1984

The Kahan Report: Justice Denied

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Repository Citation
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On September 28, 1982 the Israeli Cabinet resolved to establish a commission of inquiry pursuant to Israel's Commission of Inquiry Law of 1968, largely in response to the largest protest demonstration ever held in Israel's history. The charge to the commission was to examine "all the facts and factors connected with the atrocity carried out by a unit of the Lebanese Forces against the civilian population in the Shatila and Sabra camps." The selected chairman of the commission was Yitzhak Kahan, President of the Israeli Supreme Court.

The Begin administration was compelled, despite its obvious reluctance, to establish the Commission in response to international outrage over the massacres and internal domestic protests against Israeli involvement, which was gradually revealed in the press after initial denials by the Begin government of any involvement in the massacres. By February 9, 1983, when the Kahan Report was released, the massacres had already been absorbed into the morass of tragedies which had occurred and still are occurring in Lebanon. But 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. A brief flurry of reprimands, to the extent they can be nominated as such, followed—a few military and military intelligence personnel lost their positions; Sharon, one of the most harshly criticized individuals in the Report, lost his portfolio. The Report was heralded as a triumph of democracy, a testing and reaffirmation of the principles upon which Israel was founded. The conscience of a nation (or perhaps nations—including the United States) was appeased.

A fundamental misconception of the Report is that it was a resolution of national and individual liability for the massacre under principles of international law and human rights. It was not, nor did it purport to be, such a resolution. Before examining the responsibility of Israel and its officials under international law, it is necessary to review briefly relevant portions of the Report's analysis and conclusions.

The Commission's factual inquiries and conclusions relate only to the events of September 16-18, 1982, not to the overall illegality of the invasion or its aftermath. Also, although the resolution authorizing the Commission speaks of the atrocities carried out by "a unit of the Lebanese forces," that is, the Phalangists, the Commission did attempt to determine who in fact carried out the massacres. And, as is ordinarily the case with any tribunal, the Commission attempted to determine the facts, draw inferences from the facts, and ultimately reach conclusions of responsibility.

Was there then justice for the Palestinians? Did the Report place blame on the guilty parties, and impose or demand punishment appropriately? Without question, 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 principles of international law and human rights. It was not, nor did it purport to be, such a resolution. Before examining the responsibility of Israel and its officials under international law, it is necessary to review briefly relevant portions of the Report's analysis and conclusions.

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For purposes of determining the issues of responsibility under international law, it is not necessary to scrutinize the facts and factual inferences drawn by the Commission. It is not necessary to do so, for even assuming the correctness of these factual assumptions, clear, grave violations of international law were committed by the investigated Israeli officials. Briefly, however, some mention must be made of the more questionable factual assumptions.

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Kahan Report—

Although the link between the Phalangists and Israel is frankly acknowledged, Israel's support, indeed its creation of Major Haddad as a military power in Lebanon, is not acknowledged except to the extent that the Report notes Haddad did not proceed north of the Awali River "pursuant to IDF orders." Secondly, on September 16, the IDF (that is the Israeli army) military operational order number 6 was issued, stating: "The refugee camps are not to be entered. Searching and mopping up the camps will be done by the Phalangist/Lebanese army."

The entry of the Phalangists into the camps was supposedly agreed upon by Minister of Defense Sharon and Chief of Staff Eitan in the evening of September 14. The Report ultimately concludes that Prime Minister Begin knew nothing of these decisions, although it concedes that it is "ostensibly puzzling" that the Defense Minister did not inform the Prime Minister of the Phalangists' entry into the camps, and that Begin purportedly knew nothing of the plan until a Cabinet meeting at 7:30 p.m. on Thursday, the 16th, at which he raised no objection. Moreover, in his deposition before the Commission, Chief of Staff Eitan stated that Begin called him between 9:00 and 10:00 a.m. on Saturday to tell him of American complaints about report from the Gaza Hospital. Begin said that he did not recall this conversation.

Yet the most implausible factual determination in the Report is that the IDF, including the Chief of Staff, were unable to see or perceive anything of what was going on in the Shatila camp from the forward command post on the roof of a five (actually seven) story building 200 meters southwest of the camp, even with the aid of binoculars. A Time article (September 24) said that journalists kept outside of the camp could hear the one-sided gunfire. The Chief of Staff himself acknowledged in a meeting the morning of the 16th that the IDF had surrounded the camps. In Going All the Way: Christian Warlords, Israeli Adventurers, and the War in Lebanon, Jonathan Randal says, "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." This factual assumption is obviously crucial because it refocused the Commission's inquiry into the responsibility of personnel on the scene from a question of their actual knowledge to a question of what they should have known.

Putting these questions aside, the following facts are established in the report:

1. An IDF order was issued on September 16 prohibiting the IDF from entering the camps with "searching and mopping up to be done by the Phalangists/Lebanese army."

2. Chief of Staff Eitan and Minister of Defense Sharon agreed to have the Phalangists enter the camps on September 14.

3. On September 15, Chief of Staff Eitan went to Phalangist headquarters and told the Phalan-
gist commanders that they were to enter the camps and that a Phalangist liaison officer was to be located at the Israeli's command post under the command of Brigadier General Yaron, another Israeli officer investigated by the Commission.

4. In the morning of Wednesday, September 15, the Minister of Defense, the Chief of Staff, the Director of Military Intelligence, a representative of Mossad, Brigadier General Yaron, and Major General Drori met at the Israeli command post for the Chief of Staff to report on his arrangements with the Phalangists. During the meeting the Defense Minister spoke twice to Begin by phone. Immediately afterward the Defense Minister went to the Phalangist headquarters with the Director of Military Intelligence, representatives of Mossad, and others and informed the Phalangists that they should maintain contact with Major General Drori regarding their modes of operation.

5. Later that day, Major General Drori met with the Phalangists and told them to enter the camps from the direction of Shatila.

6. In a meeting the morning of September 16, the first day of the massacre, the Defense Minister and Chief of Staff met. Eitan said the camps were surrounded and the Phalangists were to go in at 11:00-12:00 p.m. The Minister of Defense said he would send the Phalangists into the camps. Sharon spoke to Begin by phone, but purportedly said nothing about entry into the camps.

7. At 11:00 a.m. on the 16th, the Phalangist commanders met with Major General Drori and it was agreed they would enter the camps and coordinate their action with Brigadier General Yaron that afternoon. It was agreed that there would be 150 Phalangists to enter from south to north and from west to east. It was also established that there would be a Phalangist liaison officer on the roof. General Yaron set up lookout posts on the roof of the forward command post and on a nearby roof "even though he knew it was impossible to see very much of what was going on in the camps from these lookouts."

8. On September 16, the Defense Minister issued a document on West Beirut's entry to the Chief of Staff, his deputy and the Director of Military Intelligence saying "the IDF shall command the forces in the area. For the operation in the camps the Phalangists should be sent in."

9. At approximately 6:00 p.m., Thursday, September 16, the Phalangists entered the camps.

10. The Report determined that it was foreseeable that the entry of the Phalangists into the camps was likely to result in a massacre.

These are only the facts (as accepted by the Commission) preceding the entry of the Phalangists into the camps. They establish that the Phalangists entered the camps with the encouragement, cooperation, and assistance of the Israeli officials, obviating for present purposes any secondary inquiry into whether the Israelis should have known or did know later what was going on in the camps. The Commission did find among other subsequent events that the IDF provided mortar and aircraft illumination for the Phalangists to operate, and that on Friday afternoon Brigadier General Yaron, Major General Drori and Chief of Staff Eitan met with the Phalangist staff, agreed to let them "continue action mopping up..." until 5:00 a.m. Saturday, and agreed to provide the Phalangists with a tractor "to demolish illegal structures."

Given these facts from the Report itself and limiting this analysis to those facts preliminary to entry into the camps, the next step is to examine the determinations of Israel's responsibility by the Commission compared with Israel's responsibility under international law. The Commission devised two levels of responsibility—direct and indirect. Its conception of the differences between the two muted Israel's responsibility. According to the Commission, those directly responsible were only those who actually perpetrated or planned the massacre itself. Accordingly, it 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." In reaching this conclusion the Commission determined:

1. No other military force was seen by witnesses in the area of the

(Continued)
Kahan Report—

camps or at the time of the entrance into or exit from this area.

2. Major Haddad's forces were not involved because: (a) there was testimony that no unit of that force had crossed the Awali that week; (b) the relations between the Phalangists and Haddad's forces were poor; (c) Haddad's arrival at the airport on Friday was unrelated to the massacres; and (d) some members of the Phalangists had Moslem names and southern Lebanese accents as reported by several witnesses.

3. There was no reason to conclude IDF soldiers were in the camps based on a lost IDF dogtag found in the camp and the placement of cluster bombs (in themselves a violation of US/Israeli agreements yet used by the Israelis in the invasion) as booby traps under the bodies.

If, as the Report acknowledges, 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, then why wasn't Israel directly responsible? According to the Report, 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. A recent book, The Battle of Beirut by Michael Jansen, makes a convincing argument that in fact there was such a plan and intent. Yet, whether the Israelis let in the Phalangists when they knew or should have known that a massacre would result, or let them in . . . with intent for a massacre to take place, the result is the same under international law—Israel bears responsibility . . .

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Shortly before its decision on Israel's indirect responsibility is the only paragraph addressed to the ramifications of the Report's 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 perspective—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.

The principle of customary international law of belligerent occupation to which the Report refers 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. Israel is a signatory to the Convention, having ratified it in 1951. Article 27 of the Convention stipulates that the civilian population must be protected, especially against all acts of violence or threats thereof. The "lack of clarity" referred to in the Report as to Israel's obligations as an occupying power, is a lack of clarity in Israel's eyes only. Israel has contended that it is not an occupying power in Lebanon as defined by international law on the ground that it has not established a military government in the area it controlled and that its presence was temporary. No international legal authority agrees with its position. The United Nations, the International Committee of the Red Cross, the Advisory Committee on Human Rights in Lebanon, other respected international law authorities, as well as the United States, view Israel as a belligerent occupant of Lebanon and therefore bound by the international law of occupation. 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.

Article 43 of the Hague Regulations requires the occupying power to take all measures in its power to restore and ensure as far as possible, public order and safety. More importantly, Article 29 of the Fourth Geneva Convention provides that the party to the conflict, here Israel, in whose hands protected persons may be, is responsible for the treatment accorded to them by its "agents" without regard to any individual agent's responsibility. The Phalangists entered the camps at the instigation of Israeli officials, with their encouragement and support. Without Israel's ac-
quiescence 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." Regardless of whether there was intent or a plan with the Phalangists to effectuate a massacre, Israel is responsible for the actions of the Phalangists acting 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 would independently and unquestionably render Israel liable for their actions in the camp.

Thus far, this analysis has addressed only in part the responsibility of Israel as a state for the massacres. For the nine individuals subjected to inquiry by the commission—Prime Minister Begin, Defense Minister Sharon, Foreign Minister Shamir, Chief of Staff Eitan, Director of Military Intelligence Saguy, the Head of Mossad, Major General Drori, Brigadier General Yaron, and Sharon's aide Duda'i—their personal liability under international law for the massacres would be determined primarily by the Nuremberg Principles, affirmed by the United Nations General Assembly and acknowledged as part of customary international law by the Supreme Court of Israel in the Eichmann case.

Article 6(a) 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 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 any persons in execution of such plan."

The Israeli invasion of Lebanon was a clear-cut violation of customary international law, the UN Charter and several resolutions against aggression pursuant to the Charter. Begin himself has acknowledged that the invasion was not a war of self-defense. As perpetrators of a "crime against peace," the leaders, organizers and others acting to

(Continued)
Kahan Report—

formulate and execute the invasion are responsible for all acts performed by any persons in execution of the invasion. From media reports and the Kahan Report itself it is clear that the Phalangists' entry into the camps and their "mopping up" were viewed as an integral and necessary part of the invasion of Lebanon from its inception, for which the involved Israeli officials are responsible under Article 6. Sharon insisted the entry into the camps was necessary to rid them of 2000 terrorists that never materialized.

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Aside from their responsibility predicated on the illegal invasion, and with only the possible exception of the head of Mossad and Duda'i, whom the Commission absolved, the other individuals by the Report's own determinations would be responsible for war crimes or crimes against humanity. Under customary international law, 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 a war crime and fails to take the necessary and reasonable steps to ensure compliance with the law of war, is responsible for such crimes." The Kahan Report concluded precisely that—that Begin, Sharon, Shamir, Eitan, Saguy, Drori 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.

Article 146 of the Geneva Convention also obligates the United States to bring any party suspected of a "grave breach" as defined in Article 146 before an American court for prosecution if the party should enter the United States' territory. Israel, therefore, is not alone in failing to seek justice under international law. Also, under common Article 1 of the Geneva Conventions it would appear the United States has a responsibility to ensure compliance with the Conventions by contracting parties such as Israel.

There may be other bases for responsibility of the United States under international law by virtue of its relationships with Israel. In The Battle of Beirut, Jansen makes a very convincing argument for Alexander Haig's advance knowledge and encouragement of Sharon in the invasion. Former President Carter stated to the press that he believed Washington had given Israel approval for the invasion. The deeper the extent of the United States' acquiescence in the invasion and in Israel's unlawful use of American weaponry, the greater the potential for individual responsibility for United States officials as accomplices in crimes against peace and humanity, and war crimes.

This analysis has not addressed the many other questions of responsibility under international law for parties other than Israeli and Israeli officials because the Kahan Report confines its inquiry in such a manner. I have touched on a few aspects of the United States' involvement only as they might relate to Israel's own involvement but not, for example, in terms of the United States' relationship with the Phalangists or the Gemayel regime. The Commission examined documents on this point, incorporated as Appendix B to the Report, which was not published "in the interest of protecting [Israel's] security or foreign relations." With this background, the Commission's projections as to future issues of the United States' involvement are worth repeating:

It should...be noted that in meetings with US representatives during the critical days, Israel's spokesmen repeatedly requested that the US 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 Israel and other elements. (emphasis added)

The Sunday Times of London reported in January of this year [1983] that US officials in Beirut learned of the massacre only a few hours after it was begun but did not act rather than compromise their intelligence sources.

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The mechanisms for justice are in place. Among other international law principles, the Geneva Conventions and the Nuremberg Principles provide a widely accepted international framework for resolution of responsibility and punishment for the atrocities. The Kahan Report, no matter how well intentioned, failed the result in any meaningful sanction. Begin, Sharon, and Shamir were all criticized by the Commission—yet Begin just recently retired; Shamir became the new Prime Minister; and Sharon remained in the Cabinet (although without his portfolio). The Report may have appeased many consciences, but wrongly so—the inquiry was full of sound and fury, but ultimately, for the Palestinians and others massacred, signifies nothing.