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Sharon vs Time: The Criminal Responsibility Under International Law for Civilian Massacres

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SHARON *vs* TIME
THE CRIMINAL RESPONSIBILITY UNDER
INTERNATIONAL LAW FOR CIVILIAN MASSACRES

Linda A. Malone *

I.	Sharon <i>vs</i> Time, Inc.	44
	A. American Law of Libel	44
	B. The Testimony in Sharon <i>vs</i> Time	45
II.	The Involvement of Sharon in the Massacres According to the Kahan Report	51
	A. The Commission's Establishment, Terms of Reference and Authority	51
	B. Factual Background Leading Up to the Day the Massacres Began	53
	C. The Massacres	56
III.	The Report's Delineation of "Direct and Indirect" Responsibility for the Massacres	62
	A. Responsibility of Israel and its Officials	62
	B. The Findings as to Sharon's Responsibility	64
IV.	Sharon's Responsibility for the Massacres Under International Law	65
	A. The International Law Criteria - The Nuremberg Principles	65
	B. The International Law Criteria - The Genocide Convention	68
	C. The International Law Criteria - The Laws of War	71
V.	Conclusion: Finding the Truth, the Whole Truth and Nothing But the Truth	72

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One section of the [Kahan] 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 Jemayel family on the day after Bashir Jemayel's assassination. Sharon reportedly told the Jemayels 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 Jemayels the need for the Phalangists to take revenge for the assassination of Bashir, but details of the conversation are not known.¹

The publication of the above paragraph by *Time* magazine in February, 1983, prompted Ariel Sharon, former Minister of Defence of Israel, to sue *Time* for libel in a New York Federal District Court. *Time* claimed its story was substantiated by confidential sources, Sharon's own testimony before the Kahan Commission, the disparity between the public portion of the Kahan Report and the Report's harsh findings against Sharon, and from other news reports claiming that Sharon had anticipated the massacres or intended for them to occur.

On 16 September 1982, the Israeli Defence Forces (IDF), occupying Beirut as a result of Israel's June invasion of Lebanon, permitted the Phalangists, a Lebanese Christian militias, to enter the Palestinian refugee camps of Sabra and Shatilla, purportedly to look for 2000 fighters who allegedly stayed in the camps after the evacuation of the Palestine Liberation Organization's (PLO) forces from Beirut. From approximately 6:00 p.m. 16 September until 8:00 a.m. 18 September, the Phalangists, and perhaps other militia, massacred unarmed men, women, and children living in these two camps. The exact number of victims cannot be determined but estimates range from roughly 300 to 3000 people.

The Israeli Cabinet established a commission of inquiry² pursuant to Israel's Commission of Inquiry Law³ to investigate the Sabra and Shatilla massacres.⁴ The Commission issued its report on 9 February 1983. The Kahan Report refocused the controversy on the individual responsibility of many high ranking Israeli officials including former

1. *Time*, Feb. 21, 1983, at 29.

2. The Commission of Inquiry into the Events at the Refugee Camps in Beirut, 1983: Final Report (Authorized Translation) in *Jerusalem Post*, Feb. 9, 1983 (supplement) at 2. The Report may also be found in *Int'l. Leg. Mat.* at 473 (May 1983). All references in this article are to the Feb. 9, 1983 *Jerusalem Post* (hereinafter "Kahan Report").

3. *Id.*

4. *Id.*

Prime Minister Begin, Minister of Defence Sharon, and then Foreign Minister Shamir.⁵ The Report was heralded, in part by the Commission itself, as a triumph of democracy and reaffirmation of the principles upon which Israel and other democratic nations were founded.

Sharon, one of the most harshly criticized individuals in the Report, merely lost his cabinet portfolio for his responsibility in the massacres. Sharon was not among those who applauded the Report. He claimed that the Report had put the "Mark of Cain" upon him for finding that he should have known the Phalangists were liable to commit atrocities if sent into the refugee camps and for not having taken steps to prevent such atrocities from occurring.⁶ Sharon was even less pleased with *Time's* coverage of the Report, and in particular, one paragraph that went beyond the scope of the Report. In that paragraph, *Time* stated that the unpublished Appendix B of the Report "contained further details" about a condolence visit Sharon made to the Jemayel family the day after the assassination of Bashir Jemayel, which was also the day before the Phalangists entered the refugee camps. The crucial, allegedly libellous statement was that "Sharon also reportedly discussed with the Jemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known".⁷

Sharon sued *Time* for 50 million dollars, charging libel.⁸ He alleged that the statement went beyond the Kahan Report, which had found him indirectly responsible for the massacres, by suggesting that he actively encouraged revenge and, therefore, was directly responsible for the massacres, and that the statement was false.⁹ He claimed that *Time* had published the statement with knowledge of or a reckless disregard of its falsity.

The case took approximately one year and cost about 3 million dollars. At the end, the jury returned with a verdict that left both Sharon and *Time* claiming victory. The jury struggled with the complexities of Israeli politics, the invasion of Lebanon, and United States libel law, to

5. Jerusalem Post Int'l., Feb. 13-19, 1983 at 1, cols. 1-2.

6. Smolla, *Suing the Press: Libel, The Media, and Power* 81 (1986) (hereinafter "Smolla"), offers a more detailed analysis of Sharon vs Time, Inc. from the perspective of United States libel law. See also New Yorker, June 16, 1986, at 42-83.

7. Time, Feb. 21, 1983, at 29.

8. N.Y. Times, Nov. 30, 1984, at B1, col 4.

9. *Id.*

discover the "truth" of Sharon's role in each.¹⁰ Because of the intricacies of American libel law and the procedural framework for libel suits, the ultimate issue of Sharon's responsibility for the massacres was never resolved before the Federal District Court.

Under international law the Kahan Report's distinction between direct and indirect responsibility for massacres of civilians is not recognized. Of course, evaluation of that responsibility cannot be limited to the contents of Appendix B.

This article will review in the facts and circumstances involved in the *Sharon vs Time, Inc.* case in Part I. Part II will look to the Kahan Report's findings regarding the involvement of Sharon in the events surrounding the massacres at Sabra and Shatilla. Part III will examine the Report and its delineation of direct and indirect responsibility for the massacres. The final section will deal with Sharon's responsibility for the massacres according to International Law.

I. *Sharon vs Time, Inc.*

The *Sharon vs Time*¹¹ trial was a detailed analysis of the intricacies of American libel law and provided a look at Sharon's participation in the events surrounding the massacres at the Sabra and Shatilla camps. Due to the structure of American libel law, the extent of Sharon's involvement in the massacres was never determined. The issues in the case were largely restricted to whether or not Appendix B substantiated Time's statement and whether the statement was defamatory by going beyond the findings of the Report.

A. American Law of Libel

In American libel law, the elements of a cause of action include: a statement of fact, that is false, and defamatory, of and concerning the

10. N.Y. Times, Jan. 20, 1985, at 20, col. 6. The jury also had to act as linguistic experts. Sharon had testified before the Commission that he had discussed revenge "etslenu". The Hebrew word "etslenu" may mean "among us" or "by us". A Hebrew language expert testified as to the possible meanings because Sharon said he meant to use the word in the sense of "among us" - that is, among the Israelis and not "by us" - that is, by Israelis with Phalangists. N.Y. Times, Jan. 3, 1985, at B3, col. 6.

The primary reported decision in the Sharon case is the opinion denying Time's motion for summary judgment. *Sharon vs Time, Inc.*, 599 F.Supp. 538 (S.D.N.Y. 1984).

11. *Sharon vs Time, Inc.*, 599 F.Supp. 538 (S.D.N.Y. 1984).

plaintiff, that is published to a third party that causes actual injury and is the result of fault by the defendant.¹² As *Time* was a media defendant, Sharon also had to prove that the false statement was published with knowledge of its falsity or a reckless disregard of its falsity.¹³ This additional requirement saved *Time* from a determination that Sharon had been libeled.

The jury, in *Sharon vs Time*, found that there was a defamatory statement of fact of and concerning Sharon that was published and caused injury to the plaintiff and the jury found that the statement was false, at least based on the admissible evidence. The remaining element of demonstration of fault, that is "actual malice", a knowledge or reckless disregard of falsity, by *Time* was not proven by clear and convincing evidence.

B. The Testimony in *Sharon vs Time*

The *Sharon v. Time* trial quickly settled into a contest between Sharon and David Halevy, the reporter whose confidential sources resulted in the controversial paragraph. Sharon and Halevy presented equally detailed testimony. Sharon testified about his childhood and his political and military careers. The trial became a forum for a re-evaluation of the war in Lebanon and the conclusions of the Kahan Report in order to remedy an aspiring politician's reputation as a decision maker.

David Halevy's detailed testimony became a focus for re evaluation of the editorial process in media. Halevy, an Israeli, had served as an Israeli military officer. The events which led to *Time's* publication of

12. Smolla, *Law of Defamation* 123 (1986).

13. See, *New York Times vs Sullivan*, 376 U.S. 283 (1964).

This case established a national standard that libel law in the U.S. is limited by the First Amendment of the Constitution provisions for a free press. Here, the *New York Times* was sued for libel by Sullivan, a Montgomery, Alabama police commissioner. He alleged that an advertisement run by "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South", which spoke of the struggles of the civil rights movement in the South, had libelled him. The federal district court in Montgomery, a courtroom where seating was segregated and the judge spoke of "white man's justice," awarded Sullivan \$500,000 in damages. Four years later the Supreme Court struck down the award, holding that before a media defendant can be found liable for defamation for a false defamatory statement the First Amendment, which protects freedom of speech and the press, requires that it be proven that the false statement was published with knowledge of its falsity or a reckless disregard of its falsity. In other words, only if the media defendant knew the article was false, or was aware that it might be false and disregarded that risk, could the media defendant be found liable for defamation.

the Sharon article began on December 6, 1982 when Halevy reported, based on three confidential sources (one of whom read him minutes of the condolence meeting over the phone) that Sharon "had given the Jemayel's the feeling" he understood the Phalangists' need for revenge during his condolence call to the Jemayels.¹⁴ Halevy's three most important sources were General No.1, who told Halevy that notes existed of the Bikfaya meeting; Source A, an Israeli intelligence agent who read at least part of the notes to Halevy over the phone and said that the notes had been submitted to the Kahan Commission; and source C, who also read to Halevy from the notes.

Halevy's testimony established the laxity of *Time's* editorial process. After the Kahan Report was published Harry Kelly, *Time's* Jerusalem Bureau Chief, asked Halevy if Appendix B would support the confidential source's information.¹⁵ Halevy told Kelly "there is a case against General Sharon between the lines of the Kahan Report" and that "it is probably in Appendix B".¹⁶

Halevy *never* asked his confidential Source C if Appendix B actually said that Sharon had discussed revenge with the Jemayels.¹⁷ Halevy testified that he went back to reread the Kahan Report to *deduce* what Appendix B said.¹⁸ When Halevy returned to Kelly's office to respond to his question about whether the conversation was substantiated by Appendix B, he simply "... raised my thumb in the kind of 'Okay', all cleared."¹⁹ Although Source C never told Halevy or was ever asked if Appendix B said that Sharon had discussed revenge with the Jemayels, Halevy confirmed to Kelly that Appendix B did substantiate his story.

Kelly testified that it was his impression that Halevy had seen notes of the condolence call from his confidential source.²⁰ After the press release on the story came out Ehud Olmert, a member of the Israeli Knesset, told Kelly he had seen Appendix B and it did not contain the information that *Time's* article claimed it did.²¹

14. Smolla, at 84.

15. *New Yorker*, June 23, 1986, at 73.

16. *Id.* at 85.

17. Smolla, at 85.

18. *N.Y. Times*, Nov. 30, 1984, at B1, col. 4.

19. *Id.* at col. 5.

20. Smolla, at 86.

21. *Id.* at 86-87.

William Smith in New York wrote the *Time* story that incorporated Halevy's report.²² Halevy used the language that Sharon "gave them the feeling ...".²³ Smith changed the wording to "discussed with the Jemayels the need for ... revenge."²⁴ Compounding the problem, *Time* sent out a press release publicizing the article with the headline "Sharon Said to Have Urged Lebanese to Send Phalangists into Camps."²⁵

Just as the jury became intimately familiar with Sharon's career, lawyers for both sides explored exhaustively Halevy's journalistic career. It became clear that Halevy was deeply opposed to the war in Lebanon. Halevy had been in Beirut the day Jemayel was killed and he testified as to the atmosphere of revenge at Jemayel's funeral. Asked about his attitude towards Sharon, Halevy testified that Sharon "should have quit politics"²⁶ after the massacres: "The Kahan Commission practically fired him ... I think a public figure, once there is a verdict on a public figure, that public figure should hide, should stay away from politics."²⁷ He testified, "the occupation of the West Bank is corrupting my country, is corrupting my society. I am a great believer that occupation means corruption."²⁸

Sharon's lawyers attempted to discredit Halevy as a biased reporter. They were able to show that he had been placed on probation for a year by *Time* for erroneous reporting.²⁹

Time's editors and writers were closely questioned as to their understanding of the meaning of Sharon having discussed revenge with Phalangists. *Time's* managing editor Ray Cave testified he believed that the Kahan Commission knew that Sharon had discussed revenge with the Phalangists.³⁰ Although Cave testified that he believed Sharon was

22. *Id.* at 86.

23. *Id.*

24. *Id.*

25. *Id.* at 86-87 (emphasis added).

26. N.Y. Times, Dec. 4, 1984, at B2, col. 5.

27. *Id.*

28. *Id.*

29. N.Y. Times, Dec. 14, 1984, at B9, col. 1. In 1979 Halevy erroneously reported that Prime Minister Begin was in such ill health that he had been told by his doctors not to work more than three hours a day. *Time's* internal investigation concluded that Halevy was either "inexcusably shoddy in his reporting", had "intentionally misled" *Time*, or was "the victim of an incredibly well orchestrated disinformation plot." *Id.*

30. N.Y. Times, Dec. 20, 1984, at B4 col. 3.

responsible for the massacres, he would not say that he thought Sharon anticipated the killings or the article said or implied such anticipation.³¹

William Smith testified that Sharon had "allowed the Phalangists to go into the camps, and the result of that action was the murder of 700 or 800 unarmed civilians", and that he understood the Commission had found Sharon "indirectly" responsible but refused to acknowledge that the article he wrote accused Sharon of direct responsibility.³²

The essential element of proof was Appendix B which the Israeli government refused to release. In the final days of the trial, Judge Sofaer successfully negotiated a compromise agreement between Israel and the lawyers for *Time* and Sharon. Israeli lawyers for *Time* and Sharon in Israel were permitted to read, in the presence of former Chief Justice Kahan, Appendix B, notes and testimony on the condolence visit of Sharon to the Jemayel family, notes and testimony on an earlier meeting between Sharon and Phalangist leaders in Beirut on 15 September, notes and testimony pertaining to a meeting between Sharon and Bashir Jemayel on 12 September, and all notes and testimony relating to any other meetings between Sharon and the Phalangists between 14 and 16 September, after which Kahan would respond yes or no to three questions:

Does the document contain any evidence or suggestion that Mr Sharon held a conversation with the Jemayel family, or any other Phalangist, in which he discussed the need to avenge the death of Bashir Jemayel?

Does it contain any evidence or suggestion that any Phalangist mentioned the need for revenge to Mr. Sharon?

And does it contain any evidence or suggestion of whether Sharon knew in advance that Phalangists would massacre civilians if they entered the refugee camps unaccompanied by Israeli troops?³³

Justice Kahan replied:

In none of the documents or testimony is there any evidence or suggestion that Minister Sharon had a discussion with the Jemayel family or with any other Phalangist, at Bikfaya or

31. *Id.*

32. *Id.*

33. N.Y. Times, Jan. 1, 1985, at A31, col. 6; N.Y. Times, Jan. 8, 1985, at A1, col. 4 and B4, cols. 5-6; and New Yorker, June 23, 1986, at 77.

elsewhere, in which Minister Sharon discussed the need to avenge the death of Bashir Jemayel.

In none of the documents or testimony is there any evidence or suggestion that Minister Sharon had a discussion with a Phalangist in which either person mentioned the need for revenge.

There is no mention in the said documents or testimony of the possibility of the massacre taking place if Phalangists were allowed to enter the camps unaccompanied by IDF troops.³⁴

Time objected that it had not been permitted to see all necessary documents. In its closing argument, *Time* conceded that the discussion of revenge did not appear in Appendix B, but reasserted that *Time* believed it was true when the article was published, that the rest of the article was true, and the magazine had properly relied on confidential sources.³⁵

Judge Sofaer gave the jury three questions that had to be answered in the affirmative to find *Time* liable for defamation: a single negative answer would absolve *Time* of liability.

The three questions were: If Mr Sharon has "proved by a preponderance of the evidence" that the disputed paragraph defamed him by indicating that he "consciously intended" or "actively encouraged" the killing of civilians; second, if Mr Sharon proved defamation, has he "proved by clear and convincing evidence" that he did not discuss the need for the Phalangists to take revenge for the assassination of Bashir

34. N.Y. Times, Jan. 8, 1985, at B4, cols. 5-6.

35. N.Y. Times, Jan. 11, 1985, at B4, col. 1. A letter from *Time*'s Israeli lawyers expressing reservations about the documents which had not been examined was read to the jury after the public and reporters were excluded from the courtroom pursuant to the negotiated settlement with Israel. Judge Sofaer stressed that he was seeking Israel's permission to release the letter. N.Y. Times, Jan. 11, 1985, at B4, cols. 1-2. The January 21 issue of *Time* released during the jury's deliberations, stated that it

now issues a correction: Appendix B does not contain further details about Sharon's visits to the Jemayel family. *Time* regrets that error.

Time stands by the substance of the paragraph in question . . . *Time* did not say, and has never said that Sharon intended the Phalangists commit a massacre, or encouraged such a massacre.

The Israeli government continues to deny *Time* the right to inspect other specific testimony relevant to this case that is known to exist as part of the record of the commission of inquiry.

Reprinted in N.Y. Times, Jan. 15, 1985, at B2, cols. 5-6.

Jemayel; and third, if Mr. Sharon proved defamation and falsity, has he also “proved by clear and convincing evidence” that someone at *Time* had published the article with actual malice, that is, with “knowledge that it was false,” a “reckless disregard” of whether it was false, or with “serious doubts” about the truth of the false and defamatory statement when it was published.³⁶

The jury decided for Sharon on the first two questions but after almost a week of deliberation they found for *Time* on the third crucial question.³⁷ The third question with which the jury had struggled is the constitutional standard of intent under *New York Times Vs Sullivan*³⁸ which must be demonstrated under American libel law to hold a media defendant responsible for libel.

In a highly unusual procedure, after the verdict the jury’s foreman read a statement that “We [the jury] find that certain *Time* employees, particular correspondent David Halevy, acted negligently and carelessly in reporting and verifying the information which ultimately found its way into the published paragraph of interest in this case.”³⁹ After announcement of the jury’s verdict, Judge Sofaer asked everyone in the courtroom to stand in tribute to what was undeniably a textbooklike application of complex libel law to the facts of the *Sharon* case.⁴⁰ Both sides claimed victory. *Time* printed a retraction which in part, stated:

[The libel suit] was brought by a foreign politician attempting to recoup his political fortunes. He could not sue Israel’s Kahan Commission, which had found him guilty of indirect responsibility for the massacres at Sabra and Shatilla and recommended his ouster as Defence Minister. So he sued *Time*.

Time’s defence in this suit was severely hampered by the Israeli Government. That Government, citing security con-

36. N.Y. Times, Jan. 15, 1985, at B2, cols. 4-6. The jury instructions are reprinted in *Libel in Trial: The Westmoreland and Sharon Cases*, BNA Special Report, Appendix 4 (BNA 1985).

37. N.Y. Times, Jan. 25, 1985, at A1, cols. 2-3 and B4, cols. 1-6. By answering no the jury also gave a negative answer to three supplementary questions that asked if *Time* “knowingly fabricated” information, “materially exaggerated” it or “disregarded substantial evidence of the probable falsity of the paragraph.” N.Y. Times, Jan. 25, 1985, at A1, cols. 2-3.

38. *New York Times Co. vs Sullivan*. 376 U.S. 254 (1964).

39. N.Y. Times, Jan. 25, 1985, at A1, cols. 2-3.

40. Smolla, at 92.

cerns, prevented key witnesses from testifying, threatened to prosecute them if they even talked with the magazine's attorneys and denied access to documents and testimony that *Time* felt would have proven its case.⁴¹

Sharon claimed "a great moral victory", the verdict having established that *Time's* allegations were false, and the *Jerusalem Post*, quoting Sharon's admirers, reported that he would be met in Israel with a "hero's welcome."⁴²

Sharon vs Time was a public relations battle having little or nothing to do with determining Sharon's actual legal responsibility for the massacres. In a pre-trial opinion Judge Sofaer himself criticized *Time* for attempting to make the trial a public referendum on the war in Lebanon.⁴³

II. The Involvement of Sharon in the Massacres According to the Kahan Report.

A. The Commission's Establishment, Terms of Reference and Authority.

The Kahan Commission was established pursuant to Israel's Commission of Inquiry Law.⁴⁴ The Israeli government is empowered by virtue of this Law to set up a commission of inquiry whenever it appears "that a matter exists which is at the time of vital public importance and requires clarification, ...".⁴⁵ The Law requires a commission of inquiry to sit in public unless it deems it necessary to conduct any hearing in

41. N.Y. Times, Jan. 25, 1985, at B4, cols. 1-4.

42. Smolla, at 92.

43. *Id.* at 94. "*Time* seeks to litigate the entire history of the Lebanese civil war, the Israeli invasion of Lebanon, and the relationship of Israel and the Phalangists. These contents are far removed from the legitimate issues. They would be important if *Time* had merely stated in the article at issue that it thought that the Commission was involved in finding Minister Sharon not 'directly' responsible an opinion for which *Time* in any event would have been immune from suit. But the jury may find that *Time* said something very different by reporting that the Commission knew and withheld from the public details which could reasonably suggest that Minister Sharon condoned or encouraged the massacre as a measure of revenge".

44. 23 Laws of the State of Israel ("LSI"), at 32 (1968) as amended in 26 LSI, at 31 (1972).

45. Article 1.

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."⁴⁶ In accordance with Article 20(a) a commission may refrain from publishing portions of the report if necessary to protect, *inter alia*, the interest of national security. Article 15(a) requires the chairman of a 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 is likely to be harmed and to place at his disposal such evidence relevant to the potential harm as is in the possession of the commission or of a person authorized to collect materials for the commission under Article 13.

On 28 September, 1982 the Israeli Cabinet reluctantly resolved to establish a commission of inquiry when the Sabra and Shatilla massacres became a world-wide concern. The commission consisted of three members, Yitzhak Kahan, President of Israel's Supreme Court and Commission Chairman, Aharon Barak, Justice of the Supreme Court, and Yona Efrat, a reserve Major General in IDF.⁴⁷

The Israeli Cabinet drew the terms of reference for the Commission. It was to examine "all the facts and factors connected with the atrocity [*sic*] carried out by a unit of the Lebanese Forces against the civilian population in the Shatilla and Sabra camps."⁴⁸ In spite of this quite limited scope of the inquiry, the Commission did in fact broaden its authorization by investigating whether it was indeed only a "unit of the Lebanese Forces" which perpetrated the massacres. However, the Commission's factual inquiry was limited to the events of 16 to 18 September, 1982 the days on which the massacres occurred. In delivering its functions, the Commission was further hampered in several respects. It visited Beirut but was not allowed to enter the area of the massacres.⁴⁹ The Commission published notices to the public inviting testimony or any other information on the massacres; the response was however very limited. It also attempted to collect testimony from witnesses outside its jurisdiction, but its requests "were not always honoured."⁵⁰

46. Article 18(a).

47. Kahan Report at 1.

48. *Id.*

49. *Id.*

50. *Id.* See also Kapeliouk, *Sabra and Shatilla: Inquiry Into a Massacre* 81 (1984) (hereinafter "Sabra and Shatilla"). Kapeliouk expressed his belief that Arab witnesses (which 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.

The Commission conceded "not a few contradictions" about the facts evolved from the testimony which were resolved "in accordance with the usual criteria in judicial and quasi-judicial tribunals," otherwise left undefined.⁵¹ It did not purport to resolve all such contradictions, particularly those that "relate 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 are no exact notes on these conversations."⁵² It further 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".⁵³ Surprisingly, some of the conflicts which the Commission felt no need to resolve would appear to be not only significant but crucial to determination of responsibility.

The Commission, according to Article 20 of the Law, did not publish the notorious Appendix B of the Report to protect the "nation's security and foreign relations." It further issued, according to Article 15(a), a resolution pursuant to which notices of potential harm were sent to nine people - Prime Minister Menachem Begin, Foreign Minister Yitzhak Shamir, Minister of Defence 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 Minister of Defence Ariel Sharon, Avi Duda'i.⁵⁴

B. Factual Background Leading Up to the Day the Massacres Began.

It is important to state that the Commission was prudent in establishing the relationship between Israel and the Phalangists, and to point out the political motivations and attitude of the latter. The Phalangist's leaders, as the Commission noted, were of the opinion that "no unified

51. Kahan Report at 3.

52. *Id.*

53. *Id.* For a critical appraisal of the Commission's limitations and functions see Schwarzenberger, *Beirut 1982 - An Interdisciplinary Test Case*, 38 *The Year Book of World Affairs* 295, at 301-303, 305 and *passim* (1984) (hereinafter "Schwarzenberger").

54. Kahan Report, at 3.

and independent Lebanese state could be established without a solution being found to the problem of the Palestinian refugees,"⁵⁵ and that such solution was by "removing a large portion of [those] refugees from Lebanese soil, whether by methods of persuasion or other means of pressure."⁵⁶ The Phalangist leaders "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."⁵⁷

"In all the testimony" that the Commission heard, there was "unanimity" that the "battle ethics" of the Phalangists "differ greatly" from those of the IDF.⁵⁸ The Mossad, the Israeli agency that was in charge of communications between the Phalangists and Israel, held that during the various meetings that took place with Bashir Jemayel "they heard things from him that left no room for doubt that the intention of this Phalangist leader was to eliminate the Palestinian problem in Lebanon when he came to power - even if that meant resorting to aberrant methods against the Palestinians in Lebanon."⁵⁹ The Commission reported that there were massacres committed by the Phalangists against women and children in Druze villages as well as the liquidation of Palestinians carried out by the Phalangist leader of the intelligence unit, Elie Hobeika.⁶⁰

Israel's invasion of Lebanon began on 6 June 1982.⁶¹ From 12 to 14 June, IDF forces took over the suburbs of Beirut and joined the Christian forces controlling East Beirut.⁶² On 25 June the encirclement of West Beirut was completed and the PLO forces and Syrian troops were under siege.⁶³ It was a highly destructive war where the Israeli airforce and artillery played a major role in bombing and shelling West Beirut. On 19 August 1982, an agreement was reached for the evacuation of the PLO and Syrian forces from West Beirut,⁶⁴ an operation which was completed by 1 September 1982. On 23 August, Bashir Jemayel was

55. *Id.* at 4.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Text in *Journal of Palestine Studies*, Nos. 44-45 (Summer/Fall 1982), at 347.

elected president of Lebanon and he was due to assume his duties a month later.

In the afternoon of 14 September 1982, a large explosion took place in the Phalangists headquarters where Bashir Jemayel was meeting with Phalangist leaders and commanders. Israeli leaders came to know that Mr Jemayel was killed in that explosion at 11.00 p.m. of that day. It "was then that the decision was taken... that the I.D.F would enter West Beirut."⁶⁵ The decision apparently was taken in a conversation between the Prime Minister and the Minister of Defence, Mr Sharon, and between the Prime Minister and the Chief of Staff. In one of the consultations between Mr. Sharon and the Chief of Staff, there was mention of involving the Phalangists in their operations; but at that stage, such inclusion of the Phalangists was not mentioned to the Prime Minister.⁶⁶

The operating order for the entry into West Beirut that would play a pivotal part in the ensuing massacres was Order number 6 to the IDF which 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.⁶⁷

The same Order also stated that the Lebanese Army "is entitled to enter any place in Beirut, according to its request."⁶⁸ At this point, the events that would ultimately culminate in the massacres at the Sabra and Shatilla camps were set in motion.

On 15 September 1982, the IDF entry into West Beirut began.⁶⁹ That same day between 8:00 a.m. and 9:00 a.m. Sharon met at the forward command post with General Eitan, the Chief of Staff, who reported on his agreement with the Phalangists for their entry into the camps.⁷⁰ Sharon approved the agreement and phoned Prime Minister Begin from the roof of the command post.⁷¹ According to the Report, Sharon only informed Begin that there was no resistance in Beirut and

65. Kahan Report, at 5.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

that the operations were going well.⁷² Also present on the forward command post were the Defence Minister's aide 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 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.⁷³ On 16 September, a document signed by Duda'i would be used by Sharon's office summarizing in two crucial and controversial sentences Sharon's instructions in this meeting on the entry into West Beirut: "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."⁷⁴ Sharon left the meeting for the Phalangist headquarters, along with the director of Military Intelligence and representatives of Mossad. From this meeting Sharon left to pay a condolence call on the Jemayel family.

After the condolence call, Sharon at 6:00 p.m. spoke with Begin from his home, and reported that "everything is in order", and reconfirmed his approval of their decision to enter West Beirut.⁷⁵ According to the Report, there was no discussion of authorization of the Phalangists to enter the camps.⁷⁶

C. The Massacres

Thursday, 16 September 1982 was the day on which the massacres would begin. Eitan returned to Tel Aviv early that morning.⁷⁷ At 10:00 a.m. Sharon met in his office with Eitan, among others.⁷⁸ Eitan announced

the 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.⁷⁹

Eitan stated that the Sabra and Shatilla camps were surrounded by

72. *Id.*

73. *Id.*

74. *Id.* at 6.

75. *Id.* at 5.

76. *Id.* at 14.

77. *Id.* at 5.

78. *Id.*

79. *Id.* (emphasis added).

IDF forces and the Phalangists would go in when they wanted to go in after coordinating with the Israeli officials.⁸⁰ Sharon stated he "would send the Phalangists into the refugee camps."⁸¹ During the meeting, Sharon telephoned Begin and informed him

...the 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. I am bringing the Chief of Staff to the Cabinet meeting. That's the situation as of now...⁸²

At approximately 6:00 p.m. on Thursday, 16 September, the Phalangists entered the camps.⁸³ As the first reports of the massacres were arriving at the Israeli command post in Beirut on 16 September, the Israeli Cabinet was meeting to discuss the situation in Lebanon after Jemayel's assassination.⁸⁴ Attending the meeting were the Prime Minister and the Cabinet Ministers, including Sharon, the Chief of Staff, the head of Mossad, and the director of Military Intelligence.⁸⁵ The Chief of Staff, in describing his meetings with Phalangist personnel, said he had told the Phalangist commanders to go in where they were told, early that evening the Phalangists would begin fighting in Sabra, and that the Phalangists would go in there "with their own methods."⁸⁶ 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

80. *Id.*

81. *Id.*

82. *Id.* at 56.

83. *Id.* The Report at this point in its analysis, in a marked departure from its generally unemotional tone, states that there were "armed terrorist forces" in the camps whose extent they could not establish but whose arms were being used against IDF. As noted in the Report, these hidden arms and terrorists never materialized. Kahan Report at 67. The Commission concludes that this terrorist force had not been evacuated for two reasons: renewal of underground terrorist activity at a later period, and to protect the civilian population which 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.

84. *Id.* at 7.

85. *Id.*

86. *Id.*

the Lebanese army was less malleable.⁸⁷

Deputy Prime Minister Levy was the only person to question the Phalangists' entry into the camps.⁸⁸ No one responded to his expression of concern.⁸⁹ The Cabinet adopted a resolution which attributed the entry into West Beirut in part to the continued presence in Beirut of "some 2,000 terrorists, equipped with modern and heavy weapons... in flagrant violation of the evacuation agreement..."⁹⁰

During the night of Thursday and in the early morning of Friday as the massacres continued, the reports about civilian killings began to circulate among the IDF officers at the forward command post. At 8:00 a.m. on Friday, a highly respected Israeli journalist, Ze'ev Schiff, received a report from an undisclosed source in the General Staff in Tel Aviv that there was *dab'h* (Arabic for slaughter) going on in the camps.⁹¹ At 11:00 a.m. Schiff met with Minister Zipori at the Minister's office to tell him about the report of "slaughter" in the camps he had received.⁹²

From 6:00 p.m. to 8:00 p.m. on Friday, 17 September, 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 IDF soldiers in the hospital building in Beirut."⁹³ The Report says the Ministry saw to clarification of the complaints and, according to the Report, the charges against the IDF soldiers were resolved to be "unfounded."⁹⁴

Between 8:00 p.m. and 9:00 p.m. on Friday, Eitan returned to Israel and phoned Sharon to update him on the situation in Beirut. Sharon's testimony and Eitan's testimony on this conversation 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

87. *Id.* After the massacres, Eitan told reporters: "We do not give the Phalangists orders and we are not responsible for them. The Phalangists are Lebanese and Lebanon is theirs and they act as they see fit." N.Y. Times, Sept. 20, 1983, at 6, col. 3.

88. Kahan Report, at 7.

89. *Id.*

90. *Id.*

91. *Id.* at 8.

92. *Id.*

93. *Id.* at 9.

94. *Id.*

due to pressure from the United States.⁹⁵ He testified that he did not mention disorderly behaviour by the Phalangists, massacres or "killing beyond what had been expected."⁹⁶ In contrast, Sharon testified that Eitan had informed him that "the Christians had harmed the civilian population more than was expected."⁹⁷ He further testified that Eitan "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."⁹⁸ Sharon said that Eitan also mentioned that civilians had been killed; he claimed that was the first report of "irregular activity" to reach him.⁹⁹ The Commission credited Sharon's version of the telephone conversation, concluding that from this point on he knew that killings of civilians had been carried out in the camps.¹⁰⁰ 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 into the camps and its potential consequences.¹⁰¹ Finally, at 11:30 p.m., Mr Ben Yishai, the television military correspondent, called Sharon and told him of the reports he had heard that "the Phalangists were doing unacceptable things in the camps."¹⁰² Sharon did not react - by this time such reports were no longer news to him.

In his first appearance before the Commission, Eitan testified that at about 10:00 a.m. on Saturday, 18 September, Begin had phoned to tell him that the Americans were complaining that the Phalangists had entered Gaza Hospital and were killing patients.¹⁰³ At Eitan's order the complaints were investigated, it was concluded there were no such killings, and he so informed the Prime Minister. Begin, however, had testified he was in a synagogue for Rosh Hashanah from 8:00 a.m. to 1:15 p.m.¹⁰⁴ When the Commission pointed out Begin's testimony as to

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 10.

104. *Id.*

his attendance at the synagogue to Eitan in his second appearance, Eitan said the phone call must have taken place earlier in the morning.¹⁰⁵ Begin denied the call altogether as well as any American call to him about Gaza Hospital.¹⁰⁶ Sharon, however, testified that Eitan had spoken to him by phone between 9:00 a.m. and 10:00 a.m. and had told him (Sharon) that Begin had called his attention to "some occurrence at Gaza Hospital." 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..."¹⁰⁷

On Saturday morning, Sharon was receiving additional complaints about the slaughter. The Director-General of the Foreign Ministry, Mr Kimche, told Sharon that United States ambassador Draper had informed him that IDF soldiers had entered banks in Beirut and that Palestinians had been massacred.¹⁰⁸ Sharon's reply to Mr Kimche, given at approximately 1:00 p.m., was that the Phalangists' operation had been stopped and their forces expelled from the camps.¹⁰⁹ At 3:00 p.m. on Saturday, Drori told Sharon about the reports of the massacre, that the Phalangists had left the camps, and that the press and Red Cross were inside the camps.¹¹⁰ At 5:00 p.m. Drori appealed to the Lebanese army to enter the camps.¹¹¹ It finally agreed to do so between 9:30 and 10:00 p.m. that evening but did not do so until Sunday, the following day.¹¹²

Having failed to address Begin's knowledge of trouble in the camps earlier that day,¹¹³ the Report notes only that the Prime Minister "heard about the massacre" on a BBC radio broadcast that Saturday evening, at which point he contacted Eitan and Sharon.¹¹⁴ The Report itself acknowledges that it is "ostensibly puzzling"¹¹⁵ that Sharon did

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 15.

not inform Begin of the Phalangists' entry into the camps, and that Begin knew nothing of the plan until the Cabinet meeting on 16 September.¹¹⁶

At 9:00 p.m. on Sunday, 19 September, a Cabinet meeting took place with the additional participation of Eitan, the head of the Mossad, the director of Military Intelligence Saguy, Major General Drori and other unnamed individuals.¹¹⁷ 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... how many civilians they had killed; they did not say anything...¹¹⁸

Eitan explained in his testimony that his knowledge of killings was on the morning of Saturday, not Friday morning.¹¹⁹ The Commission accepted his explanation.¹²⁰ In the course of the meeting and the subsequent testimony, Begin confirmed that on 14 September, when the decision to enter West Beirut was made, he had spoken to the Chief of Staff about protecting "the Muslims from the vengeance of the Phalangists,"¹²¹ demonstrating their cognizance of the danger 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.¹²² 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.¹²³

It will never be known exactly who or how many were killed. The official burial of the dead was done by the Red Cross which counted 328 bodies, while the number given by the IDF intelligence sources is

116. *Id.* at 14.

117. *Id.* at 10.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 11.

123. *Id.*

between 700 and 800 victims.¹²⁴

III The Report's Delineation of "Direct and Indirect" Responsibility for the Massacres.

The Commission devised two levels of responsibility—direct and indirect.¹²⁵ Those directly responsible were only those who "actually perpetrated" the massacre itself.¹²⁶ Therefore, it was relatively simple for the Commission to determine that Israel was not directly responsible for the massacres and it concluded that "the atrocities in the refugee camps were perpetrated by members of the Phalangists, and that absolutely no direct responsibility devolves upon Israel or upon those who acted in its behalf."¹²⁷

A. Responsibility of Israel and its Officials.

If, as the Report states, the Israeli officials planned and aided the Phalangists in the entry into the camps, and the Israeli officials knew or should have known that the massacres were likely to result and were occurring, then why was Israel not directly responsible? The Commission stated there was no direct responsibility because the Israeli officials did not allow the Phalangists to enter the camps with the intent that a massacre occur or as a plan with the Phalangists for a massacre to take place.¹²⁸ The Commission concludes that allowing the Phalangists to enter the camps was made to avoid additional casualties in the IDF forces and to exploit the Phalangists' expertise in identifying "terrorists."¹²⁹ Others have made a convincing argument that there was such a plan and intent.¹³⁰ The Commission also concludes, in a highly

124. *Id.* at 10.

125. *Id.* at 11. For a critical evaluation of the issue of direct and indirect responsibility, see Green, *War Crimes, Extradition and Command Responsibility*, 14 *Isr. Y.B.H.R.* 17, at 39 and *passim* (1984) (hereinafter "Green").

126. Kahan Report, at 11.

127. *Id.* at 13.

128. *Id.* at 12.

129. *Id.* One article noted that the plan for the Phalangists to enter the camps "fits 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 PLO, thereby sparing the Israeli army heavy casualties." *N.Y. Times*, Sept. 20, 1982, at 8, cols. 4-5.

130. Jansen, *Battle of Beirut: Why Israel Invaded Lebanon* at 107-109 (1985) suggests that the massacres, if not their precise extent, may have been planned to

questionable factual finding that nothing was visible or audible from the roof of the forward command post to indicate a massacre was taking place.¹³¹ Therefore, the only forces found directly responsible were the Phalangists.¹³²

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:

[It] 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.*¹³³

The Report does conclude that Israel and Israeli officials were 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 began 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

promote an exodus of Palestinians from Lebanon (hereinafter "Jansen"). See also N.Y. Times, Sept. 29, 1982, at 10, cols. 4-5. Other sources have 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. See, e.g., Boyle, *International Law and Organization as an Approach to Conflict Resolution in the Middle East* 7 (1983) (hereinafter "Boyle").

131. Kahan Report at 12. 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.

132. *Id.* at 12.

133. *Id.* at 16 (emphasis added). During the Sharon trial, an Israeli Army Reserve major, Nahum Menachem, testified that only four days before the massacres he warned Sharon that there was likely to be a slaughter among the factions in Lebanon, but Sharon had said there was nothing to worry about. Menachem had previously given the same testimony to the Kahan Commission.

and exhausts Israel's indirect responsibility for what occurred in the refugee camps. ¹³⁴

In the section on individual personal responsibility, the Kahan Report concluded that Begin, Sharon, Shamir, Eitan, Saguy, Drori, the head of Mossad, and Yaron, 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. ¹³⁵

B. The Findings as to Sharon's Responsibility

The notice of harm sent to Sharon stated that he might be harmed if the Commission determined that he ignored or disregarded the danger of acts of revenge or bloodshed perpetrated by Lebanese forces against the population of the refugee camps in Beirut, and did not order the adoption of the withdrawal of the Lebanese forces from the refugee camps as quickly as possible and the adoption of measures to protect the population in the camps when information reached him about the acts of killing or excesses that were perpetrated by the Lebanese forces. The Commission found it "impossible to justify" ¹³⁶ Sharon's disregard of the danger of a massacre, particularly after Bashir Jemayel's assassination, remarking that the likelihood of the Phalangists committing atrocities "did not concern him in the least." ¹³⁷

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

If in fact the Defence 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 the 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

134. *Id.* at 13.

135. *Id.* at 13-20. At the conclusion of its determination, the Report made only "recommendations" of certain measures to be taken against the eight faulted individuals.

136. *Id.* at 15.

137. *Id.*

proper consideration in this instance.¹³⁸

Sharon was severely censured for failing to impose any checks on the Phalangists, but not for his failure to halt their operations - because the Commission had found that Sharon learned of the killings Friday evening and was told that the Phalangists would be out by the next morning.¹³⁹

The Report concluded as to Sharon:

We have found, as has been detailed in the report, that the Minister of Defence bears personal responsibility. In our opinion, it is fitting that the Minister of Defence 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 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."¹⁴⁰

IV. Sharon's Responsibility for the Massacres Under International Law.

For the nine Israeli officials to whom the Commission sent notices of harm, including and particularly Ariel Sharon, their legal responsibility for the civilian massacres in Sabra and Shatilla refugee camps could be determined in the light of the relevant principles of international law.

A. The International Law Criteria - The Nuremberg Principles.

At the close of the Second World War, the four major allied powers drafted the Charter of the International Military Tribunal. ("IMT").¹⁴¹ The Charter was applied by the Tribunal in the trial of the major German defendants. It provided for the individual criminal responsibility in cases of committing crimes against peace, war crimes or crimes against humanity. These principles of customary international law were affirmed by the United Nations General

138. *Id.*

139. *Id.*

140. *Id.* at 22.

141. 1 I.M.T. at 10-16.

Assembly.¹⁴² It is important to point out that in the *Eichman* case,¹⁴³ Israel's High Court applied these principles with full recognition that they constitute an integral part of customary international law.

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 crimes" to mean "violations of the laws or customs of war" which include "murder [and] ill treatment.. of civilian population of or in occupied territory,... not justified by military necessity." Article 6(c) defines "crimes 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 U.N. Charter and several resolutions on aggression pursuant to the U.N. Charter. Specifically, Israel's invasion of Lebanon was a war of aggression, not self-defence. Articles 2(3) and 33 of the Charter, binding on Israel as a member of the United Nations and binding as customary international law, requires members to settle international disputes by peaceful means. Article 2(4) prohibits member states from using force against the "territorial integrity or political independence of any state...". There are only six instances in which the use of force is justified under the Charter,¹⁴⁴ none of which is applicable to

142. G.A. Res. 95 (1) U.N. Doc. A/64/Add. 1 (1946).

143. *Eichmann vs Attorney General of the Government of Israel* [1961] 36 Int'l. L.R. 227 (1962).

144. There are rights of individual and collective self-defence 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 peacekeeping 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. Boyle, at 4.

Israel's invasion of Lebanon. ¹⁴⁵

Moreover, even if the invasion could be viewed as an exercise of self-defence, it would go beyond the parameters of permissible self-defence in its failure to be proportional to the triggering aggression. ¹⁴⁶ From the cease-fire on 24 July 1981 until the June 1982 invasion, Israel claimed before the Security Council that the PLO had claimed seventeen victims. ¹⁴⁷ It has been estimated that as many as twelve to fifteen thousand civilians died in Lebanon as a result of Israel's invasion. ¹⁴⁸

The leaders, organizers and other Israeli officials who acted to formulate and execute the invasion are responsible for all acts performed by any persons in the execution of the invasion under Article 6 of the Nuremberg Principles. From the Kahan Report and other source material it is clear that the Phalangists' entry into and their "mopping up" of the camps were viewed as an integral and necessary part of the invasion of Lebanon from its inception, ¹⁴⁹ for which these Israeli officials are responsible under the said Article 6(a). Sharon himself insisted on the entry into the camps was necessary to rid them of 2000 "terrorists", ¹⁵⁰ although these terrorists failed to materialize. ¹⁵¹

Aside from their responsibility for the massacres predicted on the illegal invasion, the individuals sent notices of harm by the Commission (with only the possible exceptions of the head of Mossad and Duda'i, whom the Commission absolved) would be responsible for war crimes against humanity given the findings of the Report. Under customary international law, an official or commander who has actual knowledge,

145. Mallison & Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting*, at 21-22 (1983) (hereinafter "Mallison & Mallison"). The authors demonstrated the failure of Israel to meet the legal requirement of exhausting peaceful procedures. The authors further argue at *Id.* 22-29 the failure of Israel to fulfil the legal requirements of necessity and proportionality in the "armed conflict" situation.

146. *Id.* at 22-29.

147. *Id.* at 23.

148. Jansen, at 25.

149. Kahan Report, at 12; see also N.Y. Times Sept. 26, 1982, at 6. 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 6, col. 5. Sharon testified before the Commission that there had been a "longstanding Cabinet decision taken early in the war" to involve the Phalangists in the fighting to diminish IDF casualties.

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

151. See, Kahan Report, at 6-7.

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 insure compliance with the law of war is responsible for such crimes.¹⁵² The Kahan Report found that "... if in fact the Defence Minister, when he decided that the Phalangists would enter the camps without the IDF taking part in the operation, did not think that the 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 ... distracted him . . ." ¹⁵³ Thus, the Report suggests that he was aware a massacre might occur but "disregarded" that risk and, therefore, acted recklessly or, at the least, negligently, in sending the Phalangists into the camps.

B. The International Law Criteria - The Genocide Convention.

The question has also been raised whether Israeli involvement in the massacres constitutes genocide.¹⁵⁴ The Convention on the Prevention and Punishment of the Crime of Genocide was drafted following the Second World War to outlaw the Nazi government's atrocities committed on the basis of national, ethnic, racial or religious identification and to prevent the occurrence of such atrocities. It was approved by the U.N. General Assembly and entered into force on 12 January, 1951.¹⁵⁵ Israel is a party of that Convention, and it had enacted an Israeli Law that basically followed the tenet of the Convention.¹⁵⁶ The International Court of Justice stated in its Advisory Opinion that under the Convention "the Contracting States do not have any interest of their own; they merely have, one and all, a common interest," namely

152. Application of Yamashita, 327 U.S. 1 (1946). Yamashita was tried by a special military commission for massacres of civilian population in the Philippines - the gist of the charge being his failure as army commander to control his command and thereby allowing them to commit the alleged atrocities; see also U.S. Army Field Manual 27-10, *The Law of Land Warfare*, paragraph 501, at 178-79 (1956).

153. Kahan Report at 15.

154. Mallison & Mallison, at 73.

155. The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (hereinafter "Genocide Convention"), was adopted unanimously by the General Assembly on Dec. 9 1948. 3 U.N. GAOR, Part I, Annex, p. 494, Doc. A/760 (1948).

156. See, The Crime of Genocide (Prevention and Punishment) Law, 1950 at 4 LSI, at 101 (1950); See also Schwarzenberger, at 317-318.

the achievement of the Convention objectives.¹⁵⁷

The pivotal substantive provisions are contained in Articles II, III and IV of the Genocide Convention. The Convention follows the basic tenet of criminal law in that there must be both an act, or an omission to act where there is a legal duty to do so, and the requisite intent, for criminal liability.¹⁵⁸ To establish liability for genocide under the Convention, therefore, 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 ...".¹⁵⁹ Article IV of the Genocide Convention states that persons committing genocide or any of the other acts under Article III "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."¹⁶⁰

The unresolved issue is whether a party's reckless indifference to the likelihood of a massacre of the Palestinians is sufficient intent for liability, or whether it is necessary that the party's actions were taken with the intent that a massacre of the Palestinians would occur. By analogy to American criminal law, in the second case there would be the requisite intent for international murder, whereas in the first there would be reckless or grossly negligent homicide. Given the severity and seriousness of the crime of genocide, and the Convention's explicit emphasis on intent, it is submitted that recklessness or gross negligence would not be sufficient intent. The requisite intent should be intent to kill (or intent to seriously harm) Palestinians as such, even if the precise degree of harm or extent of killing was not specifically anticipated.¹⁶¹ Even if intent in its strictest sense is required, it should be pointed out by analogy to American criminal law that proof of the consequences which may be reasonably anticipated from a party's actions can be circumstantial evidence of a party's actual intent.¹⁶² Therefore, the Report's conclusion that some of the nine named individuals, including Sharon, knew or should have known a massacre would take place, or that it was taking place, may be evidence of their actual intent

157. *Reservations to the Convention on Genocide*, (1951) I.C.J. Reps. 23.

158. Lafave & Scott, *Criminal Law* 175-77 (1972).

159. Genocide Convention, Art. II.

160. See the persuasive arguments on this issue advanced by Mallison & Mallison at 74.

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

162. See generally Sohn & Buergethal, *International Protection of Human Rights*, 913-992 (1973) (sources noting the high standard of proof for intent under the Convention).

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.¹⁶³ Yet the Commission was less charitable in its determination of the intent of Sharon in sending the Phalangists into the camps. The Report suggests that Sharon not only should have been aware that a massacre might occur, but that he consciously regarded the risk of a massacre occurring.¹⁶⁴ By analogy to American criminal law and assuming that actual intent must be demonstrated, Sharon would only be responsible for genocide if it could be demonstrated that it was his conscious object that a massacre occur or if he was aware that a massacre was practically certain to occur.¹⁶⁵

The use of terms such as "purifying and purging,"¹⁶⁶ "mopping up,"¹⁶⁷ and "cleaning up"¹⁶⁸ the camps does not reflect favourably 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 unanimously concluded:

The massacres that took place at 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."¹⁶⁹

163. Kahan Report, at 12.

164. *Id.* at 15; see also Green at 41-42, 45.

165. See, e.g. Model Penal Code 202(2) (ALI 1985).

166. N.Y. Times, Sept. 20, 1982, at 6, col. 4; Wash Post, Sept. 21, 1982, at A14, col. 6.

167. N.Y. Times, Sept. 23, 1982, at 8, col. 4.

168. N.Y. Times, Sept. 20, 1982, at 6, col. 5; N.Y. Times, Sept. 23, 1982, at 8, col. 6; N.Y. Times, Sept. 26, 1982, at 11, col. 2. Similarly, extensive bombing of the Palestinian camps and their bulldozing (see Mallison & Mallison at 61-64; Jansen at 15-39) 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, at 4.

169. *Israel in Lebanon Report of the International Commission to Enquire into Reported Violations of International Law by Israel during its Invasion of Lebanon* 196 (1983). The Commission was chaired by Sean MacBride, former Irish Foreign Minister, former United Nations 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." 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."

C. The International Law Criteria - The Laws of War

The international law principles governing the laws of war are mainly codified in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land¹⁷⁰ and the Fourth Geneva Convention for the Protection of Civilian Persons of 1949.¹⁷¹ Both documents set forth *inter alia* the duties of an occupier towards the public of an occupied territory. The Hague Convention, a multilateral treaty, was generally recognized as customary international law binding on all nations by the Nuremberg Tribunal¹⁷² and has been so recognized by the Supreme Court of Israel in the *Elon Moreh* case.¹⁷³ Article 43 requires an occupying power to take all measures in its power to restore and ensure public order and safety. According to Article 42 of the 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.

Israel has signed and ratified all the Geneva Conventions.¹⁷⁴ The Fourth Convention embodies the principles of belligerent occupation relating to the status of the civilian population in areas under military occupation as a result of war. It applies in all cases of partial or total occupation of the territory of a High Contracting Party.¹⁷⁵ The Fourth Convention has expanded the scope of the Hague Convention for the protection of civilians living in occupied territories. Article 27 of the Convention established the principle of respect for and the inviolable character of individual human rights. It states that "Protected persons are entitled, in all circumstances to respect for their persons, their honour, their family rights, ... They shall at all times be humanely treated and shall be protected against all acts of violence..." Article 32 specifically provides for the prohibition of any party to take "any measure of such a character as to cause the physical suffering or extermination of protected persons" whether such measures are applied by "civilian or military agents."

Israel under the Fourth Geneva Convention and the 1907 Hague

170. 36 U.S. Stat. 2277.

171. 75 U.N.T.S. 287.

172. See 1 I.M.T. 171 at 254 (1947).

173. See text in I Pal. Y.B. Int'l. L. 134 (1984). See, also, *Id.* at 164.

174. See Boyd, *the Applicability of the Fourth Geneva Convention to the Occupied Territories*, 1 Isr. Y.B.H.R. 258 (1971); Schwarzenberger, at 318 and note 89 thereof.

175. See Mallison & Mallison, at 54-66.

Convention had an affirmative duty to protect the civilian population in the occupied refugee camps. Israel's occupation of West Beirut satisfied this standard as both Sharon and Eitan declared on 16 September 1982, that all of Beirut was under Israeli control. Yet, it failed to do so. Its failure to provide protection could be conceptualized as direct and public incitement to commit genocide, complicity in genocide or conspiracy to commit genocide. There was, at the least, a clear failure to stop the Phalangists immediately once the killing was known to Israeli officials, particularly General Sharon.

V. Conclusion: "Finding the Truth, the Whole Truth, and Nothing But the Truth"

Here is what we know after *Sharon vs Time* and the Kahan Report: Justice Kahan stated that in none of the documents or testimony was there any evidence or suggestion that Sharon had discussed revenge with any Phalangist or that there was any mention of the possibility of the massacre taking place. The jury concluded that: (1) the statement implied that Sharon "consciously intended" for a massacre to take place; (2) that Sharon did not in fact discuss revenge with the Phalangists; and (3) that *Time* should have known that the statement was false but did not. Halevy reached his conclusion, that Sharon had discussed revenge and that this was substantiated in Appendix B, based primarily on what he perceived as a disparity between the factual findings of Sharon's involvement according to the Report and the severity of the Report's conclusions on Sharon's "indirect" responsibility. The Kahan Report found that Sharon was aware of a substantial risk that a massacre might occur, but disregarded that risk and sent the Phalangists into the camps.

What we do not know is the elusive "truth." Did Sharon discuss revenge with Phalangists, or know that a massacre would occur? The truth or falsity of the factual assertion that Sharon discussed revenge with Phalangists or knew that a massacre might occur and thereby intended for it to occur, was determined from those documents which Justice Kahan examined, upon which his conclusions were drawn, and Sharon's own testimony.

Regardless of whether or not Halevy deduced the truth about Sharon's responsibility for the massacres, that truth could not be documented. In the most emotional part of his testimony, Halevy spoke of his disappointment with his boyhood hero, his outrage at Jewish terrorism in the West Bank,¹⁷⁶ and the tragedy of the war in

176. For Jewish terrorism in the Occupied Territories, see The Karp Report in I Pal. Y.B. Int'l. L. at 185-217.

Lebanon. In his closing argument, *Time's* lawyer quoted Sharon as saying his suit was the way he was "going to wash [his] hands clean of this terrible mess."¹⁷⁷ *Sharon vs Time* was a public opinion battle Sharon desperately needed to win. Oddly enough, it was not a struggle to regain public acceptance in Israel. Despite some debate, the unity government led by Shamir and Peres had paid for the airfare and hotel expenses of Sharon and his wife as though he were on official business in his new role as Minister of Industry and Trade, because neither Shamir or Peres could risk the fragile unity of the coalition government.¹⁷⁸ *Time* paid some of Sharon's legal fees.¹⁷⁹ The actual battle was to regain the public acceptance necessary for his future political career in the opinion of Israel's strongest ally, the United States. The lawsuit was Ariel Sharon's opportunity to remove the cloud of "indirect responsibility" attributed to him for the Sabra and Shatilla massacres in the Kahan Commission Report.

After the Kahan Report, Sharon was reported to have "lashed out" at the governing Herut party for denying him a portfolio in the newly formed government of Shamir.¹⁸⁰ Shimon Peres was particularly outspoken in his demands for the resignation of Begin and Sharon for Israeli involvement in the massacres.¹⁸¹ He also called for Sharon's resignation for sending the army into West Beirut without Cabinet approval.¹⁸² Sharon's explanations to the Israeli Knesset had only increased the demand for an investigation and caused outrage at Sharon's conduct before the Knesset. In the course of his presentation Sharon had implied that, when Shimon Peres was Defence Minister, Israeli forces had been involved in the massacre of "thousands" at the Tell Zaatar refugee camp in Lebanon in 1976.¹⁸³

177. N.Y. Times, Jan. 11, 1985, at B4, col. 2.

178. N.Y. Times, Dec. 14, 1984, at B9, cols. 2-5.

179. New Yorker, June 23, 1986, at 82. The one million dollars in legal expenses were defrayed by contributions from Sharon supporters in the United States and overseas, with a partner at the law firm employed by Sharon, and a former official of the Anti-Defamation League of B'nai Brith, raising more than \$350,000 from private donors. N.Y. Times, Jan. 25, 1985, at B4, col. 6.

180. N.Y. Times, Jan. 13, 1984, at A3, col. 1.

181. N.Y. Times, Sept. 20, 1982, at 1, cols. 2, 4 & 5; N.Y. Times, Sept. 21, 1982, at 1, col. 3.

182. *Id.*

183. N.Y. Times, Sept. 23, 1982, at 8, col. 2; see also Salpeter, *A Soldier's Record: Will Sharon Survive?* 20 *The New Leader* 6-7 (Nov. 1, 1982) Sharon has said that as long as he continued to have "some influence," he would continue to serve in the government. To quote Jonathan Randal, senior foreign correspondent of

Sharon had called *Time's* report "blood libel,"¹⁸⁴ but the blood that had been spilled was that of unarmed men, women and children in Lebanon. In an article expressing outrage at Sharon's use of the term, Amos Perlmutter contended:

Mr Sharon is thus wrapping himself in the flag of Israel and Judaism, not to make a moral point but to protect his scarred reputation and resurrect his political career. In charging *Time* with blood libel, he is playing upon the Jewish people's historic anxieties about their relations with Christians - exploiting centuries of tragedy and misunderstanding to serve his personal ambition.¹⁸⁵

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 Defence Minister, only to stay on as minister without portfolio and to join two key parliamentary commissions, on defence 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.

Randal, *Going All the Way: Christian Warlords, Israeli Adventures, and the War in Lebanon*, 289 (1983).

184. Smolla, at 82.

185. N.Y. Times, Dec. 5, 1984, at A31, cols. 1-2.