Eitan said he had told United States Ambassador Morris Draper that during Bashir Jemayel's funeral Amin Jemayel had said "revenge," which Eitan said would result in "a war that no one will be able to stop."<sup>82</sup> The head of Mossad then gave a briefing on the situation after Jemayel's assassination, but made no reference in the meeting to the Phalangists' entry into the camps.<sup>83</sup>

The only person to question the Phalangists' entry into the camps even after Eitan had spoken was Deputy Prime Minister Levy who prophetically warned:

[W]e would come out with no credibility when I heard that the Phalangists are already entering a certain neighborhood—and I know what the meaning of revenge is for them, what kind of slaughter. Then no one will believe we went in to create order there, and we will bear the blame. Therefore I think that we are liable here to get into a situation in which we will be blamed, and our explanation will not stand up . . . .<sup>84</sup>

No one responded to his expression of concern. The Cabinet proceeded to adopt a resolution that attributed the entry into West Beirut in part to the continued presence in Beirut of "some 2000 terrorists, equipped with modern and heavy weapons . . . in flagrant violation of the evacuation agreement . . . ."<sup>85</sup>

Despite early reports of indiscriminate killings, the Report finds that the first Israeli attempt to curb the Phalangists did not occur until an 11:00 A.M. meeting on Friday, September 17, between Brigadier General Yaron and Major General Drori.<sup>86</sup> Although their testimony differed sharply as to what took place in that meeting, the Report concluded that an order to halt was conveyed to the Phalangist commanders.<sup>87</sup> At this same meeting, Drori telephoned Eitan, told him that the Phalangists had perhaps "gone too far," and that he had ordered the operation halted.<sup>88</sup>

At 4:00 P.M. that same day Eitan, Yaron and Drori met with

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81. KAHAN REPORT, *supra* note 1, at 7.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

the Phalangist staff at Phalangist headquarters. In this meeting, despite Drori's earlier order halting the Phalangists and report on their actions, Eitan "expressed his positive impression received from the statement by the Phalangist forces and their behavior in the field" and ordered that they "continue action, mopping up the empty camps south of Fakhani until tomorrow [Saturday] at 5:00 A.M., at which time they must stop their action due to American pressure. There is a chance that the Lebanese army will enter instead of them."<sup>89</sup> Eitan further testified that the Phalangists told him that "everything was alright, that the Americans are pressuring them to leave and they would leave by 5:00 A.M. . . ."<sup>90</sup> He did not ask the Phalangists any questions or debrief them about what had happened in the camps although he did refuse to permit them to send in more forces. Yaron, however, testified that no restrictions were placed on the Phalangists bringing in additional forces.<sup>91</sup>

During the meeting the Phalangists requested a tractor "to demolish illegal structures."<sup>92</sup> At the end of the meeting, as Brigadier General Yaron testified, it was "clear" that "the Phalangists could still enter the camps, bring in tractors and do what they wanted . . . ."<sup>93</sup> The Phalangists purportedly returned the one tractor

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89. *Id.* at 9. This order is not the only controversial directive issued by Eitan. In a January 22, 1983, *Philadelphia Inquirer* article, it was reported that nine Israeli soldiers on trial for mistreating Arab detainees submitted to the court a memorandum issued by Eitan ordering harsh treatment of Palestinian demonstrators. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *THE BITTER YEAR* 21 (1983) [hereinafter cited as *THE BITTER YEAR*]. According to the *Jerusalem Post*, Eitan used the military slang term "tirtur" (harassment or bullying) to describe treatments to be given detainees. *Jerusalem Post*, Jan. 30—Feb. 5, 1983, at 4, col. 2 (Int'l ed.). Eitan stated when the massacres first came to light that the Phalangists had entered the camps unbeknownst to the Israelis. *Jerusalem Post*, Sept. 22, 1982, at 1, col. 2.

90. KAHAN REPORT, *supra* note 1, at 9; N.Y. Times, Sept. 20, 1982, at A10, col. 4. An unanswered question raised by this part of the Report is what knowledge United States officials had at this time that would cause them to bring "pressure" to bear on the Phalangists to halt their operations. When asked for additional details of that aspect of the discussion, Major General Drori said he could not recall any details. KAHAN REPORT, *supra* note 1, at 9. The *New York Times* reported that at 9:00 A.M. on Saturday a member of the United States embassy staff entered Shatilla, established that a massacre had taken place and informed his superiors. N.Y. Times, Sept. 26, 1982, at A1, col. 5. Even earlier, according to that same article, a group of American journalists spoke with a member of the American embassy staff Friday around 3:00 P.M. and mentioned the rumors they had heard that the Phalangists had entered Shatilla. The charge d'affaires was immediately alerted and contacted Amin Jemayel, who said he would check on the report. For a discussion of the extent of American knowledge and responsibility, see *infra* notes 220-42 and accompanying text.

91. KAHAN REPORT, *supra* note 1, at 9.

92. *Id.*

93. *Id.*

supplied shortly after they received it since they had their own tractors that they used (in large part to pile up the bodies)<sup>94</sup> that night and the following morning.<sup>95</sup> In the most appalling lack of concern over the situation in the camps, no question was addressed to the Phalangist commanders about any of the rumors or reports of killing and mistreatment of the civilians in the camps.<sup>96</sup>

Between 8:00 P.M. and 9:00 P.M. on Friday, September 17, Chief of Staff Eitan returned to Israel and telephoned the Defense Minister to update him on the situation in Beirut. The versions of this conversation in Sharon's testimony and Eitan's testimony differ substantially. Eitan testified that the Phalangists had carried out their operation and had stopped, and that they would leave by 5:00 A.M. Saturday due to pressure from the United States.<sup>97</sup> He testified that he did not mention disorderly behavior by the Phalangists, massacres or "killing beyond what had been expected."<sup>98</sup> In contrast, Sharon testified that Eitan had informed him that "the Christians had harmed the civilian population more than was expected."<sup>99</sup> He further testified that the Chief of Staff "used the expression that the Lebanese Forces had 'gone too far,' and that therefore their activity had been stopped in the afternoon, the entry of additional forces had been prevented, and an order had been given to the Phalangists to remove their forces from the camps by 5:00 A.M. the following morning."<sup>100</sup> Sharon said that Eitan also mentioned that civilians had been killed; Sharon claimed that was the first report of "irregular activity" to reach him.<sup>101</sup> The Commission credited Sharon's version of the telephone conversation, concluding that from this point on the Defense Minister knew that killings of civilians had been carried out in the camps.<sup>102</sup> At 10:00 P.M. that evening Sharon also received from foreign ministry personnel a summary of complaints lodged that evening by unidentified United States representatives about the entry of the Phalangists and its potential consequences.<sup>103</sup> Finally, at 11:30 P.M., Mr. Ben Yishai called Sharon and told him of

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94. N.Y. Times, Sept. 26, 1982, at A11, col. 5.

95. KAHAN REPORT, *supra* note 1, at 9.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* See also *infra* note 242 and accompanying text.

the reports he had heard that "the Phalangists were doing unacceptable things in the camps."<sup>104</sup> Sharon did not react—by this time such reports were no longer news to him.

The Phalangists did not leave the camps at 5:00 A.M. Saturday, September 18, as ordered. When Brigadier General Yaron learned of this at 6:30 A.M., he gave the Phalangist commander on the scene the long-needed order—that they must vacate the camps "without delay"—and the last of the Phalangists left the camps at approximately 8:00 A.M.<sup>105</sup>

Testimony before the Commission revealed that a telephone conversation took place between Chief of Staff Eitan and Prime Minister Begin sometime in the morning or early afternoon on Saturday. The Prime Minister testified he was in a synagogue for Rosh Hashanah from 8:00 A.M. to 1:15 or 1:30 P.M.<sup>106</sup> In his first appearance before the Commission, Eitan testified that at about 10:00 A.M. Prime Minister Begin had telephoned to tell him that the Americans were complaining the Phalangists had entered Gaza Hospital and were killing patients.<sup>107</sup> At Eitan's order the complaints were investigated, but it was concluded there were no such killings and he so informed the Prime Minister. When the Commission pointed out Begin's testimony as to his attendance at the synagogue, Eitan said the telephone call must have taken place earlier in the morning.<sup>108</sup> Begin denied the call altogether, as well as any American call to him about Gaza Hospital.<sup>109</sup> Sharon, however, testified that Eitan spoke with him by telephone between 9:00 A.M. and 10:00 A.M. and told him (Sharon) that Begin had called his attention to "some occurrence at Gaza Hospital."<sup>110</sup> In an inexcusable failure to resolve these crucial conflicts in what Begin knew and when, the Report concluded there is "no need, for the purpose of determining the facts in this investigation," to decide between the conflicting versions.<sup>111</sup>

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104. KAHAN REPORT, *supra* note 1, at 9.

105. *Id.* at 10.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* Although not mentioned in the Report, Lieutenant Colonel Ze'ev Zecharin, the director of Eitan's office, also testified that Eitan called him at 10:30 A.M. and told him that he had spoken to Begin that morning, and Begin had questioned him about what happened in Gaza Hospital. FOIA DOCUMENT, *supra* note 1, No. 341, Dep't of State Telegram. It remains unclear not only when Begin learned of the massacres but also whether Begin and Sharon planned the entry into Beirut—specifically West Beirut—from the very incep-

That same morning, Sharon received additional complaints about the slaughter. The Director General of the Foreign Ministry, Mr. Kimche, told Sharon that United States Ambassador Draper had informed him the IDF soldiers had entered banks in Beirut and that Palestinians had been massacred.<sup>112</sup> The Defense Minister's reply, given at approximately 1:00 P.M., was that the Phalangists' operation had been stopped and their forces expelled from the camps.<sup>113</sup> At 3:00 P.M. Drori told Sharon about the reports of the massacre (the Report does not specify which reports), that the Phalangists had left the camps and that the press and Red Cross were inside the camps.<sup>114</sup> At 5:00 P.M. Drori appealed to the Lebanese army to enter the camps, which it finally did the following day.<sup>115</sup>

Having failed to address Begin's knowledge of trouble in the camps earlier Saturday, the Report noted only that the Prime Minister "heard about the massacre" on a BBC radio broadcast that evening, at which point he contacted the Chief of Staff and Defense Minister.<sup>116</sup> The Report acknowledged that it was "ostensibly puzzling" that the Defense Minister did not inform Begin of the Phalangists' entry into the camps, and that Begin knew nothing of the plan until the Cabinet meeting on the sixteenth.<sup>117</sup>

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tion of the invasion. Salpeter, *The Inquiry Begins: Placing the Blame on Israel*, 19 THE NEW LEADER 3-4 (Oct. 18, 1982).

112. KAHAN REPORT, *supra* note 1, at 10; *see infra* note 222. Bruce Kashdan from the Foreign Ministry also testified that Saturday at 10:00 A.M., Draper called him with the following message for Sharon: "You must stop the massacres. They are obscene. I have an officer in the camp counting the bodies. You ought to be ashamed. The situation is rotten and terrible. They are killing children. You are in absolute control of the area, and therefore responsible for that area." FOIA DOCUMENT, *supra* note 1, Dep't of State Incoming Telegram. *See infra* notes 239-40 and accompanying text.

113. KAHAN REPORT, *supra* note 1, at 10.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 15. At 9:00 P.M. on Sunday, September 19, a Cabinet meeting took place with the additional participation of Eitan, the head of the Mossad, Saguy, Drori and other unnamed individuals. In the course of that meeting, Eitan stated:

On Friday, I met with them [the Phalangists] at around noon, at their command post. We did not yet know what had happened there. In the morning we knew that they had killed civilians so we ordered them to get out and we did not allow others to enter. But they did not say they had killed civilians, and they did not say how many civilians they had killed; they did not say anything . . .

Eitan explained in his testimony that the knowledge of killings "[i]n the morning referred to Saturday, not Friday morning." The Commission accepted his explanation. In the course of the meeting and the subsequent testimony, Begin confirmed that on the fourteenth of September when the decision to enter West Beirut was made, he had spoken to Eitan about protecting "the Muslims from the vengeance of the Phalangists," demonstrating their cogni-



In all likelihood, it will never be known exactly who or how many were killed in the massacres. The official Red Cross burial of the dead counted 328 bodies, including Palestinians, Lebanese, Iranians, Syrians, Pakistanis and Algerians.<sup>118</sup> Some survivors buried their less fortunate family members.<sup>119</sup> Truckloads of bodies were removed by the Phalangists, and still other bodies are believed to remain under the ruins or in mass graves dug by the Phalangists.<sup>120</sup> The IDF estimates 700 to 800 were killed.<sup>121</sup> There have been estimates that approximately a thousand were killed<sup>122</sup> and over 900 people put into trucks and driven away.<sup>123</sup> One Israeli source put the total number of civilians killed at 3000.<sup>124</sup>

#### IV. THE REPORT'S DELINEATION OF "DIRECT" AND "INDIRECT" RESPONSIBILITY FOR THE MASSACRES

The Commission of Inquiry of Law of 1968 provides no standards by which a commission can determine responsibility for the acts it is required to investigate. The Kahan Commission devised two levels of responsibility—direct and indirect—and its conception of the differences between the two muted Israel's responsibility. According to the Commission, only those who "actually perpetrated" the massacre itself were directly responsible.<sup>125</sup> Therefore, it was a relatively simple matter for the Commission to determine

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zance of the danger even at that point in time. The Commission concluded that it could not determine "with certainty" what Begin had said at that time on this point. The meeting resulted in a resolution expressing regret at the massacre "at a place distant from an I.D.F. position," and concluding: "No one will preach to us moral values or respect for human life, on whose basis we were educated and will continue to educate generations of fighters in Israel." *Id.* at 10-11.

118. *Id.* at 10. Of the 328 estimated dead according to the Red Cross, 45 were Lebanese, 21 Iranians, 10 Syrians, 13 Pakistanis and 2 Algerians. FOIA DOCUMENT, *supra* note 1, No. 320, Dep't of State Incoming Telegram.

119. KAHAN REPORT, *supra* note 1, at 10; N.Y. Times, Sept. 21, 1982, at A8, col. 2.

120. KAHAN REPORT, *supra* note 1, at 10; *see also* N.Y. Times, Sept. 21, 1982, at A8, col. 3.

121. KAHAN REPORT, *supra* note 1, at 10.

122. The Times (London), Sept. 24, 1982, at 6, col. 2.

123. For example, at 1:00 P.M. on Friday a reporter for Danish television watched as a cattle truck at the southern gate of Shatilla was loaded with women and children from the camp by Christian militiamen. What happened to them is unknown. N.Y. Times, Sept. 20, 1982, at A6, col. 4. Individual or mass forcible transfers of civilians from occupied territory to any territory of any country is prohibited, regardless of motive, under article 49(1) of the Fourth Geneva Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Fourth Geneva Convention].

124. SABRA AND SHATILLA, *supra* note 22, at 63.

125. KAHAN REPORT, *supra* note 1, at 11.

that Israel and those acting on its behalf were not directly responsible for the massacres. The Report concluded that "the atrocities in the refugee camps were perpetrated by . . . the Phalangists, and that absolutely no direct responsibility devolves upon Israel or upon those who acted in its behalf."<sup>126</sup> In reaching this conclusion the Commission determined: (1) No other military force was seen in the area of the camps at the time of the Phalangists' entrance into or exit from this area;<sup>127</sup> (2) Major Haddad's forces were not involved because (a) no unit of that force had crossed the Awali that week, (b) the relations between the Phalangists and Haddad's forces were too poor for such cooperation,<sup>128</sup> (c) Haddad's arrival

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126. *Id.* at 13.

127. The Commission said that it could be "stated with certainty that no organized military force entered the camps . . . besides the Phalangist forces." *Id.* at 11. The testimony suggesting the contrary was that of the doctors and nurse taken captive by the Phalangists from the Gaza Hospital. The nurse, Ellen Siegel, testified about a visit to the hospital at 7:00 P.M. on Friday, the seventeenth, by two men in civilian clothes speaking German, which she "hinted" were Sephardic Jews. *Id.* The Commission quickly dismissed the possibility, attributing it to the nurse's "tendentiousness." *Id.* Ellen Siegel is a Jewish American nurse who had volunteered in July to serve in Beirut and had traveled to the Middle East under the auspices of the Association of Arab-American University Graduates, Inc. For a full account of her story, see McDonnell, *Sabra: An Eyewitness Account*, THE MIDDLE EAST Nov. 1982, at 29. A British doctor from the hospital, Dr. Paul Morris, supported Ms. Siegel's testimony as to the Germanic accents. FOIA DOCUMENT, *supra* note 1, Account by British doctor Paul Morris. One of the doctors also saw soldiers with an "M.P." band on their uniforms, but according to the Report, some of the Phalangists wore such bands. KAHAN REPORT, *supra* note 1, at 11.

According to one news report in Shatilla, reporters found boxes of M-16 shell cases printed in Hebrew, wrappings from Israeli chocolate wafers and remnants of United States army C-rations—perhaps evidence that some of the Phalangists were provided with food and ammunition by the Israelis. N.Y. Times, Sept. 26, 1982, at A10, col. 6. Also, the Report does not mention statements by Palestinians in the camps that Israelis prevented them from leaving the camps during the massacres. N.Y. Times, Sept. 26, 1982, at A11, cols. 3-4.

128. KAHAN REPORT, *supra* note 1, at 11. An article by Beirut correspondent Robert Fisk reported that Israeli C-130 aircraft transported some of Haddad's forces to Beirut on the day of the massacre. The Times (London), Sept. 21, 1982, at 1, col. 4. Survivors of the massacres testified that participants in the massacre had southern Lebanese accents and Moslem names. KAHAN REPORT, *supra* note 1, at 11. The Commission reasoned that this testimony was inconclusive because the Phalangist forces purportedly included Shi'ites—"albeit not many"—and persons who had fled from southern Lebanon. *Id.* Nevertheless, the Commission was unwilling to reject the possibility that men from Haddad's forces had joined in the massacre on their own prerogative. *Id.* at 11-12. As one source reported shortly after the massacres:

As for the others [others than Phalangists participating in the massacre] the evidence points to their being members of the Christian militia of Major Haddad. All of the residents and doctors in the camps spoken to by reporters said both Haddad's men, in their uniforms, and Phalangists, joined in the operation. Officials have sought to place blame solely on the Phalangists since Major Haddad's militia is virtually integrated into the Israeli army and operates entirely under its command.

N.Y. Times, Sept. 20, 1982, at A6, col. 3. Haddad had said he did not have any men "offi-

at the airport on Friday was unrelated to the massacres,<sup>129</sup> (d) testimony that some members of the Phalangists had Moslem names and southern Lebanese accents was untrustworthy;<sup>130</sup> and (3) there was no reason to conclude IDF soldiers were in the camps based solely on a lost IDF dogtag found in the camp and the placement of cluster bombs as booby traps under the bodies.<sup>131</sup>

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cially" in Beirut. The Times (London), Sept. 23, 1982, at 1, col. 3.

129. KAHAN REPORT, *supra* note 1, at 11. Major Haddad arrived at Beirut at 8:30 A.M. on Friday, September 17. He paid a condolence call to the Jemayel family, then went to visit relatives in Jouniyeh and returned that afternoon to his home in southern Lebanon. The Times (London), Sept. 23, 1982, at 1, cols. 3-4. Haddad testified before the Commission and denied any involvement in the massacres. N.Y. Times, Nov. 18, 1982, at A8, cols. 1-3.

130. KAHAN REPORT, *supra* note 1, at 11.

131. A witness from the United States testified that a civilian identification and a military dogtag belonging to an IDF soldier were found in the Sabra camp. After further investigation, the Commission found that the soldier was in Tel Hashomer Hospital after sustaining wounds from the entry into West Beirut. The soldier gave testimony that when he was wounded, apparently on September 15, a medic cut off his vest containing his personal documents and threw it on the side of the road. *Id.* at 12.

The same witness who testified about the lost IDF dogtag in the Sabra camp testified that he had heard that cluster bombs were placed under bodies as booby-traps against those trying to bury the dead. The Report states the witness "raised the question whether the Phalangists or the forces of Major Haddad—if any of them were in the camps—possessed the requisite technical skills to make use of these bombs as booby-traps." *Id.* The Commission found it "extremely far-fetched" that this testimony could be viewed as "containing anything concrete pointing to direct involvement of anyone from the I.D.F." in the massacres. *Id.*

For many years Israel's use of cluster bombs, a horrifyingly inhumane weapon, has been a controversial issue in United States-Israeli relations. On July 23, 1952, the United States and Israel entered into a Mutual Defense Agreement that presently governs the conditions under which sales of military equipment to Israel are made. Israel Mutual Defense Assistance Agreement, July 23, 1952, United States-Israel, 3 U.S.T. 4985, T.I.A.S. No. 2675. The Agreement does not provide any sanctions; however, section 4 of the Arms Export Control Act of 1961, as amended, does provide for sanctions against countries in violation of military purchase agreements. 22 U.S.C. § 2754 (Supp. 1984). The sanctions include no foreign military sales credits or loan guarantees, and no cash sales or deliveries pursuant to previous sales for "substantial" violations, "either in terms of quantities or in terms of gravity of the consequences regardless of the quantities involved," of any purchase agreement. *Id.* § 2753(c)(1)(A). The President must report to Congress "promptly" on receipt of information that such a violation may have occurred. *Id.* § 2753(2). If the President determines a violation has occurred and so reports to Congress, or if Congress so determines by joint resolution, the sanctions are to be imposed. *Id.* § 2753(3)(A).

Neither Congress nor the President has formally found Israel to be in violation of its military purchase agreement. Yet it is argued herein that the invasion of Lebanon was not an act of self-defense, and it was not pursuant to any United Nations collective security agreement under article 52 of the United Nations Charter. In the invasion, Israel used F-15 and F-16 fighter-bomber aircraft, cluster bombs, phosphorus shells and artillery canisters supplied by the United States. THE BITTER YEAR, *supra* note 89, at 70. Israel confirmed that it had used cluster bombs in civilian areas in Lebanon. N.Y. Times, June 28, 1982, at A8, col. 6; N.Y. Times, July 19, 1982, at A1, col. 5.

The cluster bomb is particularly controversial because of its devastating effects and the

As the Report acknowledged, if the Israeli officials planned and aided the Phalangists in the entry into the camps, and the Israeli officials knew or should have known that a massacre was likely to result and was occurring, then why was Israel not directly responsible? First, the Commission stated there was no direct responsibility because the Israeli officials did not allow the Phalangists to enter with the intent that a massacre take place or as part of a plan with the Phalangists for a massacre to take place; rather, the decision to have the Phalangists enter the camps was made to avoid additional casualties in the IDF forces and to exploit the Phalangists' expertise in identifying terrorists.<sup>132</sup> Other

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strict restrictions on its use by the United States. On impact a cluster bomb sprays up to 650 separate bomblets or grenades that themselves explode on impact. M. JANSEN, *supra* note 16, at 32. *Time* described their effect as follows: "Because the bombs indiscriminately blast an area several hundred feet in diameter they are clearly unsuited for use in civilian neighborhoods." Smith, *Leave West Beirut*, *TIME*, July 12, 1982, at 36, *quoted in* M. JANSEN, *supra* note 16, at 32.

Three classified agreements specifically governing Israel's use of the cluster bomb have been enacted since 1978, each more stringent than the last. According to a *New York Times* article, in 1978 Israel agreed to use them only in combat "with two or more Arab states" and only "for defensive purposes." *N.Y. Times*, June 30, 1982, at A12, col. 3; *THE BITTER YEAR*, *supra* note 89, at 74. Another newspaper reported that under the 1978 agreement cluster bombs were to be used only in levels of conflict equal to or exceeding the 1967 and 1973 wars. *L.A. Times*, July 14, 1982, at 10, col. 3, *cited in* W. ESPINOSA & L. JANKA, *DEFENSE OR AGGRESSION? U.S. ARMY EXPORT CONTROL LAWS AND THE ISRAELI INVASION OF LEBANON* 16 (1983). Even if it is conceded that Syria was involved in the fighting in Lebanon, Lebanon was allied with Israel, and Israel itself does not consider the PLO to be a state. An American commission of inquiry concluded that the bombs were used "indiscriminately" against the civilian population in at least fourteen locations in West Beirut. M. JANSEN, *supra* note 16, at 35. President Reagan blocked a consignment of 4000 cluster bomb shells in disapproval, but "the bureaucracy slipped up and the pipeline was never interrupted." J. RANDAL, *supra* note 35, at 211. As a result of President Reagan's renewed *rapprochement* with Israel, President Reagan ordered resumption of delivery of American-made cluster bombs to Israel in November of 1983. *N.Y. Times*, Nov. 29, 1983, at A1, col. 6. For a detailed treatment of the issue of United States arms control laws applicable to Israel's invasion of Lebanon, see W. ESPINOSA & L. JANKA, *supra* this note.

132. KAHAN REPORT, *supra* note 1, at 12:

No intention existed on the part of any Israeli element to harm the non-combatant population in the camps. It is true that in the war in Lebanon, and particularly during the siege of West Beirut, the civilian population sustained losses, with old people, women and children among the casualties, but this was the result of belligerent actions which claim victims even among those who do not fight. Before they entered the camps and also afterward, the Phalangists requested I.D.F. support in the form of artillery fire and tanks, but this request was rejected by the Chief of Staff in order to prevent injuries to civilians. It is true that I.D.F. tank fire was directed at sources of fire within the camps, but this was in reaction to fire directed at the I.D.F. from inside the camps. We assert that in having the Phalangists enter the camps, no intention existed on the part of anyone who acted on behalf of Israel to harm the non-combatant population, and that the events that followed did not have the concurrence or assent of anyone from the political or civilian echelon who was active regard-

sources have made a convincing argument that in fact there was a plan and intent that a massacre take place.<sup>133</sup> Yet whether the Israelis let in the Phalangists when they knew or should have known that a massacre would result, or let them in pursuant to a plan or with intent that a massacre take place, the result is the same under the tenets of international law to be discussed—Israel bears responsibility, without direct or indirect distinctions.

Second, the Commission concluded that nothing was visible or audible from the roof of the forward command post to indicate a massacre was taking place; therefore, the only forces found to be directly responsible for the massacre were the Phalangists—not on the basis of orders prior to entry but on the basis of spontaneous acts of revenge subsequently approved on site by the Phalangist commanders.<sup>134</sup>

The Report did conclude that Israel was indirectly responsible for the massacres:

[T]he decision on the entry of the Phalangists into the refugee camps was taken without consideration of the danger—which the makers and executors of the decision were obligated to foresee as probable—that the Phalangists would commit massacres and pogroms against the inhabitants of the camps, and without an examination of the means for preventing this danger. Similarly, it is clear from the course of events that when the reports begin to arrive about the actions of the Phalangists in the camps, no proper heed was taken of these reports, the correct conclusions were not drawn from them, and no energetic and immediate actions were taken to restrain the Phalangists and put a stop to their actions. This both reflects and exhausts Israel's indirect responsibility for what occurred in the refugee camps.<sup>135</sup>

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ing the Phalangists' entry into the camps.

*Id.* One article noted that the plan for the Phalangists to enter the camps "fit the objectives of [Sharon] who was reported early in the war to have hoped that the Phalangists, known for their ruthlessness, would go into West Beirut against the P.L.O., thereby sparing the Israeli army heavy casualties." N.Y. Times, Sept. 20, 1982, at A8, cols. 4-5.

133. In *The Battle of Beirut*, the author suggests that the massacres, if not their precise extent, may have been planned to promote an exodus of the Palestinians from Lebanon. M. JANSSEN, *supra* note 16, at 107-09; see also *infra* notes 267-74 and accompanying text. Another source suggested that the underlying purpose of the invasion from its inception was to destroy the PLO in order to facilitate the annexation of the occupied territories. F. BOYLE, *INTERNATIONAL LAW AND ORGANIZATION AS AN APPROACH TO CONFLICT RESOLUTION IN THE MIDDLE EAST* (1983). Article 47 of the Fourth Geneva Convention prohibits annexation of any occupied territory by the occupying power. Fourth Geneva Convention, *supra* note 123, art. 47.

134. KAHAN REPORT, *supra* note 1, at 12.

135. *Id.*

The Commission resisted any inquiry into the indirect responsibility of parties other than Israel. Nevertheless, the Commission did suggest who else might be responsible. First mention was reserved for the Lebanese army and the Lebanese government who had failed to respond affirmatively to the IDF's requests that they enter the camps.<sup>136</sup> The Commission also examined documents regarding the United States' involvement, incorporated as Appendix B to the Report, which was not published "in the interest of protecting [Israel's] security or foreign relations."<sup>137</sup> The Commission's projections as to future issues of the United States' involvement are worth repeating:

It should . . . be noted that in meetings with U.S. representatives during the critical days, Israel's spokesmen repeatedly requested that the U.S. use its influence to get the Lebanese army to fulfill the function of maintaining public peace and order in West Beirut, but it does not seem that these requests had any result. One might also make charges concerning the hasty evacuation of the multinational force by the countries whose troops were in place until after the evacuation of the terrorists. *We will also not discuss the question of when other elements besides Israeli elements first learned of the massacre, and whether they did all they could to stop it or at least to immediately bring the reports in their possession to Israeli and other elements.*<sup>138</sup>

## V. RESPONSIBILITY UNDER INTERNATIONAL LAW FOR MASSACRES OF CIVILIANS

### A. *Israel's Responsibility as a Nation*

Shortly before its decision on Israel's indirect responsibility, the Report contains the only paragraph addressing the ramifications of its conclusions under international law:

It is not our function as a commission of inquiry to lay a precise legal foundation for such indirect responsibility. It may be that from a legal perspective, the issue of responsibility is not unequivocal, in view of the lack of clarity regarding the status of the State of Israel and its forces in Lebanese territory. If the territory of West Beirut may be viewed at the time of the events as occupied territory—and we do not determine that such indeed is the case from a legal per-

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136. *Id.*

137. *Id.*

138. *Id.* at 12-13 (emphasis added).

spective—then it is the duty of the occupier, according to the rules of usual and customary international law, to do all it can to ensure the public's well-being and security.<sup>139</sup>

The principle of international law to which the Commission referred is embodied in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land<sup>140</sup> and the Fourth Geneva Convention of 1949.<sup>141</sup> The Hague Convention, a multilateral treaty, was generally recognized as customary international law binding on all nations by the Nuremberg Tribunals and has been so recognized by the Supreme Court of Israel in the *Elon Moreh* case.<sup>142</sup> Article 22 acknowledges that the right of belligerents to adopt means of injuring the enemy is not unlimited. More importantly, article 43 requires an occupying power to take all measures in its power to restore and ensure public order and safety. The Convention expressly prohibits killing an enemy who surrendered at discretion or declaring that no quarter will be given.<sup>143</sup>

Under the Hague Convention, territory is considered occupied when it is "actually placed" under the authority of the hostile army, the occupation extending only to the territory where such authority has been established and can be exercised.<sup>144</sup> Although the Convention's narrow definition of occupation often limits its application, Israel's occupation of West Beirut satisfied this standard. Both Sharon and Eitan declared on September 16, 1982, before the massacres began, that all of Beirut was under Israeli control.<sup>145</sup> Under article 3, a violation of the Convention and its regulations may render the violator, in this case Israel, liable to pay compensation.

The principle of belligerent occupation is also embodied in the Fourth Geneva Convention of 1949, relating to the status of the civilian population in areas under military occupation as a result of war.<sup>146</sup> Israel is a signatory to the convention, having ratified it and

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139. *Id.* at 12.

140. 36 Stat. 2277, T.S. No. 539 (1909-1911) [hereinafter cited as 1907 Hague Convention].

141. Fourth Geneva Convention, *supra* note 123.

142. Supreme Court Judgment with Regard to the Elon Moreh Settlement in the Occupied West Bank (Israel Oct. 22, 1979), *reprinted in* 19 I.L.M. 148, 168 (1980).

143. 1907 Hague Convention, *supra* note 140, arts. 22, 43.

144. *Id.* art. 42.

145. *See supra* notes 63-66 and accompanying text.

146. Fourth Geneva Convention, *supra* note 123. Civilians are usually defined as individuals who are not members of the armed forces and who do not participate in military operations. S. MALLISON & W.T. MALLISON, *supra* note 39, at 55.

the three other Geneva conventions in 1951.<sup>147</sup> Any "lack of clarity" as to Israel's obligations as an occupying power in West Beirut cannot be attributed to ambiguities in the four conventions. They apply in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them," and to all cases of "partial or total occupation of the territory of a High Contracting Party"<sup>148</sup>—a lesser control requirement for occupation than that of the Hague Convention. Thus even if Israel did not actually control all of Beirut, Israel was still responsible for the protection of civilians in West Beirut.

The Fourth Geneva Convention does not necessarily protect all civilians in an occupied territory, but only those who are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>149</sup> Although article 4 states that nationals of a state that is not bound by the Convention are not protected, that article must be read in conjunction with article 2, which states that a party is bound to observe the Convention in relation to a non-party if the nonparty accepts and applies the Convention. Thus the civilians in the camps who were nationals of states that have ratified the Convention (that is, the Lebanese, Syrians, Iranians, Pakistanis and Algerians) would be "protected persons" under the Convention. And although the Palestinians are not nationals of a state bound by the Convention, under article 2 Israel would be bound to observe the Convention in relation to the PLO, which has accepted and applied the terms of the Convention. The commentary to article 3 governing noninternational conflicts clarifies that a nonsignatory party need not be a state to bind others and to be bound by the Convention.<sup>150</sup> Moreover, the commentary to article

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147. See S. MALLISON & W.T. MALLISON, *supra* note 39, at 37-38. The Fourth Geneva Convention has almost as many parties as the United Nations Charter, including Lebanon, Israel, Syria and the United States. The PLO also has attempted to declare its adherence to the 1977 Geneva Protocol I concerning International Armed Conflicts that elaborate on the Fourth Geneva Convention's protection of civilians. *Id.* Israel is not a signatory to the Protocol and the Protocol has not yet come into effect. D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICT* 631 (1981).

148. Fourth Geneva Convention, *supra* note 123, art. 2.

149. *Id.* art. 4. The 1977 Protocol further clarifies that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character" and that stateless persons are protected persons within the meaning of the Fourth Convention. 1977 Protocol to the Fourth Geneva Convention arts. 50(3) & 73, *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 147, at 581, 594.

150. J. Pictet states:



4 states that protected persons include persons in the occupied territory "without any nationality" who "had fled from their homeland and no longer considered themselves, or were no longer considered, to be nationals of that country."<sup>151</sup>

Israel has contended that it is not an occupying power in Lebanon as defined by international law, on the grounds that it has not established a military government in the area and that its presence is temporary, although it has instructed its forces to follow the provisions of the Fourth Geneva Convention.<sup>152</sup> No international legal authority agrees with its position. The United Nations, the International Committee on Human Rights in Lebanon and the United States all view Israel as a belligerent occupant of Lebanon and therefore bound by the international law of occupation.<sup>153</sup>

Indeed, on July 13, 1983, Israel's own High Court of Justice ruled in a case concerning the status of detainees Israel holds in Lebanon that the Geneva Conventions apply and that Israel is an occupying power in Lebanon. In *Wahi v. Minister of Defense*, the Israeli Supreme Court had to address the legal authority of the IDF to detain the petitioners, and those rules under international law governing the IDF's treatment of the detainees in Lebanon.<sup>154</sup>

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The words "each Party" mark the great progress which the passage of a few years had brought about in international law. Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party—a Party, moreover, which was not yet in existence and which need not even represent a legal entity capable of undertaking international obligations.

J. PICTET, COMMENTARY TO THE FOURTH GENEVA CONVENTION 37 (1958).

151. *Id.* at 47.

152. ADVISORY COMMITTEE ON HUMAN RIGHTS IN LEBANON: TOWARD LEGAL ORDER AND RESPECT FOR HUMAN RIGHTS, 12 (Aug. 10, 1983) (available from the American Friends Service Committee) [hereinafter cited as TOWARD LEGAL ORDER].

153. *Id.* The United Nations Security Council passed three resolutions during the invasion referring to the Geneva Conventions of 1949 and the Hague Convention of 1907 in calling on all parties to the conflict to protect the civilian population and in condemning Israel's blockade of Beirut: 37 U.N. SCOR (2380th mtg.), at 7, U.N. Doc. S/RES/512 (1982); 37 U.N. SCOR (2382nd mtg.), at 4-5, U.N. Doc. S/RES/513 (1982); 37 U.N. SCOR (2385th mtg.), at 53-55, U.N. Doc. S/RES/515 (1982). On September 24, 1982, the United Nations General Assembly, with the exception of Israel and the United States, voted in favor of a resolution condemning the massacre and calling on the Security Council to investigate. Seventh Emergency Session resumed Sept. 24, 1982, 37 U.N. GAOR, at 158-59, U.N. Doc. A/ES-7/PV.32 (1982). On September 19, the Security Council had unanimously condemned the massacres. 37 U.N. SCOR (2396th mtg.) at 97-98, U.N. Doc. S/RES/521 (1982).

154. *Wahi v. Minister of Defense* (Israel May 11, 1983) (copy on file with author). The treatment accorded to detainees in Lebanon and the number of persons detained became one of the more controversial aspects of Israel's invasion of Lebanon. N.Y. Times, Oct. 2, 1983, at A18, col. 3. One source estimated that at least 7000 persons were still being detained in southern Lebanon as of the final months of 1982 and cited an Amnesty International report on August 9, 1982, estimating that there were then 10,000 detainees in the

Rejecting the arguments advanced by the Israeli government and military authorities, the court concluded that both the Geneva Conventions and the Hague Convention of 1907 with its more narrow definition of occupied territories applied to Lebanese territory occupied by Israel, irrespective of the establishment of a special organizational status or the duration of the occupation.

Article 27 of the Fourth Geneva Convention stipulates that the civilian population must be protected, especially against all acts of violence or threats thereof. The third paragraph of that article prohibits "any adverse distinctions being made among protected persons and in particular those based on race, religion, or political opinion." Article 32 prohibits a High Contracting Party from causing "physical suffering or extermination of protected persons" and article 33 prohibits reprisals against protected persons. Article 29 of the Fourth Geneva Convention provides that a party charged with protecting the civilian population is responsible for the treatment accorded to them by its "agents" without regard to any individual agent's responsibility. According to the Commission, the Phalangists entered the camps at the instigation of Israeli officials. Indeed, without Israel's acquiescence and support, the Phalangists' entry into the Israeli surrounded camps would have been impossible. The extent of Israeli control of the Phalangists is reflected in the testimony of Chief of Staff Eitan that on September 15 he "ordered the Phalangist commanders to effect a general mobilization of all their forces, impose a general curfew on all areas under their control, and be ready to take part in the fighting."<sup>155</sup> Regardless of an intent or a plan with the Phalangists to effectuate a massacre, Israel is responsible under article 29 for the actions of the Phalangists as their agents in the camp. Moreover, if we assume, contrary to the finding of the Report, that Haddad's forces were also involved in the massacre, their involvement and allegiance to the Israeli command would independently and unquestionably render Israel liable for their actions in the camp.<sup>156</sup>

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Ansar prison. *THE BITTER YEAR*, *supra* note 89, at 26, 149. Four thousand five hundred of these Palestinian and Lebanese prisoners were released in November of 1983 in return for six Israelis held by the PLO. *N.Y. Times*, Nov. 25, 1983, at A1, col. 3. For a detailed evaluation of the human rights practices of Israel in occupied Lebanon from the Arab perspective, see *THE BITTER YEAR*, *supra* note 89.

155. See *supra* note 54 and accompanying text.

156. See *supra* notes 39, 128-29 & 135 and accompanying text. However, if only individual members of Haddad's forces were involved, and Haddad neither knew nor should have known of their plans, the argument could be made that Israel could not be held responsible under article 29 for their actions.

Violations of the Fourth Geneva Convention carry specific sanctions. Under article 146, the country responsible must enact any legislation necessary to provide "effective penal sanctions" for persons committing "grave breaches" as defined in article 147 and must search for such violators and bring them before its courts. "Grave breaches" include "willful killing, torture or inhuman treatment."<sup>157</sup> Under common article 1, it is the responsibility of the contracting parties, including the United States, to "undertake to respect and to ensure respect [for the Convention] in all circumstances." In a briefing memorandum on "United States International Commitments Concerning the Protection of Palestinians Remaining in the Beirut Area" drafted September 18, 1982, and recently declassified and released by the State Department in litigation, the United States' obligation under article 1 is duly noted and the memorandum concludes that "to the extent that Israeli forces were in a position to control access to and security within the camps and failed to do so, Israel would be in breach of its obligations under the Convention."<sup>158</sup> A section addressed to the United States' responsibility for the Palestinians based on its guarantees of safety is deleted.

### *B. The Responsibility of Individual Israeli Officials*

Thus far, this analysis has focused on Israel's responsibility as a state for the massacres. For the nine individuals sent notices of harm by the Commission—former Prime Minister Begin, Defense Minister Sharon, Foreign Minister Shamir, Chief of Staff Eitan, Director of Military Intelligence Saguy, Head of the Mossad Major General Drori, Brigadier General Yaron and Sharon's aide Duda—personal liability for the massacres under international law would be determined primarily by the Nuremberg Principles,<sup>159</sup> affirmed by the United Nations General Assembly<sup>160</sup> and acknowledged as part of customary international law by the Supreme Court of Israel in the *Eichmann* case.<sup>161</sup> The tragic irony of apply-

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157. Fourth Geneva Convention, *supra* note 123, art. 147.

158. FOIA DOCUMENT, *supra* note 1, No. 148, attachment no. 25, p.3 (Sept. 18, 1982).

159. London Agreement, Aug. 9, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter cited as Nuremberg Principles].

160. G.A. Res. 95(1), U.N. Doc. A/64/Add. 1, at 188 (1946).

161. *Eichmann v. Attorney Gen.*, 36 I.L.R. 277, 296 (S. Ct. of Israel, sitting as a Ct. of Criminal Appeal, 1962) (the Nuremberg Principles have been part of the law of nations since "time immemorial"); *see also* F. BOYLE, *supra* note 133, at 15 (suggesting that the U.S. also may have violated the Nuremberg Principles by supplying arms to Israel).

ing the Nuremberg Principles to the Israeli officials is that the Principles were originally formulated to punish the atrocities of the Nazi regime against the Jewish people.<sup>162</sup>

Article 6(a) of the Nuremberg Principles defines "crime against peace" to include "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Article 6(b) defines the term "war crime" to include "murder [and] ill treatment . . . of a civilian population of or in occupied territory . . . not justified by military necessity," and article 6(c) defines a "crime against humanity" to include "murder, extermination . . . and other inhumane acts committed against any civilian population . . . ." The same article provides that "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by persons in execution of such plan."

The Israeli invasion of Lebanon was a violation of customary international law, the United Nations Charter and several resolutions on aggression pursuant to the Charter.<sup>163</sup> Specifically, Israel's invasion of Lebanon was a war of aggression, not self-defense as that concept has come to be defined under post-United Nations Charter international law. The United Nations Charter, binding on Israel as a member of the United Nations and binding as customary international law, requires members to settle international dis-

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162. S. MALLISON & W.T. MALLISON, *supra* note 39, at 32, 37. After World War II, the United Kingdom, the United States, the Soviet Union and France wrote the Charter of the International Military Tribunal that was subsequently applied in the trial of the German defendants at Nuremberg. It provided for individual criminal responsibility for crimes against peace, crimes against humanity and war crimes as defined in the Charter. *Id.*

163. See generally F. BOYLE, *supra* note 133, at 7-11 (concluding that Israel's invasion violated various international agreements); see also S. MALLISON & W.T. MALLISON, *supra* note 39, at 13-29 (discussing Israel's contention that the invasion was justified as self-defense). For a detailed and more favorable perspective on Israel's assertions of self-defense prior to the 1982 invasion, see Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1 (1982). Even this article, however, is critical of the lack of proportionality in Israel's actions of purported self-defense. As the article went to press, Israel invaded Lebanon. *Id.* at 48 n.158.

The United Nations Security Council issued two resolutions, calling for a cease fire after the invasion and demanding that Israel withdraw all its forces unconditionally from Lebanon. S.C. Res. 508 & 509, (demanding that Israel withdraw and that a cease fire begin) (1982), reprinted in DEP'T ST. BULL., September 1982, at 14. These resolutions are binding on all members of the United Nations under article 25 of the United Nations Charter.

putes by peaceful means.<sup>164</sup> It also prohibits members from using force against the "territorial integrity or political independence of any state . . . ."<sup>165</sup> There are only six instances in which the use of force is justified under the Charter, none of which is applicable to Israel's invasion of Lebanon.<sup>166</sup> The right of self-defense under article 51 is the only instance in which an individual state without U.N. authorization may resort to force under the Charter.

In the past, Israel has relied on the right of self-defense in the event of an "armed attack" under article 51 as justification for its actions in retaliation for a PLO attack anywhere in the world on any Jewish person.<sup>167</sup> Article 51 preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." By its terms, article 51 applies to an armed attack against a United Nations "Member," that is, the state itself. That language demonstrates an intent to confine the exercise of self-defense to those actions necessary to protect the territorial integrity and security of the state—an interpretation reinforced by several related United Nations resolutions to be discussed.

In a paper on the legal aspects of the invasion issued by the Information Division of the Israeli Ministry of Foreign Affairs, the

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164. U.N. CHARTER art. 2 ¶ 3, art. 33. For a discussion of whether Israel satisfied this requirement before its resort to force, see S. MALLISON & W.T. MALLISON, *supra* note 39, at 21-22.

165. U.N. CHARTER art. 2 ¶ 4.

166. These are the rights of individual and collective self-defense in the event of an "armed attack" as prescribed by article 51; chapter 7 "enforcement action" by the appropriate regional organizations acting with the authorization of the Security Council as required by article 53; the peace-keeping operations under the jurisdiction of the Security Council pursuant to chapter 6 or under the jurisdiction of the General Assembly pursuant to the Uniting for Peace Resolution, G.A. Res. 377, 5 U.N. GAOR Supp. (No. 20) at 10, U.N. Doc. A/1775 (1950), or by a regional organization under the supervision of the Security Council pursuant to chapter 8 and articles 24 and 25.

On May 17, 1983, the Lebanese and Israeli governments concluded an Agreement on Troop Withdrawal mediated by the United States. The text appears in N.Y. Times May 17, 1983, at A4, cols. 1-6. The Agreement mandated an Israeli troop withdrawal after withdrawal of Syrian and Palestinian troops from Lebanon. N.Y. Times, Nov. 3, 1983, at 14, col. 3. It has been argued that the agreement is void under article 51 of the Vienna Convention on the Law of Treaties, May 22, 1969, Gr. Brit. T.S. No. 58 (Cmd. 7964), U.N. Doc. A/Conf. 39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679, 698 (1969), which provides:

*Coercion of a State by the threat or use of force*

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

167. S. MALLISON & W.T. MALLISON, *supra* note 39, at 7-8.

government justified the invasion as follows:

Israel was faced with a vast terrorist arsenal of thousands of tons of weapons, ammunition, missiles and heavy artillery equipment, all of which constituted a direct, immediate and actual threat to Israel's security. The magnitude and immediacy of the threat, and the actual use of the fire power against civilian objectives both within Israel and in southern Lebanon, as well as the murderous terror operations against Jews and Israelis throughout the world, left no alternative but to remove that threat and to neutralize the scope of operations, including the headquarters, stores and infrastructure, so far as to prevent its reappearance in the future.<sup>168</sup>

These purported justifications do not meet the international legal standard of self-defense. They fail to demonstrate that Israel's action was in response to an "armed attack"; rather, they demonstrate only an unlawful exercise of anticipatory self-defense. Even assuming a proper invocation of the right to self-defense, Israel violated international law by responding disproportionately to the threat to its state.

The concept of an "armed attack" prerequisite to the exercise of self-defense is clarified by three United Nations General Assembly resolutions: the Definition of Aggression,<sup>169</sup> the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,<sup>170</sup> and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.<sup>171</sup> The Definition of Aggression is a clarification of the United Nations Security Council's jurisdiction over "any threat to the peace, breach of the peace, or act of aggression."<sup>172</sup> Article 1 defines aggression as "the use of armed force by a State against the *sovereignty, territorial integrity or political independence* of another State, or in any other manner inconsistent with the Charter of the United Nations . . . ."<sup>173</sup> Article 2 provides that the first use of armed force by a

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168. FOIA DOCUMENT, *supra* note 1, Briefing 342/18.7.82/3.10.108, at 2.

169. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

170. G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965).

171. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

172. U.N. CHARTER art. 39.

173. (Emphasis added.) Proponents of a broader concept of self-defense often refer to the negotiating history of article 51 and the French text that uses the term "aggression armée." See, e.g., S. MALLISON & W.T. MALLISON, *supra* note 39, at 13 (suggesting that the French text more accurately reflects the negotiation history). The negotiating history may be used to support almost any interpretation of article 51. Even assuming that the French

state in contravention of the United Nations Charter is *prima facie* evidence of an act of aggression, defined in article 3 to include the invasion by armed forces of another state. Article 3 also provides that the sending of armed bands to carry out acts of armed force against a state must be of sufficient gravity to be tantamount to an invasion or attack against the state itself. Finally, article 5 adopts the Nuremberg Principles, which make armed aggression a "crime against peace," and prohibit territorial acquisition by virtue of such aggression.<sup>174</sup>

According to United Nations reports, the PLO did not launch any sort of "armed attack" against Israel but in fact was abiding by the terms of a cease fire negotiated in the summer of 1981 by President Reagan's special envoy, Phillip Habib.<sup>175</sup> Begin himself admitted that the invasion of Lebanon was not an exercise of self-defense necessary to preserve the state.<sup>176</sup> The concept of an "armed attack" triggering self-defense must be narrowly circumscribed to prevent states from resorting to armed aggression in anticipation of perceived "threats" to their welfare. As Israel's invasion of Lebanon illustrates, without such limitation the self-defense exception swallows the general rule that disputes be resolved by peaceful means.

The Declaration on the Inadmissibility of Intervention and the Declaration on Principles of International Law prohibit armed intervention against another state and reaffirm the United Nations

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text's use of "armed aggression" is broader than "armed attack," the argument remains that the United Nations definition of aggression refers to the use of force and that the examples of aggression given in article 3 of the definition all involve the actual use of force against another state.

174. S. MALLISON & W.T. MALLISON, *supra* note 39, at 15. United Nations General Assembly Resolution 95(1) (1946) acknowledges as international law the Charter and Judgment of the International Military Tribunal at Nuremberg. See *infra* notes 159-61 and accompanying text.

175. F. BOYLE, *supra* note 133, at 8-9; S. MALLISON & W.T. MALLISON, *supra* note 39, at 10; see also Report of the Secretary-General on the United Nations Interim Force in Lebanon, U.N. Doc. S/15194/Add. 1 (1982), reprinted in 21 I.L.M. 908 (1982) (reporting on events in Lebanon between Dec. 11, 1981, and June 3, 1982). A written version of this cease fire agreement between Israel and the PLO after Israel's 1981 aerial bombardment of Lebanon has not been made public. S. MALLISON & W.T. MALLISON, *supra* note 39, at 7.

176. N.Y. Times, Aug. 21, 1982, at A6, col. 6; F. BOYLE, *supra* note 133, at 9-10; M. JANSEN, *supra* note 16, at 123-25. In Begin's speech to the National Defense College reported in the above *New York Times* article, he stated that the invasion of Lebanon, as well as the 1956 war and the 1967 war, were not necessary wars of self-defense. *Id.* at 139. When Eitan was asked in 1981 why he advocated an invasion of Lebanon, he answered: "What do you suppose I have built a large modern army for?" N.Y. Times, Dec. 30, 1982, at A21, col. 2.

Charter's requirement that international disputes be resolved by peaceful means, the use of force being a last resort. In addition, the International Court of Justice held under post-Charter customary international law that Albania's violation of international law (knowingly allowing its territory to be used for acts contrary to the rights of other states, i.e., the laying of mines in the Straits of Corfu) could not excuse the United Kingdom's own violation by attempting to remove the mines.<sup>177</sup> Thus one state's violation of international law does not ipso facto permit another state to respond in violation of international law. In the instant case, Lebanon had an obligation to assure that its territory was not being used by the PLO in violation of international law, but its failure to do so, either through unwillingness or inability, cannot justify Israel's armed intervention in Lebanon.

The primary justification for Israel's invasion of Lebanon appears to be the existence of a "terrorist arsenal" that purportedly constituted "a direct, immediate and actual threat to Israel's security."<sup>178</sup> Even assuming that such an arsenal existed, the viability of this justification would depend initially on whether a right of anticipatory self-defense can be found either under article 51 or under post-Charter international law. As discussed above, the text of article 51, in conjunction with subsequent United Nations resolutions and the paramount Charter requirement that international disputes be resolved by peaceful means, leads to the conclusion that there must be an actual armed attack to justify the lawful exercise of self-defense. Moreover, the *Corfu Channel* case repudiated the concepts of intervention, protection and self-help in post-Charter international law.<sup>179</sup> Given the many varying interpretations of that decision, it is worthwhile to quote the court at length:

The court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present

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177. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 36; see also F. BOYLE, *supra* note 133, at 4.

178. See *supra* note 168 and accompanying text.

179. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 35. This article does not address separately the issue of whether the invasion could be justified as a reprisal under international law. Reprisals differ from self-defense primarily in intent in that they are punitive in nature and come after the harm has already been inflicted. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 A.J.I.L. 1, 1-3, 10-11 (1972). The arguments made for a restrictive interpretation of the right of self-defense apply with equal force to the concept of reprisals. Also, as with the concept of anticipatory self-defense, the invasion as a reprisal would fail to meet the requirements of necessity and proportionality.



defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

The United Kingdom agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of the Albanian sovereignty.<sup>180</sup>

Nevertheless, the concept of anticipatory self-defense dies a hard death for reasons unrelated to international law.<sup>181</sup> Governments are reluctant to stand idly by when confronted with what they perceive, rightly or wrongly, to be a threat to their nation, particularly when the United Nations Security Council appears unwilling or unable to act.

Accepting, *arguendo*, the concept of anticipatory self-defense, Israel's invasion of Lebanon must be deemed unlawful for failing to meet the accepted requisites for lawful self-defense. The classic formulation of the customary right of self-defense was stated by Secretary of State Daniel Webster referring to the destruction of the steamship *Caroline* by the British forces at Niagara Falls: self-defense is confined to cases in which the "necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation."<sup>182</sup> Moreover, the response must be strictly limited to the object of stopping or preventing the danger and must be reasonably proportionate to what is required for achieving this object.<sup>183</sup> These requirements of necessity and proportionality are interrelated in the context of the Israeli invasion in that they are both determined by the seriousness of the threat

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180. 1949 I.C.J. at 35. In light of the Court's language, it is difficult to explain one commentator's conclusion that "[t]he *Corfu Channel* court permitted the use of force in the face of a strong probability of armed attack." Levenfeld, *supra* note 163, at 27.

181. See, e.g., Levenfeld, *supra* note 163, at 20-21.

182. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 412-14 (1906).

183. Wadlock, *The Regulation of the Use of Force by Individual States in International Law*, 81 ACAD. DE DROIT INT'L RECUEIL DES COURS 455, 463-64 (1952).

posed by the PLO to Israel before the invasion. The purportedly vast terrorist arsenals in Lebanon did not materialize, at least in relation to West Beirut.<sup>184</sup> As noted earlier, Begin acknowledged that the long planned invasion was not necessary to the state of Israel,<sup>185</sup> nor was it proportional to the triggering aggression.<sup>186</sup> An Israeli official announced that Israeli attacks in Lebanon would not be proportionate,<sup>187</sup> and indeed they were not. From the cease fire on July 24, 1981, until the invasion, Israel claimed before the Security Council that the PLO had claimed seventeen victims.<sup>188</sup> One authority estimated that as many as twelve to fifteen thousand civilians died in Lebanon,<sup>189</sup> but by any count the casualties in Lebanon far exceeded the casualties inflicted by PLO attacks.

Turning, then, to the issue of individual responsibility for these violations of international law, under article 6 of the Nuremberg Principles, the leaders, organizers and other Israel officials who acted to formulate and execute the invasion are responsible for crimes against peace and for all acts performed by any persons in execution of the invasion. Israeli officials who planned the invasion viewed the Phalangists' entry into the camps and their "mopping up" of the camps as an integral and necessary part of the invasion of Lebanon.<sup>190</sup> For example, Sharon insisted that entry into the camps was necessary to rid them of two thousand terrorists,<sup>191</sup> but such a vast terrorist presence was never proved.<sup>192</sup>

Aside from their responsibility for the massacres predicated on the illegal invasion, the individuals that received notices of harm from the Commission (with only the possible exceptions of the

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184. See M. JANSEN, *supra* note 16, at 4-6; see also REPORT OF THE INTERNATIONAL COMMISSION TO ENQUIRE INTO REPORTED VIOLATIONS OF INTERNATIONAL LAW BY ISRAEL DURING ITS INVASION OF LEBANON: ISRAEL IN LEBANON 14-23 (1983) [hereinafter cited as ISRAEL IN LEBANON].

185. See *supra* note 176; see also ISRAEL IN LEBANON, *supra* note 184, at 14-23.

186. F. BOYLE, *supra* note 133, at 11; S. MALLISON & W.T. MALLISON, *supra* note 39, at 27-29.

187. N.Y. Times, July 30, 1982, at A3, col. 5.

188. S. MALLISON & W.T. MALLISON, *supra* note 39, at 23.

189. M. JANSEN, *supra* note 16, at 25.

190. KAHAN REPORT, *supra* note 1, at 12; N.Y. Times, Sept. 26, 1982, at A6, col. 5; N.Y. Times, Sept. 20, 1982, at 6, cols. 4-5. The *New York Times* reported that during the second week of the war Sharon was considering sending the Phalangists into Shatilla, Sabra and Fakhani in West Beirut. N.Y. Times, Oct. 20, 1982, at A6, col. 5. Sharon testified before the Commission that "there had been a long-standing Cabinet decision, taken early in the war, to involve the Phalange forces in the fighting to help prevent I.D.F. casualties." FOIA DOCUMENT, *supra* note 1, No. 326, Dep't of State Incoming Telegram.

191. The Times (London), Sept. 29, 1982, at 8, cols. 2-5.

192. See KAHAN REPORT, *supra* note 1, at 6-7.

head of Mossad and Duda'i, whom the Commission absolved) could be responsible for war crimes or conceivably crimes against humanity given the findings of the Report. In *Application of Yamashita*, General Yamashita of Japan was tried by a special United States military commission applying the international laws of war as incorporated into United States domestic law.<sup>193</sup> Yamashita was charged with war crimes, including the massacre of civilian populations in the Phillipines, which also is a crime against humanity under the Nuremberg Principles. The gist of the charge was that Yamashita failed as commander to control the troops in his command and thereby prevent the alleged atrocities. In holding Yamashita responsible for the alleged war crimes, the Court established that an official or commander who has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed war crimes, and fails to take the necessary and reasonable steps to ensure compliance with the law of war, is responsible for such crimes.<sup>194</sup>

The Kahan Report concluded that Begin, Sharon, Shamir, Eitan, Saguy, Drori, Yaron, and to a lesser extent the head of the Mossad, should have known of the likelihood of a massacre and either failed to prevent the entry of the Phalangists into the camps and/or failed to take steps to restrain the Phalangists once the massacres had begun and information to that effect was received.<sup>195</sup> The Commission did not fault Begin for not inquiring

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193. 327 U.S. 1 (1946).

194. *Id.* at 14-16; U.S. ARMY FIELD MANUAL 27-10, *The Law of Land Warfare* ¶ 501, at 178-79 (1956).

195. KAHAN REPORT, *supra* note 1, at 13-20. At the conclusion of its determination, the Report made only recommendations and remarks concerning the eight faulted individuals. For Begin, Shamir and the head of Mossad, however, no recommendations were made, the Report concluding that it was "sufficient to determine responsibility." *Id.* at 22. For Major General Drori as well, no recommendation was made given the difficulty of his tasks during that week in the eyes of the Commission and given that his guilt was predicated on his failure to continue the measures he did take for terminating the Phalangists' actions. *Id.* For Defense Minister Sharon, in contrast, the Commission suggested that the Defense Minister "draw the appropriate personal conclusions . . . and if necessary, that the Prime Minister consider whether he should exercise his authority under section 21-A(a) of the Basic Law: the Government, according to which the Prime Minister may, after informing the Cabinet of his intention to do so, remove a minister from office." The Commission made no recommendations as to Chief of Staff Eitan despite its "grave conclusions" regarding his responsibility, because his term of service was to end in April of 1983. *Id.* at 22. The Commission recommended that Director of Military Intelligence Saguy not continue as director. *Id.* Brigadier General Yaron, it was suggested, was not to serve in the capacity of a field commander in the IDF, with the recommendation that he not be reconsidered before three years had

into the details of the entry into West Beirut, but did find that he bore "a certain degree of responsibility" for failing to show any interest at any time in the Phalangists' entry into the camps after he learned of it in Thursday's Cabinet session, despite his awareness of the likelihood of a massacre.<sup>196</sup> Shamir was blamed for having failed to take appropriate steps when told of the "slaughter" by Minister Zipori on Friday.<sup>197</sup> Chief of Staff Eitan was reprimanded, as was Sharon, for the decision to have the Phalangists enter the camps, again with the suggestion that a massacre was anticipated:

[I]t is difficult to avoid the conclusion that the Chief of Staff ignored this danger [to the civilian population] out of an awareness that there were great advantages to sending the Phalangists into the camps, and *perhaps also out of a hope that in the final analysis, the Phalangist excesses would not be on a large scale.*<sup>198</sup>

Eitan also was blamed for: (1) not imposing checks on the Phalangists; (2) failing to check reports of killings; and (3) failing to stop the Phalangists' operations on Friday, particularly during his meeting with the Phalangist commanders.<sup>199</sup> Director of Military Intelligence Saguy was held responsible for: (1) having failed to pay sufficient attention to the decision to send in the Phalangists; (2) having failed to warn the bureaucracy of the likelihood of bloodshed; and (3) having failed to attempt to stop the operation, the Commission stating it "could not believe" that he was not aware of the decision to send in the Phalangists until Friday morning.<sup>200</sup> Drori was commended for having ordered a halt to the Phalangists on Friday morning, but faulted for failing to apprise Eitan on Friday of the danger to the civilians and failing to curtail continuation of the killings in his meeting with the Phalangists and thereafter.<sup>201</sup> Brigadier General Yaron, according to the Report, received reports of the killings of women and children on Thursday evening, yet (1) did not check the report, (2) did not pass on the reports to the G.O.C. and Chief of Staff, and (3)

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passed. *Id.* The Commission also recommended that an investigation be made into the functioning of the political organs and military branches to promote better communications, and possibly to determine any individuals responsible for its shortcoming in communication. *Id.* at 21-22.

196. *Id.* at 14.

197. *Id.* at 16.

198. *Id.* (emphasis added).

199. *Id.* at 16-17.

200. *Id.* at 17-18.

201. *Id.* at 18-19.

did not take appropriate steps to stop the Phalangists and protect the civilians.<sup>202</sup> Avi Duda'i was not faulted for failing to pass on to the Minister of Defense the report of the massacres he purportedly received on Friday morning because the Commission was unable to determine if he had in fact received such a report.<sup>203</sup> The head of the Mossad was absolved of any "serious" responsibility because he had not heard of the decision to send in the Phalangists until the Thursday Cabinet meeting and he had assumed his position only two days before Bashir Jemayel's assassination. Nevertheless, the Commission said that at least he should have addressed the dangers of the Phalangists' entry in the camps.<sup>204</sup>

As to Sharon, the Commission came very close to suggesting that Sharon sent in the Phalangists anticipating a massacre:

If in fact the Defense Minister, when he decided that the Phalangists would enter the camps without the I.D.F. taking part in the operation, did not think that that decision could bring about the very disaster that in fact occurred, the only possible explanation for this is that he disregarded any apprehensions about what was to be expected because the advantages [to reduce the I.D.F. casualties, to involve the Phalangists in the fighting, and to discover terrorists] to be gained from the Phalangists' entry into the camps distracted him from the proper consideration in this instance.<sup>205</sup>

Having decided to send in the Phalangists, Sharon was also censured for failing to impose any checks on the Phalangists, but not for his failure to halt their operations—because the Commission found that Sharon learned of the killings Friday evening and was told that the Phalangists would be out by the next morning.<sup>206</sup>

By the time of the jury decision in *Sharon v. Time, Inc.*,<sup>207</sup> Sharon had already risen from the ashes of the Kahan Report to the influential position of Minister of Commerce and Industry. The central issue in the libel suit, however, was not Sharon's responsibility for the massacres. The determinative issue from a libel perspective was whether *Time* could muster enough admissible evidence from the sources on which it had relied to demonstrate that its story was true, or alternatively, that it had not acted with

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202. *Id.* at 19.

203. *Id.* at 19-20.

204. *Id.* at 18.

205. *Id.* at 15.

206. *Id.*

207. *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) (opinion denying summary judgment).

knowledge or reckless disregard of the falsity of its story.<sup>208</sup> On two issues preliminary to the final verdict, the jury had reached findings in favor of Sharon. First, the jury found that the implication of *Time*'s story was that Sharon had intended a massacre to take place, an implication that went beyond the Report's lesser finding that Sharon should have foreseen that a massacre would take place. Second, the jury had to determine the truth or falsity of the paragraph claiming there was information in Appendix B that Sharon had discussed revenge with the Jemayels. Sharon simply testified that no such discussion had taken place. That testimony left *Time* with the unenviable task of demonstrating the actual truth of the statement without the benefit of any of the reporter's confidential sources, whose testimony had been excluded as hearsay. In addition, the Israeli government had initially refused to release the contents of Appendix B. Eventually both sides were permitted to read Appendix B, but Israel refused to permit *Time* to examine other secret documents that *Time* claimed would support its story. When *Time* was forced to concede that Appendix B did not contain information concerning the alleged discussion, the lack of evidence in *Time*'s favor left the jury with little alternative but to find that the story was false given Sharon's testimony. On the ultimate issue of *Time*'s intent in publishing the story, the jury refused to find *Time* had published the false paragraph with knowledge or a reckless disregard of its falsity, but in an unusual closing statement berated *Time* for its "negligence" in failing to verify its story adequately.<sup>209</sup> The only fact relevant to Sharon's responsibility for the massacres that was *conclusively* determined in the *Time* case is that Appendix B does not state that Sharon discussed revenge with the Jemayels. Although the jury did find that the paragraph on Sharon's alleged discussion was false, *Time* has maintained such a discussion did take place but that it was

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208. The disputed paragraph in its entirety reads as follows:

One section of the report, known as Appendix B, was not published at all, mainly for security reasons. That section contains the names of several intelligence agents referred to elsewhere in the report. *Time* has learned that it also contains further details about Sharon's visit to the Gemayel family on the day after Bashir Gemayel's assassination. Sharon reportedly told the Gemayels that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known.

Doerner, *Man With a Mission*, *TIME*, Feb. 11, 1985, at 29.

209. McGrath & Stadtman, *Absence of Malice*, *NEWSWEEK*, Feb. 4, 1985, at 52, col. 1.

unable to introduce the evidence necessary to support the truth of the statement. In any event, there is already speculation that Sharon's "moral victory" in the case will enhance his political future.<sup>210</sup>

Given these findings, the conclusion is inescapable that at least seven of the nine individuals named should have known of the likelihood of a massacre before the Phalangists' entry, knew a massacre was going on after their entry, or should have known that a massacre was going on, yet failed to take appropriate steps to protect the civilian population. Under customary international law, and specifically the Nuremberg Principles, they could therefore be responsible for war crimes and crimes against humanity.

*C. The Responsibility of Parties Not Addressed in the Kahan Report*

The Kahan Report did not address the responsibility of parties outside of Israel but did touch briefly on the potential responsibility of the United States and Lebanon. A similarly brief analysis of such responsibility is appropriate here. Under the Geneva Conventions the United States had a responsibility to ensure compliance with the conventions by contracting parties such as Israel.<sup>211</sup> Article 146 of the Fourth Geneva Convention also obligates the United States to bring before an American court for prosecution any party alleged to have committed a grave breach of the Convention if the party should enter the United States' territory. Israel, therefore, is not alone in failing to impose the sanctions provided under international law for the massacres.

The extent of the United States' responsibility may not be limited to its failure to bring others to justice, however. As the Report stated, "[o]ne might also make charges concerning the hasty evacuation of the multinational force by the countries whose troops were in place until after the evacuation of the terrorists."<sup>212</sup> The Israeli invasion of Lebanon began on June 6, 1982.<sup>213</sup> On Au-

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210. *Id.* at 57.

211. Fourth Geneva Convention, *supra* note 123, art. 1. The United States bears a special responsibility for the actions of Israel by virtue of its extensive aid to Israel. One source estimates that United States aid to Israel from 1974 has equalled \$25.3 billion or \$7 million each day for the last ten years. *THE BITTER YEAR*, *supra* note 89, at 4. According to the same source, less than twenty-four hours after the massacres at Sabra and Shatilla, a congressional committee voted to increase United States aid to Israel by \$335 million. *Id.*

212. *KAHAN REPORT*, *supra* note 1, at 12.

213. *Id.* at 4. The Commission briefly addressed in the Report whether the mere inclusion of the Phalangists in the entry into West Beirut could be the basis for indirect Israeli

gust 19, Lebanon, the United States, France, Italy, Israel and the PLO reached an agreement for the evacuation of PLO and Syrian forces from West Beirut.<sup>214</sup> From August 21 to 26, the multinational American, French and Italian force arrived in Beirut, where they oversaw the evacuation of PLO and Syrian forces until completed on September 1. The Report then noted that:

[A]ccording to information from various sources, the terrorists did not fulfill their obligation to evacuate all their forces from West Beirut and hand their weapons over to the Lebanese army but left in West Beirut, according to various estimates, approximately 2000 fighters, as well as many arms caches, some of which were handed over by the terrorists to the Lebanese leftist militia "Mourabitoun."<sup>215</sup>

The multinational force left Lebanon after the completion of the evacuation—less than one week before the massacres. The United States Marine contingent of the multinational force withdrew from Beirut at 2:00 A.M. on September 10, 1982, before the end of the thirty-day period originally specified by the President.<sup>216</sup> The United States had a special responsibility for the Palestinians in that the PLO withdrawal from Beirut was in return for the United States' and Israel's guarantees of safety for the Palestinian civilians remaining in Lebanon.<sup>217</sup> According to information issued by the Department of State:

On August 20, 1982, the United States announced that agreement had been reached by the governments of Lebanon, Israel, France, Italy and the United States and by the Palestine Liberation Organi-

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responsibility for the massacres. First, the Commission concluded that the June 15 resolution could not be utilized as the basis for the Phalangists' later involvement in the entry into West Beirut, as urged by Begin and Sharon. It found that the circumstances in June had changed entirely by September after the evacuation of Syrian and PLO forces and after Bashir Jemayel's assassination. Nevertheless, despite the lack of a formal Cabinet resolution, the Commission concluded that no responsibility for the massacres could be predicated on the involvement of the Phalangists in the entry into West Beirut. The political and military reasons for including the Phalangists justified their involvement in West Beirut according to the Report, negating any potential responsibility on that basis alone. *Id.* at 13.

214. *Id.* See also BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 415, LEBANON: PLAN FOR THE PLO EVACUATION FROM WEST BEIRUT (Aug. 1982) (this agreement was reached with the negotiating assistance of Special United States Ambassador Philip C. Habib) [hereinafter cited as CURRENT POLICY NO. 415].

215. KAHAN REPORT, *supra* note 1, at 4.

216. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 418, PRESIDENT REAGAN'S MIDDLE EAST PEACE INITIATIVE 1 (Sept. 10, 1982).

217. There were duly signed assurances from American envoy Philip Habib, guaranteeing the safety of the families of the leaders after their departure from Beirut.



zation (PLO) on a plan for the departure from Lebanon of PLO leaders, officers, and combatants in Beirut. In the context of providing safeguards for the implementation of the plan, the United States conveyed to the Government of Lebanon the assurances received from the Government of Israel "that it would not interfere with implementation of any part of the plan, including its provisions with respect to persons left behind in Beirut" and "that it would do the utmost to ensure that those assurances would be scrupulously observed. The U.S. also conveyed to the Government of Lebanon assurances regarding the safety of Palestinians and other inhabitants of West Beirut received from the leadership of certain Lebanese groups with which the U.S. had been in touch."<sup>218</sup>

One might question whether withdrawal of the United States' forces before the expiration of their original mandate was taken with due regard for the safety of the remaining Palestinian population in West Beirut. In a recent article that examines the United States' legal responsibility for the massacres, the author concludes, in part based on the findings of the Kahan Report, that: (1) the United States did expressly give a guarantee of safety for the remaining Palestinians in Beirut based on the assurances the United States obtained from Israel and the Phalangists; (2) the guarantee was to extend beyond the departure of the multinational force; (3) the communication of this guarantee could have been either oral or written; (4) the United States was unable to fulfill its assurances to the PLO following the takeover of West Beirut by the IDF; and (5) both Israel and the Phalangists, who apparently had given assurances to the United States, violated their commitments.<sup>219</sup> However, as the author notes, the result is merely that the United States violated its legal obligations under the August 20, 1982, departure plan for the PLO,<sup>220</sup> with substantive responsibility for the massacres to be determined by other rules of international law such as the Nuremberg Principles and the Geneva Conventions.

Could the United States be directly responsible under international law for the massacres? Such responsibility would depend

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218. FOIA DOCUMENT, *supra* note 1, Exhibit E, *Jabara v. Schultz*. This statement was a response from the Department of State to one of a series of questions relating to the massacre submitted to the Department by Congressmen George Crockett and Clement Zablocki on February 4, 1983.

219. Hassan, *The Legal Implications for the United States in the PLO Evacuation from Beirut*, 18 TEXAS INT'L L.J. 509, 539 (1983). It might be noted that the political unpopularity of sending the Marines to Beirut as part of the multinational force undoubtedly contributed to their being withdrawn at the earliest possible moment.

220. *Id.*

largely on when the United States first learned of the massacres and what action it took and could have taken to stop them. The Report refused to discuss the question of when non-Israeli individuals first learned of the massacres and whether they did what they could to end them.<sup>221</sup> Whatever information the Commission might have had about such responsibility on the part of the United States, it was not revealed. But suggestions as to United States' knowledge of the ongoing massacres did appear in the Report. At the meeting between Eitan, Drori, Yaron and the Phalangists on Friday the seventeenth at 4:00 P.M., the Phalangists told Eitan that the Americans were "pressuring them to leave."<sup>222</sup> From 6:00 P.M. to 8:00 P.M. on Friday, September 17, unidentified Foreign Ministry personnel began receiving reports from unidentified United States representatives that "the Phalangists had been seen in the camps and that their presence was liable to lead to undesirable results—as well as complaints about actions by I.D.F. soldiers in the hospital building in Beirut."<sup>223</sup> The Report said the Ministry investigated the complaints and resolved that they were "unfounded."<sup>224</sup>

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221. KAHAN REPORT, *supra* note 1, at 12-13.

222. *Id.* at 9. See *infra* note 234 and accompanying text for the possible source of this American pressure.

223. KAHAN REPORT, *supra* note 1, at 9. Hanon Baro-On, Assistant Director-General of the Foreign Ministry in Jerusalem, testified that at about 6:30 P.M. that Friday he received such a call from an American official and transmitted the information about the irregularities to Begin's military secretary that evening. He personally spoke to the Prime Minister's military aide, Lieutenant Colonel Azriel Nevo, and it was his understanding of the military aide's job that the information would be given to Begin. Baro-On did not know whether the aide had in fact transmitted the information to Begin. FOIA DOCUMENT, *supra* note 1, No. 346, Dep't of State Incoming Telegram. In Nevo's testimony, he denied having received any call from Baro-On. The Times (London), Nov. 22, 1982, at 1, col. 4. Bruce Kashdan, an Israeli Foreign Ministry representative in Beirut, also testified that Morris Draper called him on Friday between 7:00 and 8:30 P.M. and informed him that:

Lebanese Prime Minister Wazzan had told him that soldiers had entered one of the hospitals in the camps and had started killing there. Draper also related that Wazzan had told him these were Phalangists in the Shatilla camp. Draper reportedly continued that his "own officers (not further identified) had seen about two hundred Phalangist soldiers and ten trucks at Beirut airport. Draper then is said to have remarked to Kashdan that "using Phalangists in West Beirut could have horrible results."

Kashdan said he immediately passed Draper's report to the I.D.F. in Beirut and to Ariel Kenet, the Foreign Ministry Duty Officer, and Foreign Ministry Director General David Kimche. Kenet, in previous public testimony on November 14, upheld Kashdan's claim, noting that he also passed on Kashdan's report to Kimche and, at Kimche's request, to the duty officer at the Defense Ministry situation room in Tel Aviv. [Kimche testified only in camera, on November 7.]

FOIA DOCUMENT, *supra* note 1, No. 346, Dep't of State Incoming Telegram.

224. KAHAN REPORT, *supra* note 1, at 9.

An article in the Israeli paper *Ma'ariv* cited "Israeli elements" as stating that the United States "knew by noon on Friday, and perhaps even earlier, that civilians were being killed" in Shatilla, but perhaps did not know of the "scope of the killing" and did not transmit the information to any Israeli officials.<sup>225</sup> The same article stated that "U.S. diplomats in Beirut . . . influenced Lebanese Prime Minister Shafiq Al-Qazzan into refraining from sending Lebanese army units into the refugee camps," concluding "the United States involvement with everything regarding the refugee camps in Beirut proves that these elements had a degree of responsibility for everything that took place in Shatilla, at least as much responsibility as Israel had."<sup>226</sup> American Embassy spokesmen, in response to inquiries from the Israeli newspapers *Ha'aretz* and *Davar*, stated that Draper had in fact encouraged direct contact between the IDF and the Lebanese army.<sup>227</sup> Indeed, in President Reagan's speech following the massacres he stated:

During the negotiations leading to the PLO withdrawal from Beirut, we were assured that Israeli forces would not enter West Beirut. We also understood that following withdrawal, Lebanese army units would establish control over the city. They were thwarted in this effort by the Israeli occupation that took place beginning on Wednesday. We strongly opposed Israel's move into West Beirut following the assassination of President-Elect Gemayal both because we believed it wrong in principle and for fear that it would provoke further fighting. Israel, by yesterday in military control of Beirut, claimed that its moves would prevent the kind of tragedy which has now occurred.<sup>228</sup>

According to a report in the *London Times*, United States intelligence officials learned of the killings even earlier, on Thursday evening—only a few hours after the Phalangists entered the camps.<sup>229</sup> According to this same article, reports of "killings and beatings" reached the United States Foreign Relations Committee in Washington at 9:30 A.M. on Friday, the seventeenth. One explanation posited for the lack of any action based on this knowledge is that the United States' intelligence sources were so sensitive that they

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225. FOIA DOCUMENT, *supra* note 1, No. 294, Ma'ariv report by military correspondents Ya'akov Erez and Yosef Wachsman (Sept. 30, 1982).

226. *Id.*

227. FOIA DOCUMENT, *supra* note 1, No. 181, Dep't of State Incoming Telegram.

228. FOIA DOCUMENT, *supra* note 1, No. 147, Dep't of State Incoming Telegram.

229. Sunday Times (London), Jan. 30, 1983, at 1, col. 8.

could not be revealed.<sup>230</sup>

The first United States contact made with Israel appears to be that mentioned in the Report of a complaint from unidentified United States personnel to the Foreign Ministry between 6:00 and 8:00 P.M. on Friday, the seventeenth, that the Phalangists had been seen in the camps (and their presence would lead to undesirable results) and that IDF soldiers were in a Beirut hospital.<sup>231</sup> According to the *Times*, the call was made by the United States chargé d'affaires in Tel Aviv to Hanan Baro-on, assistant director of the Israeli Foreign Ministry to Jerusalem.<sup>232</sup> In an earlier article, the *Times* also reported testimony before the Commission that between 7:00 and 8:30 P.M. on Friday evening Bruce Kashdan, the Israeli Foreign Ministry representative in Beirut, received a call from Morris Draper who warned: "Using Phalangists in West Beirut could have horrible results."<sup>233</sup>

Other suggestions of United States knowledge of the massacre—and warnings even before the massacres—deserve mention. The director of the Palestine information office in Washington said he had contacted the Egyptian, Tunisian and Saudi Arabian offices in Washington and asked that a warning that the Lebanese militia forces with the support of the Israeli army were preparing to "depopulate" refugee areas of Lebanon be passed on to the State Department. He was told, although the articles does not say by whom, that the information had been checked "by United States authorities" and had been found to be "incorrect."<sup>234</sup> A Tel Aviv paper, *Ma'ariv*, quoting unidentified "Israeli sources," also reported that unnamed United States officials appealed to a Phalange officer, Fadi Faram, the morning of Friday, September 17, and demanded withdrawal of his troops.<sup>235</sup> In response, Reagan administration spokesman Larry Speakes said "fragmentary" reports were received Friday night that "something was going on," but he insisted the United States was "not aware" of a massacre until Saturday, September 18.<sup>236</sup> In NEA Press Guidance documents dated September 22, 1982, the suggested reply to questions of United States knowledge of the situation in the camps is that on

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230. *Id.* at 2, col. 6.

231. KAHAN REPORT, *supra* note 1, at 9.

232. Sunday Times (London), Jan. 30, 1983, at 2, col. 6; *see also supra* note 220.

233. The Times (London), Nov. 22, 1982, at 1, col. 4; *see also supra* note 219.

234. L.A. Times, Sept. 22, 1982, at §12, col. 1.

235. Washington Post, Oct. 1, 1982, at A22, col. 4.

236. *Id.*

Friday, September 17, "fragmentary and conflicting indications that something was amiss" were received, which were followed by expressions of concern to the Israeli liaison office near Beirut and to "the senior leadership of the Lebanese Forces/Phalange militia . . . ." The response further states that an embassy official entered Shatilla on Saturday morning (apparently the official referred to in Draper's outraged telephone call on Saturday).<sup>237</sup> In response to the question: "What do you have on a report that the Tunisian Ambassador warned the United States on Wednesday of last week about movement by Phalangists into Palestinian refugee camps in Beirut?," it was suggested that "[t]he first indication we received that something was wrong in the camps came on Friday, September 17, and we began inquiries immediately."<sup>238</sup>

The next complaint from United States personnel to Israeli personnel mentioned in the Report occurred on Saturday morning. The Chief of Staff and Sharon testified to the effect that Begin had spoken to Eitan on Saturday morning about American complaints that the Phalangists had entered Gaza Hospital and had killed patients.<sup>239</sup> That same morning the Director General of the Foreign Ministry told Sharon that United States Ambassador Morris Draper had told him that Palestinians had been massacred.<sup>240</sup> Testimony before the Commission revealed that at 10:00 A.M. that Saturday Draper called Bruce Kashdan, the Israeli Foreign Ministry representative in Beirut and said he had a message for Sharon: "You must stop the massacres. They are obscene. I have an officer in the camp counting bodies. You ought to be ashamed. The situation is rotten and terrible. They are killing children. You are in absolute control of the area, and therefore responsible for that area."<sup>241</sup> Kashdan transmitted this message to the Director General of the Foreign Ministry and it is apparently, at least in part, the message the Director General received from Draper and conveyed to Sharon as noted in the Report.<sup>242</sup>

Recently the United States Department of State released government documents pursuant to litigation under the Freedom of

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237. FOIA DOCUMENT, *supra* note 1, No. 226, NEA Press Guidance, Lebanon: U.S. Knowledge About Massacre (Sept. 22, 1982); *see infra* note 241 and accompanying text.

238. FOIA DOCUMENT, *supra* note 1, No. 227, NEA Press Guidance, Lebanon: Report Tunisian Warned of Movement Into Camps (Sept. 22, 1982).

239. KAHAN REPORT, *supra* note 1, at 10.

240. *Id.*

241. The Times (London), Nov. 22, 1982, at 1, col. 3.

242. *See supra* notes 103-04 and accompanying text.

Information Act that previously had been classified, excised or denied, and that relate to the question of when the United States learned of the massacres. According to these documents, an American journalist informed the United States embassy on Friday, September 17, in Beirut, that around noon that day Shatilla was surrounded by Israeli soldiers and tanks, and that approximately one hundred Phalangists were rounding up young men inside the camp. An hour later the embassy contacted a source whose name is deleted and was told "orders were being given" to have the Phalangists withdraw immediately. At 5:30 P.M. that same day a Beirut embassy officer went to Shatilla and observed twenty to thirty Phalangists at the entrance to the camps who refused to allow him to enter. He reported no unusual activity specifically around the Akka and Gaza hospitals but a source (whose name is deleted) reported at 4:45 P.M. that patients had been killed by the IDF. After deletions relating to September 17, a chronology of the United States' knowledge notes reports of killings the morning of September 18 that led to an embassy officer at Shatilla conveying the "first confirmed United States eyewitness information on [the] massacre between 10:30 and 11:00 P.M." All following entries are deleted.<sup>243</sup>

Given all of this conflicting background there may be some predicate for United States' responsibility for the massacres under the Nuremberg Principles and customary international law. As noted earlier, under the *Yamashita* case, an official or commander who knew or should have known that troops or other persons *subject to his control* have committed a war crime and fails to take any steps to assure compliance with international law is responsible for those crimes committed.<sup>244</sup> To the extent that Israeli officials or the Phalangists could be viewed as subject to United States' control, and the United States officials failed to take measures protective of the camps' population once they knew or should have known of the massacres, they may be held responsible for war crimes and crimes against humanity. Obviously, the question of effective control by the United States would be far from clear. The *Yamashita* case involved a chain of military command and a commanding officer's failure to control his troops. Where a government official has the authority to oversee and effectively control the con-

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243. FOIA DOCUMENT, *supra* note 1, Attachments Nos. 15-17, Dep't of State Incoming Telegram.

244. See *supra* note 194 and accompanying text.

duct of the chain of command, there would appear to be no reason to distinguish between the responsibility of the government official and that of a military commander in controlling that government's troops. Responsibility becomes more attenuated when the question of control focuses on the extent of effective supervision one state's government officials can exercise over another state's military decisions or the actions of a militia such as the Phalangists. The question of responsibility in such circumstances would be dependent on factual issues of control difficult to prove without encountering the often insurmountable barrier of confidential government information. However, one element of United States' control that should be pointed out in this context is control over the use of arms purchased from the United States. As discussed earlier,<sup>245</sup> our bilateral arms agreements and the Arms Export Control Act with Israel limit the use of arms to internal security, self-defense, and collective defense measures authorized by the United Nations.

Turning to an alternate theory of potential liability, some evidence has been advanced of United States knowledge and encouragement of Israel in the invasion of Lebanon.<sup>246</sup> Former President Carter stated to the press that he believed Washington had given Israel approval for the invasion.<sup>247</sup> In that sense, as participants in the formulation and execution of a common plan to invade Lebanon (a crime against peace), high ranking United States officials could be responsible for all acts performed by any person in execution of the plan under article 6. The deeper the extent of the United States' acquiescence in the invasion and in Israel's unlawful use of American weaponry in that invasion, the greater the potential individual responsibility of United States officials for complicity in crimes against peace or humanity and war crimes committed or permitted by Israel or its agents.

The responsibility of Lebanon is somewhat more complex. The Kahan Commission merely suggested a degree of responsibility should be imposed on the Lebanese government and army for their failure to enter the camps in place of the Phalangists when re-

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245. See *supra* note 131 and accompanying text.

246. M. JANSSEN, *supra* note 16, at 73-87; CURRENT POLICY NO. 415, *supra* note 214, at 4; F. BOYLE, *supra* note 133, at 5-7; see also J. RANDAL, *supra* note 35, at 247-51 (addressing the issue of Secretary of State Alexander Haig's possible advance approval of the invasion).

247. CURRENT POLICY NO. 415, *supra* note 214, at 4. It is also worth noting that section 500 of the U.S. Army Field Manual on the law of land warfare provides individual criminal responsibility for "[c]onspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity and war crimes." U.S. ARMY FIELD MANUAL 27-10, *supra* note 194, ¶ 500, at 178.

quested to do so.<sup>248</sup> Certainly the Lebanese government and army were aware of the blood feud between the Palestinians and the Phalangists and the likely result of a confrontation between the two. The Hague Convention and Fourth Geneva Convention govern the conduct of Israel, Lebanon and Syria in their conflicts with each other. Much less clear is the extent to which either Convention could be said to govern the responsibility of the Lebanese government toward those who were residing in the refugee camps within its territory. In any event, at a minimum the Lebanese government is subject to the Geneva Conventions, which require every party to an armed conflict *not* of an international character to refrain from violence to life and person and to seek to ensure humane treatment of civilians.<sup>249</sup> Moreover, Lebanon is a party to the International Covenant on Economic, Social and Cultural Rights,<sup>250</sup> the International Covenant on Civil and Political Rights,<sup>251</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>252</sup> obligating it to accord the designated rights to all those within its territory and subject to its jurisdiction. Among other provisions, article 6 of the Covenant on Civil and Political Rights guarantees every human being the right to life with the additional proviso in article 6(3) that when deprivation of life constitutes genocide, the Covenant does not derogate in any way from any obligations under the Genocide Convention. Individual responsibility would be premised again on the Nuremberg Principles and customary international law. If individuals in the Lebanese government or army knew or should have known that persons subject to their control were about to commit or were committing war crimes or crimes against humanity, they would themselves be responsible.<sup>253</sup>

The Phalangists also would be subject at a minimum to the

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248. KAHAN REPORT, *supra* note 1, at 12. Moreover, in Thomas Friedman's influential article after the massacre, he reported that "well-placed Israeli officials" said the military operation of the Phalangists was planned by Bashir Jemayel before his assassination and that the Israeli army assumed the entry was part of the overall plan laid out by Jemayel that he intended to carry out after he took office. N.Y. Times, Sept. 20, 1982, at A6, cols. 4-5; see also SABRA AND SHATILLA, *supra* note 22, at 85 and *supra* notes 90, 223 (citing evidence that Lebanese officials knew of the massacres on Friday).

249. Fourth Geneva Convention, *supra* note 123, art. 3.

250. G.A. Res. 2200 (21), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 1967), reprinted in 6 I.L.M. 360 (1967).

251. G.A. Res. 2200 (21), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 1967), reprinted in 6 I.L.M. 368 (1967).

252. Mar. 12, 1969, 660 U.N.T.S. 195 (1966), reprinted in 5 I.L.M. 352 (1966).

253. See *supra* note 194 and accompanying text.



requirements of humane treatment under common article 3 of the Geneva Convention. Needless to say, the Phalangist commanders and soldiers who participated in or planned any aspect of the massacres would be individually liable for war crimes and crimes against humanity, as well as for genocide under the Genocide Convention.<sup>254</sup> Although a Lebanese commission of inquiry has been established, it appears unlikely, given current political conditions, that any meaningful sanctions will be imposed.<sup>255</sup>

*D. The Convention on the Prevention and Punishment of the Crime of Genocide*

The Convention on the Prevention and Punishment of the Crime of Genocide<sup>256</sup> was drafted following World War II to outlaw the Nazi government's atrocities on the basis of national, ethnic, racial or religious identification and to prevent the recurrence of such atrocities.<sup>257</sup> Any recurrence of such atrocities by means of the Convention, however, cannot be prevented without rational and unflinching vigilance in enforcing its provisions. With obvious regret and reluctance, the question has been raised whether the Israeli invasion of Lebanon and its involvement in the massacres of the Palestinian civilian population in Sabra and Shatilla constitute genocide.<sup>258</sup> The pivotal substantive provisions are contained in

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254. The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1938, 78 U.N.T.S. 277. See *infra* notes 256-77 and accompanying text (discussing the Genocide Convention) [hereinafter cited as Genocide Convention].

255. S. MALLISON & W.T. MALLISON, *supra* note 39, at 82. A report issued by Lebanon's military prosecutor holds Israel "legally responsible" for the massacres. In addition: While Israel's Kahan report pinned the blame on Phalangist militiamen, the report by Mr. Assad Germanos, the Lebanese military prosecutor, suggests in carefully chosen words that "border elements" (a clear reference to the militiamen of Major Saad Haddad) or "others who may have suffered from the excesses of the Palestinians" were responsible for the killings. The agency, which is close to the Phalange party and the Government, carried the text of the report. Mr. Germanos is himself a Phalange sympathizer.

The report exonerates the Phalange and the "Lebanese forces," the coalition of Christian militias, on the basis that "there is no sufficient evidence to suggest that either of the two commands had any advance knowledge of the events" and "it could not be determined that either of these commands had issued orders to their fighters." *The Times* (London), June 22, 1983, at 6, col. 7.

256. Genocide Convention, *supra* note 254.

257. S. MALLISON & W.T. MALLISON, *supra* note 39, at 73. The Convention was adopted unanimously by the General Assembly in 1948. 3 U.N. GAOR, Part I, Annex 494, U.N. Doc. A/760 (1948). It was signed by the United States two days later. Lebanon and Israel are parties to it; the United States has yet to ratify it.

258. See, e.g., S. MALLISON & W.T. MALLISON, *supra* note 39, at 73 (suggesting Israeli action could constitute genocide); ISRAEL IN LEBANON, *supra* note 184, at 197 (majority of

Articles II and III.<sup>259</sup> The Convention may be analogized to the basic tenet of Anglo-American law that for criminal responsibility there must be an act or an omission to act where there is a legal duty to do so, plus the requisite intent for criminal liability.<sup>260</sup> To establish liability for genocide under the Convention, there must be one of the prohibited acts and the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>261</sup> Persons committing genocide or any of the other acts under article 3 "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."<sup>262</sup>

The Kahan Report concluded that the Phalangists were directly responsible for the killings and serious harm inflicted in the camps. As discussed above, Israel was under an affirmative duty to protect the civilian population in the refugee camps and failed to do so. Its failure to provide protection could be conceptualized under article III as direct and public incitement to commit geno-

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the Commission view Israel's actions in Lebanon as a "form of genocide").

259.

Article II.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent birth within the group;
- (e) Forcibly transferring children of the group to another group.

Article III.

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

260. W. LAFAYE & A. SCOTT, CRIMINAL LAW 175-77 (1972).

261. Genocide Convention, *supra* note 254, art. II.

262. Genocide Convention, *supra* note 254, art. IV. Article V requires contracting parties to enact legislation in accordance with their constitutions to provide effective penalties for genocide, and article VI provides that persons charged with genocide should be tried in the state in which the act was committed or by an international tribunal with jurisdiction over the contracting parties. Both Lebanon and Israel are parties to the Convention. The question of jurisdiction over questions of genocide is beyond the scope of this article; it has been suggested that the Convention makes genocide an offense punishable by any state with personal jurisdiction over the defendant. *See generally* R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 151-66 (1979) (containing a series of journal articles on these questions). These questions of jurisdiction and enactment of domestic legislation have posed a major barrier to acceptance of the Convention, including acceptance by the United States.

cide, complicity in genocide or conspiracy to commit genocide. Whether Israel's responsibility for genocide can be based solely on the massacres<sup>263</sup> turns primarily on the intent of those who permitted the Phalangists to enter or failed to stop the Phalangists once the killing was known.

A preliminary issue of intent is whether the massacres demonstrated intent to destroy the Palestinians "in whole or in part." There has been much controversy over whether intent to kill only part of an ethnic group as opposed to intent to destroy the entire ethnic group or a substantial part of it is sufficient intent for genocide.<sup>264</sup> Regardless of whether a restrictive interpretation of the requisite intent is accepted (that is, that there must have been intent to destroy the Palestinians or a substantial number of the Palestinians as an ethnic group), a colorable argument could be made that the massacres were extensive enough to satisfy such an interpretation and to demonstrate an intent to destroy the Palestinians as a viable entity. Whatever interpretation is accepted, the number of victims is of important evidentiary value for proving the necessary intent.

Another unresolved issue is whether a party's reckless indifference to the likelihood of a massacre of the Palestinians is sufficient "intent to destroy, in whole or in part" the Palestinians, or whether it is necessary that the party's actions were taken with the purpose or knowledge that a massacre of the Palestinians would occur. By analogy again to Anglo-American criminal law, in the second case there would be the requisite intent for intentional murder, whereas in the first there would be reckless or grossly negligent homicide.<sup>265</sup> Given the severity and seriousness of the crime of genocide, and the Convention's implicit emphasis on a high degree of intent, it is the view of this author that recklessness or gross negligence would not be sufficient. The requisite intent should be intent to kill (or intent to seriously harm) Palestinians as an ethnic group, even if the precise degree of harm or extent of

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263. This section does not address the broader issue of whether the invasion itself and other acts pursuant to the invasion were acts of genocide.

264. See generally Leblanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 A.J.I.L. 369 (1984) (discusses the meaning of the U.N. Genocide Convention).

265. Leblanc states: "It should be borne in mind that the drafters of the Convention distinguished between homicide and genocide. As they saw it, homicide becomes genocide when the underlying intent relates to a group: individuals are killed not for any reason peculiar to them but simply because they are members." *Id.* at 371. Analogies to homicide are made herein as to the *degree* of intent, not the nature of the intent.

killing was not specifically anticipated.<sup>266</sup> This interpretation is borne out by the negotiating history of the Convention and the defeated proposal of the Soviet Union's representative that acts that result in the destruction of groups be encompassed in the Convention. The United States representative opposed the proposal as a "fundamental modification" of the definition of genocide requiring intent as an essential element of the crime.<sup>267</sup>

Even if this high degree of intent is required, it should be pointed out that proof of the consequences that may be reasonably anticipated from a party's actions could be viewed as circumstantial evidence of a party's actual intent.<sup>268</sup> Therefore, the Report's conclusion that many of the nine named individuals knew or should have known a massacre would take place, or that it was taking place, may be evidence of their actual intent for a massacre to occur or continue.

The Commission did find that the IDF entered West Beirut only to restore order after Bashir Jemayel's assassination.<sup>269</sup> Yet the Commission was less charitable in its determination of the intent of Sharon and Eitan in sending the Phalangists into the camp. The Report strongly suggests that Sharon knew that a massacre would occur.<sup>270</sup> Sharon has stated that he had "anticipated civilian casualties," but not the extent to which they would occur.<sup>271</sup> Similarly, Eitan, according to the Report, perhaps hoped "that in the final analysis, the Phalangist excesses would not be on a large

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266. See generally L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 913-22 (1973) (sources noting the high standard of proof for intent under the Convention).

267. Leblanc, *supra* note 264, at 371-72.

268. Compare W. LAFAVE & A. SCOTT, *supra* note 260, at 202-03 (discussing "presumed intent").

269. KAHAN REPORT, *supra* note 1, at 12. According to statements by Sharon, this assertion was only "a smoke screen" because the actual intention was to destroy the remaining Palestinian guerillas in Lebanon (ostensibly including the 2000 Palestinian terrorists purportedly sought in the camps that never materialized). N.Y. Times, Sept. 26, 1982, at A6, col. 5; Sunday Times (London), Sept. 29, 1982, at 8, cols. 2-5. See also S. MALLISON & W.T. MALLISON, *supra* note 39, at 28 (discussing the U.N. Security Council's inquiry into Israeli justification for attacking the camps). On September 18, 1982, the *Washington Post* carried a headline across the top of its first page that read: "Israelis Hunt Palestinian Sympathizers in Beirut: Christian Forces Join in Search." The article by Mr. Loren Jenkins stated that two days after the Israeli army drove into Moslem West Beirut, the search for Palestinian sympathizers started. It continues: "Plainclothes security agents, carrying lists of names, led squads of soldiers through the streets in search of presumed enemies to interrogate." *Washington Post*, Sept. 18, 1982, at A1, col. 4.

270. See *supra* note 205 and accompanying text.

271. *Washington Post*, Oct. 26, 1982, at A1, col. 5.

scale."<sup>272</sup> In an interview two days after the entry into West Beirut, Eitan said: "We are going to mop up West Beirut, gather all the weapons, arrest the terrorists, exactly like we did in Sidon and Tyre and in all other places in Lebanon. We will find all the terrorists and their leaders. We will destroy whatever requires destruction."<sup>273</sup> The use of terms such as "purifying and purging,"<sup>274</sup> "mopping up,"<sup>275</sup> and "cleaning up"<sup>276</sup> the camps do not reflect favorably on the Israeli officials' and commanders' actual intent. Indeed, the report of an international commission into Israel's violations of international law during the invasion concluded: "The massacres that took place in Sabra and Shatilla in September 1982 can be described as genocidal massacres, and the term 'complicity in genocide' is wide enough to establish the responsibility of Israel for these acts."<sup>277</sup>

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272. See *supra* note 198 and accompanying text.

273. SABRA AND SHATILLA, *supra* note 22, at 14. In SABRA AND SHATILLA, Kapeliouk notes two Israeli sources of the opinion that the massacres were intended to provoke a massive exodus of Palestinians from Lebanon:

Ze'ev Schiff, the military correspondent of *Ha'aretz*, and Ehud Ya'ari, Israeli television's specialist on Arab affairs, both subscribe to this theory. The methodical destruction of Palestinian homes clearly supports it; for without their shelter, the Palestinian refugees would have no alternative but to leave Lebanon. Contrary to some claims, when the Phalangists requested bulldozers from the Israelis they did not intend to tear down barricades. On the basis of aerial photographs in their possession, Israeli military authorities knew quite well that there were no roadblocks or barricades in the camps. The bulldozers had no other use but to destroy homes and bury corpses in mass graves. On November 7, General Yaron stated before the Commission of Inquiry: "We knew they wanted to destroy the camps . . . Some of them [the Phalangists] affirmed that they were planning to replace the camps with a zoo."

*Id.* at 45.

274. N.Y. Times, Sept. 20, 1982, at A6, col. 5; Washington Post, Sept. 21, 1982, at A14, col. 6.

275. N.Y. Times, Sept. 23, 1982, at A8, col. 4.

276. N.Y. Times, Sept. 23, 1982, at A8, col. 6; N.Y. Times, Sept. 26, 1982, at A11, col. 2. Similarly, extensive bombing of the Palestinian camps and their bulldozing (see S. MALLISON & W.T. MALLISON, *supra* note 39, at 61-64; M. JANSEN, *supra* note 16, at 15-38) may be circumstantial evidence of an intent to drive the Palestinians, not merely Palestinian "terrorists," out of Lebanon. The Report states only that West Beirut was "occasionally shelled and bombed" by Israeli forces. KAHAN REPORT, *supra* note 1, at 4.

277. ISRAEL IN LEBANON, *supra* note 184, at 196. The Commission was chaired by Sean MacBride, former Irish Foreign Minister, former United States Commissioner for Namibia and Nobel Peace Prize winner in 1974. Four of the Commission's six members concluded that Israel embarked on "deliberate destruction of the national and cultural rights and identity of the Palestinian people" amounting to genocide but not in the sense of extermination of the Palestinians in a physical sense. The other two took the view that "while Israeli policy and practices in Lebanon are a violation of international humanitarian law, they do not amount to the crime of genocide."

"The commission unanimously concluded, however, that Israel was involved in the planning and preparation of the massacres (at Sabra and Chatila [sic]) and played a facilitation

## CONCLUSION

It is in some ways easier to understand and grieve the death of one person than that of thousands. Perhaps as a result, a tragedy of human history is that massacres of civilian populations did not end with World War II. One aspect of the aftermath of that war's atrocities, however, was the creation of precepts of international law to deter the recurrence of such atrocities and, failing that, to punish their perpetrators. The potential for justice and orderly resolution exists. Among other principles of customary international law, the Geneva Conventions, the Nuremberg Principles and the Genocide Convention provide an international framework for resolution of responsibility and punishment for massacres of civilian populations.

The Kahan Report, no matter how well intentioned, failed to result in any meaningful sanctions. Begin, Sharon and Shamir were all criticized by the Commission; yet Begin recently retired,<sup>278</sup> Shamir became the Prime Minister,<sup>279</sup> and Sharon remained in the Cabinet (although without his portfolio).<sup>280</sup> The Report may have appeased many consciences, but wrongly so. The inquiry is full of sound and fury, but ultimately, for the many victims of the massacres, signifies nothing.

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tive role in the actual killings." *The Times* (London), Feb. 3, 1983, at 8, col. 7.

278. In a recent article on Begin's resignation, political correspondent Mark Segal speculated that the "cruellest moment" for Begin in his Lebanese adventure "came when Begin finally recognized the reckless and irresponsible advice he had accepted from the two generals he so admired and trusted—Ariel Sharon and Rafael Eitan." He goes on to remark that "Begin may today regret not having carried out the implied recommendation of the Kahan Report by dismissing Sharon from his cabinet." *Jerusalem Post*, Sept. 25-Oct. 1, 1983, at 15, cols. 5-6 (Int'l ed.).

279. *N.Y. Times*, Oct. 11, 1983, at A1, col. 4, A3, col. 1 (setting forth the relatively unchanged list of Cabinet members, including Mordechai Zipori as Minister of Communications).

280. Sharon has said that "as long as he continues to have some influence, he would continue to serve in the government." *Jerusalem Post*, July 31-Aug. 6, 1983, at 9, col. 1 (Int'l ed.). To quote Jonathan Randal, senior foreign correspondent of the *Washington Post*:

The main culprit, Ariel Sharon, neatly dodged the spirit if not the letter of the 108-page report enjoining him to resign. Resign he did as Defense Minister, only to stay on as minister without portfolio and to join two key parliamentary commissions, on defense and Lebanese affairs. Sharon made clear this was his, and Begin's, way of rejecting the commission's verdict of Israel's "indirect responsibility" for the slaughter.

J. RANDAL, *supra* note 35, at 289.