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THE APPOINTMENT OF GENERAL YARON: CONTINUING IMPUNITY FOR THE SABRA AND SHATILLA MASSACRES

Linda A. Malone*

In December of 1999, General Amos Yaron was appointed to serve as head of Israel's Defense Ministry. Earlier, in August of 1986, Yaron had been appointed military attaché to the United States. In reaction to the 1986 appointment, survivors of a 1982 massacre of Palestinians living in Sabra and Shatilla refugee camps located in Lebanon filed a complaint in the District of Columbia District Court. The complaint alleged Yaron violated U.S. treaties, customary international law, and U.S. statutes incorporating international customary international law. The complaint provided that:

The defendant Yaron is not entitled to any immunity from accountability before this Court by virtue of a claim of diplomatic immunity. Article 146 of Fourth Geneva Convention of 1949 is an express waiver of diplomatic immunity with respect to those alleged to have committed grave breaches as defined by Article 147. Moreover, under the Nuremberg Principles and the principle of customary international law known as *jus cogens* which has been incorporated into the Vienna Convention on the Law of Treaties, two governments cannot agree to immunize a war criminal from accountability for his acts.

The defendant Yaron is not entitled to any immunity from accountability arising out of any otherwise arguably applicable statute of limitations, in that customary international law provides that there shall be no statute of limitations with respect to war crimes because of the particularly grievous nature of such violations.¹

Nevertheless, the case was dismissed on immunity grounds.

That Yaron evaded responsibility and sanctions for his conduct at the time of his rise through the Israeli Defense Ministry to his recent achievement of its highest post violates international law, and dishonors the memory of the hundreds of civilians who were brutally massacred over a two-day period in an area of Lebanon under his direct control. This commentary explores the past and present prohibition of such impunity under international law, based on the findings with respect to Yaron's responsibility as determined by the Israeli commission, which investigated the massacres.

On September 28, 1982, the Israeli Cabinet resolved to establish a commission of inquiry² pursuant to Israel's Commission of Inquiry Law

¹ The Palestine Yearbook of International Law, Vol. V, 1989 at 254 (on file with author).

² See Kahan Report at 3, reprinted in 31 I.L.M. 373, 373; see also Christopher Walker, *Begin Agrees to Hold Massacre Inquiry*, TIMES (London), Sept. 29, 1982 at 1.

of 1968,³ largely in response to the largest protest demonstration in Israel's history.⁴ The commission's charge 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 Shatilla and Sabra camps."⁵ Yitzhak Kahan, President of the Israeli Supreme Court, was selected chairman of the commission.⁶

The issuance of the commission's Report, rekindled the controversy 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.⁷ A brief flurry of reprimands, to the extent they can be denominated as such, followed - Sharon, one of the most harshly criticized individuals in the Report, merely lost his portfolio.⁸ No other individual prosecutions or sanctions were imposed.

I. PRELUDE TO THE MASSACRE

What became known in Israel as the "Peace for the Galilee" war began on June 6, 1982.⁹ From June 12 to 14, Israeli Defense Force (I.D.F.) took over the suburbs of Beirut and joined with the Christian forces controlling East Beirut.¹⁰ On June 15, the Israeli Cabinet resolved that any entry into West Beirut would be by the Phalangists with the help of the I.D.F., and by June 25, the I.D.F. had encircled West Beirut.¹¹ On

³ The outline of the facts as found by the Kahan Report, which demonstrate Yaron's responsibility, are provided in more detail in Linda A. Malone, *The Kahan Report, Ariel Sharon, and the Sabra-Shatilla Massacres: Responsibility under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373.

⁴ See *Crisis in Lebanon*, N.Y. TIMES, Sept. 21, 1982, at 6. Other influential factors leading to the inquiry were the resignation of Energy Minister Yitzhak Berman, outraged at the Cabinet's failure to establish a commission of inquiry, and President Yitzhak Navon's call for an inquiry. See Robert Fisk, *Tentative Hopes for an Open Beirut*, TIMES (London), Sept. 23, 1982, at 5.

⁵ See Kahan Report, *supra* note 2, at 3. The "camps" actually consist of many one or two room cement structures with several larger, mainly two-story buildings, all separated by alleyways. MICHAEL JANSEN, *THE BATTLE OF BEIRUT: WHY ISRAEL INVADDED LEBANON* 97 (1982).

⁶ See Kahan Report, *supra* note 2, at 3.

⁷ See JERUSALEM POST, Feb. 13-19, 1983, at 1, col. 1-2 (int'l ed., on file with author).

⁸ See *id.* at col. 3-5.

⁹ See Kahan Report, *supra* note 2, at 7.

¹⁰ See *id.*

¹¹ See *id.* In the report, the Commission briefly addressed whether mere inclusion of Phalangists in West Beirut's entry could be the basis for indirect Israeli responsibility for the massacres. First, the Commission concluded that the June 15 resolution could not be deemed the basis for the Phalangists' later involvement in the entry, as urged by Begin and Sharon. It

August 19, an agreement between Lebanon, the United States, France, Italy, Israel and the Palestine Liberation Organization (P.L.O.) was reached with the negotiating assistance of the United States through Ambassador Philip C. Habib.¹² It provided for the evacuation of P.L.O. and Syrian forces from West Beirut. By August 23, Bashir Gemayel was elected president of Lebanon, his term of office to begin one month later.¹³

From August 21 to 26, the multinational American, French and Italian force arrived in Beirut, and oversaw the evacuation of P.L.O. and Syrian forces until it was completed on September 1.¹⁴ The Report then notes in its chronology that

. . . [a]ccording to information from various sources, the terrorists did not fulfill their obligation to evacuate all their forces from West Beirut and hand their weapons over to the Lebanese army but left in West Beirut, according to various estimates, approximately 2,000 fighters, as well as many arms caches, some of which were handed over by the terrorists to the Lebanese leftist militia "Mourabitoun".¹⁵

The multinational force left Lebanon from September 10 to 12, after the completion of the evacuation, but less than one week before the massacres occurred.¹⁶

The Report states that when word of Bashir Gemayel's assassination reached Israel at approximately 11:00 p.m. on Tuesday, September 14, Prime Minister Begin, Minister of Defense Sharon, and Chief of Staff Eitan decided that the I.D.F. would enter West Beirut, without seeking a Cabinet resolution to that effect.¹⁷ Although Sharon and Eitan purportedly

found that the June circumstances had changed entirely by September, after the evacuation of Syrian and P.L.O. forces and after Bashir Gemayel's assassination. Nevertheless, despite the lack of a formal Cabinet resolution, the Commission concluded there was no responsibility for the Phalangists in the entry into West Beirut. The political and military reasons for including the Phalangists justified their involvement in West Beirut, according to the Report, negating any potential responsibility on that basis alone. *See id.* at 13. The decision to enter West Beirut was also made by Begin and Sharon, without Cabinet approval. *See Kahan Report, supra* note 2.

¹² *See id.*; *see also* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T. OF STATE, CURRENT POLICY NO. 415, LEBANON: PLAN FOR THE PLO EVACUATION FROM WEST BEIRUT (Aug. 1982).

¹³ *See Kahan Report, supra* note 2, at 7.

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.* at 8. There was no prior consultation with the Cabinet; Foreign Minister Shamir was the only minister informed of this decision, which he endorsed. The Commission concluded that no indirect responsibility for the massacres could be predicated on this decision, because of the "extraordinary emergency situation" created by Bashir Gemayel's

discussed including Phalangists in the operation, the Commission determined it was not mentioned to Prime Minister Begin.¹⁸ Chief of Staff Eitan testified that at 8:30 p.m. on September 14, he and Defense Minister Sharon agreed that Phalangists would enter the Sabra and Shatilla camps.¹⁹

The operating order for the entry into West Beirut that played a pivotal part in the ensuing massacres was Order Number 6 to the I.D.F., which provided in part that "the refugee camps are not to be entered. Searching and mopping up the camps will be done by the Phalangists/Lebanese army."²⁰

II. THE MASSACRE UNFOLDS

At this point, the events that ultimately culminated in the massacres at the Sabra and Shatilla camps were set in motion. Sometime in the evening between September 14 and September 15, Chief of Staff Eitan met in Beirut with Major General Drori and the division commander.²¹ At 3:30 a.m. on September 15, Chief of Staff Eitan went to the Phalangists' headquarters and, according to his own testimony, "ordered the Phalangist commanders to effect a general mobilization of all their forces, impose a general curfew on all areas under their control, and be ready to take part in the fighting."²² The Phalangist commanders asked for twenty-four hours to prepare.²³ Chief of Staff Eitan then asked that a Phalangist liaison officer come to the Israeli division's forward command post.²⁴

On September 15, 1982, the entry into West Beirut began.²⁵ The I.D.F. entered West Beirut shortly before 6:00 a.m.²⁶ That same day between 8:00 a.m. and 9:00 a.m., Defense Minister Sharon met at the forward command post with Chief of Staff Eitan who reported his agreement with the Phalangists for their entry into the camps.²⁷ Sharon approved the agreement and phoned Prime Minister Begin from the roof

assassination. *See* Kahan Report, *supra* note 2, at 13. The Lebanese army, it states, could not have enforced order in West Beirut. *See id.*

¹⁸ *See id.*

¹⁹ *See id.* at 9.

²⁰ *See id.* at 8.

²¹ *See id.* at 9

²² *See id.*

²³ *See* Kahan Report, *supra* note 2, at 9.

²⁴ *See id.*

²⁵ *See* Kahan Report, *supra* note 2, at 9.

²⁶ *See id.*

²⁷ *See id.*

of the command post.²⁸ Yet, according to the Report, Sharon only informed Begin that there was no resistance in Beirut and that the operations were going well.²⁹ Also present at the forward command post were the Defense Minister's aide Duda'i, the Director of Military Intelligence Yehoshua Saguy, a representative of the Mossad, Major General Drori,³⁰ and Brigadier General Yaron, among others. Duda'i's notes of the meeting stated that the Phalangists were to be sent into the camps, and that Sharon had spoken twice with the Prime Minister from the roof of the command post.³¹ On September 16, the Defense Minister's office issued a document signed by Duda'i summarizing in two crucial, controversial sentences Sharon's instructions in this meeting regarding the entry into West Beirut: "Only one element, and that is the I.D.F., shall command the forces in the area. For the operation in the camps the Phalangists should be sent in."³² The document was directed to Chief of Staff Eitan, the Deputy Chief of Staff and the Director of Military Intelligence.³³ It is known, from a stamp on that office's copy, that the Director of Military Intelligence's office received the document.³⁴ Witnesses disagreed about whether this instruction signified that Phalangists' forces were to be directly under I.D.F. command.³⁵

Thursday, September 16, 1982, was the day on which the three-day massacres began. In the early morning hours, Chief of Staff Eitan returned to Tel Aviv.³⁶ At 10:00 a.m., Sharon met in his office with Chief of Staff Eitan, the Director of Military Intelligence, Brigadier General Saguy, and Mr. Duda'i, among others.³⁷ Eitan announced, "the whole city is in our hands, complete quiet prevails now, *the camps are surrounded*, the Phalangists are to go 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."³⁸ Specifically referring to a map, Eitan stated that I.D.F. forces surrounded the Sabra and Shatilla camps, and that it was agreed the

²⁸ See *id.*

²⁹ See *id.*

³⁰ Major General Drori was commander of Israel's Northern Region in addition to being in charge of the Golan Heights and the Lebanese territories occupied at the beginning of the war. See Kahan Report, *supra* note 2, at 5.

³¹ See *id.*

³² See *id.* at 10-11.

³³ See *id.* at 11.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See Kahan Report, *supra* note 2, at 10.

³⁷ See *id.*

³⁸ *Id.* (emphasis added).

Phalangists would go in at their discretion, after a coordinating session with the Israeli officials.³⁹

The first session coordinating the Phalangists' entry into the camps was held at 11:00 a.m. on September 16.⁴⁰ Unnamed Phalangist commanders met with Major General Drori at the headquarters of one of the divisions.⁴¹ It was again agreed that the Phalangists would enter the camps, coordinating their entry with Brigadier General Yaron that very afternoon at the forward command post.⁴² It was also agreed that a company of 150 fighters from the Phalangist force would enter the camps from south to north and from west to east.⁴³ Brigadier General Yaron, discussed purported terrorist locations in the camp and, apparently still apprehensive about the Phalangists' involvement, also warned the Phalangists commanders not to harm the civilian population.⁴⁴

The Report then notes that Yaron required safety checks upon the Phalangists. The Report first remarks that Yaron set up lookout posts on the roof of the forward command post and on a nearby roof "even though he knew that it was impossible to see very much of what was going on in the camps from these lookouts."⁴⁵ An additional measure, not specified in the Report and described only in the classified Appendix B to the Report, was imposed to ascertain the actions of the Phalangists' forces in the camps.⁴⁶ Yaron and the Phalangists also stipulated that a Phalangist liaison officer with a "communications set" would be present at all times on the roof of the forward command post with a Mossad liaison officer at the Phalangists' headquarters.⁴⁷

At approximately 6:00 p.m. on Thursday, September 16, the Phalangists entered the camps, initially entering the Shatilla camp from the west and southwest, as directed.⁴⁸ Around 7:00 p.m., Israeli Lieutenant

³⁹ *See id.*

⁴⁰ *See id.* at 11.

⁴¹ *See id.*

⁴² *See* Kahan Report, *supra* note 2, at 11.

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See* Kahan Report, *supra* note 2, at 11.

⁴⁸ *See id.* Other sources have since placed the exact time at 5:15 p.m. 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 the I.D.F. As noted in the Report, these hidden arms and terrorists never materialized. *See* Kahan Report, *supra* note 2, at 6-7. The Commission concludes that this terrorist force had not been evacuated for two reasons: renewal of the underground terrorist activity at a later period, and to protect the civilian population, which

Elul overheard a transmission over the Phalangists' communication set to Elie Hobeika while he was on the roof of the command post.⁴⁹ He heard a Phalangist officer from the forces in the camp tell Hobeika there were 50 women and children and ask what he should do.⁵⁰ Hobeika replied, "[t]his is the last time you're going to ask me a question like that, you know exactly what to do." This remark was followed by "raucous laughter" by the Phalangists on the roof.⁵¹ Brigadier General Yaron, who was also on the roof, asked Lieutenant Elul what he had overheard.⁵² When Lieutenant Elul reported the above information, Yaron spoke to Hobeika in English for about five minutes but Lieutenant Elul did not hear the conversation.⁵³

According to Yaron's testimony, however, the conversation Lieutenant Elul relayed to him was only that "one of the Phalangists had asked the commander what to do with 45 people, and reply had been to do with them what God orders you to do" (which Yaron said he took to be a reference to the treatment of forty-five dead terrorists).⁵⁴ Yaron testified that he believed Elul's report involved the same incident he received in a report that evening from another source, an intelligence officer.⁵⁵ Shortly before 8:00 p.m., an intelligence officer on the roof of the forward command post ordered two actions to obtain information on the Phalangists' activities.⁵⁶ The Report does not reveal what these actions

had remained in the camps - because given the hostility prevailing between the various sects and organizations, a population without armed protection was in danger of massacre. In a clear jab at the United States' failure to provide protection for the civilian population, the Commission adds that during the evacuation negotiations, a "guarantee for the safety of the Muslims in West Beirut was given by the representative of the United States who conducted the negotiations, following assurances received from the government of Israel and from Lebanon."

The author has purposefully refrained from use of the term "terrorist," because it tends to be an inflammatory, meaningless term, particularly in the circular context of violence and retaliation in the Mideast. Two examples will suffice to prove this point. Begin was the head of Irgun, a Jewish dissident organization, at the time of its mass murder of 250 Palestinian villagers in 1948 at Deir Yassin. Anwar Sadat spent thirty-one months in prison for his involvement in the assassination of the Egyptian Minister of Finance in 1946, for which he was later acquitted and released. Of course, both of these "terrorists" later received the Nobel Peace Prize for their efforts toward peace in the Mideast.

⁴⁹ See Kahan Report, *supra* note 2, at 12.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See Kahan Report, *supra* note 2, at 12.

⁵⁶ See *id.*

were, because they are only outlined in the confidential Appendix B.⁵⁷ As a result of one of the actions, the intelligence officer received a report that the Phalangists' liaison officer overheard a radio transmission from a Phalangist inside the camps, which stated he was holding forty-five people and asked the liaison officer what to do. The Phalangist officer replied, "Do the will of God" or words to that effect.⁵⁸ The intelligence officer received this report at approximately 8:00 p.m., but did not convey it to anyone else, including Yaron, until a briefing with Yaron that night at 8:40 p.m.⁵⁹ The Report concludes that, although Yaron confused the two reports (from Elul and from the intelligence officer) in his testimony, they were clearly two different and separate reports of separate incidents.⁶⁰ The Commission had little difficulty determining that Lieutenant Elul had informed Yaron of the content of the conversation he overheard, as Elul had testified.⁶¹

Also at approximately 8:00 p.m., another report regarding Phalangists' indiscriminate killing was made in Yaron's presence. The Phalangists' liaison officer "G." told various people in the command post dining room, including Yaron and I.D.F. officers, that about 300 people, including civilians, had been killed in the camps.⁶² Shortly thereafter, he reduced the number of casualties from 300 to 120, but no one took action because of either report.⁶³

At 8:40 p.m. in Beirut an update briefing was held in the forward command post for I.D.F. officers lead by Brigadier General Yaron.⁶⁴ The Divisional Intelligence Officer who received the earlier report regarding the Phalangists' liaison officer's order to "do the will of God" reported on the Phalangists' operations in the camps.⁶⁵ The officer's report and exchange with Yaron create serious implications:

Intelligence Officer: [T]hey, it turns out, are pondering what to do with the population they are finding inside. On the one hand, it seems, there are not terrorists there, in the camp. Sabra camp is empty. On the other hand, they have amassed women, children, and apparently also old people, with whom they don't exactly know what to do . . . and evidently they had some sort of decision in principle that they would concentrate them together, and lead

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.* at 13.

⁶⁰ *See id.* at 12.

⁶¹ *See* Kahan Report, *supra* note 2, at 12.

⁶² *See id.* at 13.

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

them to some place outside the camps. On the other hand, I also heard from - (the Phalangists' liaison officer G.) . . . that 'do what your heart tells you because everything comes from God.'

* * *

Brigadier General Yaron: Nothing, no, no. I went to see him up top and they have no problems at all.

Intelligence Officer: People remaining in the field? Without their lives being in any danger?

Brigadier General Yaron: It will not, will not harm them.⁶⁶

The Phalangists' actions against the civilians in the camps were not mentioned again. In his testimony, Yaron explained he had interrupted the officer because he had warned the Phalangists' officers on the roof not to harm civilians and had been assured they would issue such orders.⁶⁷

Between 10:00 p.m. and 11:00 p.m. this same Divisional Intelligence Officer contacted Northern Command on his own and told the Deputy Intelligence Officer of the Phalangist officer's statement that 300 terrorists and civilians had been killed and that he had subsequently reduced the number to 120.⁶⁸ The recipients of the report at the General Staff Branch conveyed it by telephone to the Chef De Bureau of the Director of Military Intelligence at 5:30 a.m. on Friday morning.⁶⁹

Yaron did not inform Major General Drori of any of the reports he had received about Phalangists' killing civilians, not even Friday morning when Drori contacted him for a report about various matters relating to the war.⁷⁰

During Thursday night and early Friday morning, reports of civilian killings began to circulate among the I.D.F. officers at the forward command post. When the Phalangists' liaison officer asked a Lieutenant Colonel Treiber for greater illumination of the camps, he refused, because the "Phalangists had killed 300 people."⁷¹ For some unexplained reason, Treiber subsequently ordered that more illumination be provided.⁷²

⁶⁶ See *id.*

⁶⁷ See Kahan Report, *supra* note 2, at 13.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at 14-15.

⁷¹ See *id.* at 15.

⁷² See *id.*

The confirmation attempts continued throughout Friday morning, but no confirmations were successful. As a result, the report was treated as if unreliable and was not circulated according to standard procedure.⁷³

Meanwhile, I.D.F. soldiers outside the camps detected more killing and violent actions against refugees in the camps during those morning hours.⁷⁴ Lieutenant Grabowsky, stationed 200 meters from the camp on an earth embankment, witnessed Phalangist soldiers take men, women and children out of the camps' area and lead them to the area near the stadium.⁷⁵ Between 8:00 a.m. and 9:00 a.m., he saw two Phalangist soldiers hit two young men, saw them lead the men back into the camp, heard a few shots and then saw the two Phalangists come out alone.⁷⁶ He climbed up on the embankment and saw that the Phalangist soldiers had killed a group of five women and children and later saw a Phalangist kill another civilian.⁷⁷ Other soldiers deterred him from making a report to his superiors. They told him that the battalion commander had already been informed that civilians were being killed, and he had only replied, "We know, its not to our liking, and don't interfere."⁷⁸

The killing continued for another twenty-three hours. Afterward, Yaron met with Drori but, according to Drori, said nothing to him about the "excesses" committed by the Phalangists.⁷⁹ Yaron's version differed. He claimed he had telephoned Drori in the morning, because "something smelled fishy" to him, which led Drori to meet with him at 11:00 that morning.⁸⁰ The testimony regarding their discussion during that 11:00 meeting differs even more. Colonel Duvdevani was also present at the meeting. He said that he told Drori and Yaron he had a "bad feeling" about what was going on in the camps (based on the Phalangists' Officer G.'s report of approximately 300 persons dead and Israeli lack of knowledge about the events).⁸¹ Yaron testified that he told Drori everything he knew at the time.⁸² The only information, which Drori testified he heard about the Phalangists' operations in the camps was that

⁷³ See Kahan Report, *supra* note 2, at 16.

⁷⁴ See *id.* at 17.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.* What the lieutenant testified he saw from an earth embankment 200 meters from the camp is particularly interesting in that supposedly nothing was visible from the roof of the seven story command post, also 200 meters from the camp.

⁷⁸ See *id.*

⁷⁹ See Kahan Report, *supra* note 2, at 18. This meeting happened at an unspecified time following a 9:00 meeting with Phalangists.

⁸⁰ See *id.* at 15.

⁸¹ See *id.*

⁸² See *id.*

they were “carrying out ‘an unclean mopping-up’ - that is, their soldiers were not calling on the residents - as I.D.F. soldiers do - to come out before opening fire on a house which was to be ‘mopped up,’ but they were ‘going into the house firing.’”⁸³ Drori nevertheless commanded Yaron to, in turn, order the Phalangists to stop where they were in the camps and to advance no further.⁸⁴ Yaron, however, testified he had, in fact, suggested such an order to Drori.⁸⁵ In any event, the Report states that such an order was conveyed to the Phalangists’ commanders.⁸⁶ At this same meeting, Drori telephoned Chief of Staff Eitan, told him that the Phalangists had perhaps “gone too far,” and that he had ordered the operation halted.⁸⁷

At 11:00 a.m., journalist Ze’ev Schiff met with Minister Zipori at the Minister’s office to tell him about the report he had received of “slaughter” in the camps.⁸⁸ Minister Zipori in Schiff’s presence, called Foreign Minister Shamir to discuss Schiff’s report.⁸⁹ Minister Zipori testified that he told Shamir he had received reports that the Phalangists “are carrying out a slaughter” and asked Shamir to check the report with the United States and Israeli officials with whom Shamir was to meet at 12:30.⁹⁰

At 12:30, Minister Shamir met in his office with United States Ambassador Morris Draper, other United States representatives, Minister of Defense Sharon, the director of Military Intelligence Saguy, the head of General Security Services, and others not named.⁹¹ From the Report, it appears that no one in the meeting made any mention of the Phalangists’ presence or activities in the camps. The meeting ended at 3:00 p.m.; the Foreign Minister went home and took no further action on the Report.⁹² The killing continued for another seventeen hours.

Lieutenant Grabowsky, who had witnessed the Phalangists’ treatment of civilians from the earth embankment outside the camps, continued his own inquiry that afternoon. One of his soldiers, at his request, asked Phalangist soldiers in Arabic why they were killing civilians.⁹³ He was

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See Kahan Report, supra note 2, at 15.*

⁸⁶ *See id.*

⁸⁷ *See id.* at 16.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 17.

⁹¹ *See Kahan Report, supra note 2, at 17.*

⁹² *See id.*

⁹³ *See Kahan Report, supra note 2, at 17.*

told, "the pregnant women will give birth to terrorists and children will grow up to be terrorists."⁹⁴ Throughout the afternoon, the I.D.F. soldiers saw the Phalangists' treatment of men, women and children and heard complaints and stories of the massacre. One soldier said he heard a report to the battalion commander, describing the Phalangists as "running wild."⁹⁵ Lieutenant Grabowsky left the area at 4:00 p.m., and later that afternoon related what he had seen to his commander and other officers.⁹⁶ They referred him to his brigade commander, to whom he reported at 8:00 p.m., again conveying what he had seen earlier in the day.⁹⁷ The battalion commander, in his testimony, denied receiving any report of killings or mistreatment of civilians other than the report that 300 were killed on Thursday night.⁹⁸ The Report says there was no need to resolve these testimonial conflicts beyond the soldiers' attempts to report the acts to their superiors, and that these soldiers' reports did not reach Yaron or Drori.⁹⁹ The Commission sent no 15(a) notice to the battalion commander, leaving any further investigation of his conduct to the I.D.F.¹⁰⁰

At 3:30 p.m. Chief of Staff Eitan met with Drori at the Khalde airport near Beirut.¹⁰¹ They traveled from there to a meeting at Phalangist headquarters, joined along the way by Brigadier General Yaron.¹⁰² Drori testified that he told the Chief of Staff what he knew of the Phalangists' actions and his reasons for halting their operation, and yet Chief of Staff Eitan did not see fit to ask any questions about the Phalangists' actions nor the order halting them.¹⁰³ At 4:00 p.m. Chief of Staff Eitan, Brigadier General Yaron, and Major General Drori met with the Phalangist staff at Phalangist headquarters.¹⁰⁴ In this meeting, despite Drori's earlier order halting the Phalangists and the report on their actions, the Chief of Staff, "expressed his positive impression received from the statement by the Phalangist forces and their behavior in the field" and concluded that they "continue action, mopping up the empty camps south of Fakhani until tomorrow [Saturday] at 5:00 A.M., at which time they must stop their

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See Kahan Report, supra note 2, at 18.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

action due to American pressure. There is a chance that the Lebanese Army will enter instead of them."¹⁰⁵ The Chief of Staff also testified that the Phalangists told him that "everything was alright, that the Americans are pressuring them to leave and they would leave by 5:00 A.M. . . ." ¹⁰⁶

The Chief of Staff did not ask the Phalangists any questions or debrief them about activities in the camps. Eitan said he refused to permit them to send in more forces, but Yaron testified that there were no restrictions placed on the Phalangists' use of additional forces.¹⁰⁷ The killing continued beyond 5:00 a.m. the following day [Saturday], until 8:00 a.m. An unanswered mystery raised by this portion of the Report is what knowledge United States officials had of the Phalangists' operations at this time that were bringing "American pressure" to bear on the Phalangists to halt their operations.¹⁰⁸

During the meeting, the Phalangists requested a tractor "to demolish illegal structures."¹⁰⁹ At the end of the meeting, as Brigadier General Yaron testified, it was "clear" that "the Phalangists could still enter the camps, bring in tractors and do what they wanted" ¹¹⁰ The one tractor

¹⁰⁵ See Kahan Report, *supra* note 2, at 18. This order is not the only controversial directive issued by Eitan. In a January 22, 1983 Philadelphia Inquirer article, it was reported that nine Israeli soldiers on trial for mistreating Arab detainees submitted to the court through their attorneys a memorandum issued by Eitan ordering harsh treatment of Palestinian demonstrators. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *THE BITTER YEAR 21* (1983). According to the Jerusalem Post, Eitan used the military slang term "turtur" (harassment or bullying) to describe treatments to be given detainees. See JERUSALEM POST, Jan. 30-Feb. 5, 1983, at 4, col. 2 (int'l ed., on file with author).

Eitan had originally stated when the massacres came to light that the Phalangists had entered the camps unbeknownst to the Israelis. See JERUSALEM POST, Sept. 22, 1982, at 1, col. 2 (on file with author).

¹⁰⁶ See Kahan Report, *supra* note 2, at 19. See also David K. Shipler, *Killings a Shock, Israeli Aides Say*, N.Y. TIMES, Sept. 20, 1982, at 10.

¹⁰⁷ See Kahan Report, *supra* note 2, at 19.

¹⁰⁸ When asked for additional details of that aspect of the discussion, Major General Drori said he could not recall any details. See *id.* The New York Times reported that at 9 a.m. on Saturday a member of the United States embassy staff entered Shatilla, established that a massacre had taken place, and informed his superiors. See Thomas L. Friedman, *Crisis in Lebanon: The Beirut Massacre*, N.Y. TIMES, Sept. 26, 1982, at 19. Even earlier, according to that same article, a group of American journalists spoke with a member of the American embassy staff Friday around 3:00 p.m. and mentioned the rumors they had heard that the Phalangists had entered Shatilla. The charge d'affaires was immediately alerted and contacted Amin Jemayel, who said he would check on the report. The article concludes "[t]his and other evidence suggests that the Phalange Party leadership, including Mr. Gemayel, the new President, may not have known what the militiamen were doing." See *id.* at 20.

¹⁰⁹ See Kahan Report, *supra* note 2, at 19.

¹¹⁰ See *id.* at 18-19.

supplied, with its I.D.F. markings removed, was purportedly returned by the Phalangists shortly after they received it, since they had their own tractors, which they used (in large part to pile up the bodies) that night and the following morning.¹¹¹ The most appalling lack of concern for the camp-situation was the absence of questions to the Phalangists' commanders about the rumors and reports of murdered and mistreated civilians in the camps.¹¹²

The Phalangists did not leave the camps at 5:00 a.m., as ordered. At 6:30 a.m., when Brigadier General Yaron learned this, he gave the Phalangist commander on the scene the much-needed order - that they must vacate the camps "without delay."¹¹³ Between 6:30 a.m. and 7:00 a.m., a group of Phalangist soldiers entered the Gaza Hospital in Sabra and took a group of doctors, nurses and foreign national workers out of the hospital under armed guard.¹¹⁴ Two doctors and a nurse who later testified before the Commission said they saw several corpses, groups of people guarded by armed soldiers, and bulldozers.¹¹⁵ They were interrogated by the Phalangists and then taken to the I.D.F. forward command post from which they were later released.¹¹⁶ It was not until approximately 8:00 a.m. that the last of the Phalangists left the camps.¹¹⁷

In all likelihood, exactly who or how many were killed in the massacres will never be known. The official burial of the dead was done by the Red Cross, which counted 328 bodies, including Palestinians, Lebanese, Iranians, Syrians, Pakistanis and Algerians.¹¹⁸ Some survivors buried their less fortunate family members themselves.¹¹⁹ The Phalangists removed truckloads of bodies.¹²⁰ Other bodies are believed to remain under the ruins or in mass graves the Phalangists dug.¹²¹ The I.D.F. itself estimates 700 to 800 were killed.¹²² Other estimates place the death toll at

¹¹¹ See Friedman, *supra* note 108, at 20; Kahan Report, *supra* note 2, at 19.

¹¹² See Kahan Report, *supra* note 2, at 9.

¹¹³ See *id.* at 20.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See Kahan Report, *supra* note 2, at 21. Palestinians were not the only victims. Of the estimated 328 dead, according to the Red Cross, there were 45 Lebanese, 21 Iranians, 10 Syrians, 13 Pakistanis, and 2 Algerians in addition to Palestinians.

¹¹⁹ See Kahan Report, *supra* note 2, at 21.

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.*

approximately a thousand,¹²³ with more than 900 people driven away in trucks.¹²⁴ One Israeli source suggested the total number civilians killed was 3,000.¹²⁵

III. THE AFTERMATH AND ITS LEGAL IMPLICATIONS

The Commission determined two levels of responsibility - direct and indirect.¹²⁶ According to the Commission, those directly responsible were only those who "actually perpetrated" the massacre itself.¹²⁷

The Report concludes that Israel was indirectly responsible for the massacres:

[T]he decision on the entry of the Phalangists into the refugee camps was taken without consideration of the danger - which the makers and executors of the decision were obligated to foresee as probable - that the Phalangists would commit massacres and pogroms against the inhabitants of the camps, and without an examination of the means for preventing this danger. Similarly, it is clear from the course of events that when the reports 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 and exhausts Israel's indirect responsibility for what occurred in the refugee camps.¹²⁸

For the nine individuals sent notices of harm by the Commission - then 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 Dud'i - their personal liability under international law for the massacres would be determined, at that time, primarily by the Nuremberg Principles,¹²⁹ affirmed by the United Nations General

¹²³ See *Massacre in Beirut: The Evidence from the Shameful Days*, TIMES (London), Sept. 24, 1982 at 6.

¹²⁴ For example, at 1:00 p.m. on Friday, a reporter for Danish television watched as a cattle truck at the southern gate of Shatilla was loaded by Christian militiamen with women and children from the camp. What happened to them is unknown. Individual or mass forcible transfers of civilians from occupied territory to any territory of any country is prohibited, regardless of motive under article 49(1) of the Fourth Geneva Convention. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

¹²⁵ See AMNON KAPELIOUK, SABRA AND SHATILLA, INQUIRY IN A MASSACRE, Ch. II (1984).

¹²⁶ See Kahan Report, *supra* note 2, at 23-29.

¹²⁷ See *id.* at 23.

¹²⁸ See *id.* at 29.

¹²⁹ See Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8 1945, 82 U.N.T.S. 279, 59 Stat. 1544, 3 Bevans 1238.

Assembly¹³⁰ and acknowledged as part of customary international law by the Supreme Court of Israel in the *Eichmann* case.¹³¹ The tragic irony of the application of the Nuremberg Principles to the Israeli officials is that these Principles were originally formulated to punish the atrocities of the Nazi regime against the Jewish people.¹³²

Brigadier General Yaron, according to the Report, received reports of the killings of women and children on Thursday evening, yet (1) did not check the report; (2) did not pass the reports on to the G.O.C. and Chief of Staff; and (3) did not take appropriate steps to stop the Phalangists and protect civilians.¹³³ It is inescapable, based on the Commission's conclusions, that at least seven of the nine individuals, including Yaron, should have known of the likelihood of a massacre before the Phalangists' entry, knew or should have known a massacre was going on after their entry and yet failed to take appropriate steps to protect the civilian population. Under the customary international law of command responsibility and the Nuremberg Principles, those individuals could therefore be responsible for war crimes.¹³⁴

The Kahan Report, no matter how well intentioned, failed to result in any meaningful sanctions. Begin, Sharon, and Shamir were all criticized by the Commission - yet Begin stayed in office until he retired;¹³⁵ Shamir

¹³⁰ See G.A.Res. 95(a), U.N.Doc. A/64/Add. 1 (1946).

¹³¹ See Attorney General v. Eichmann, 36 I.L.R. 5 (Isr. D.C. (Jm.) 1961), 36 I.L.R. 277 (Isr. S. Ct. 1962). See also F. BOYLE, *INTERNATIONAL LAW AND ORGANIZATION AS AN APPROACH TO CONFLICT RESOLUTION IN THE MIDDLE EAST* (1983) (Ch. IV), at 15.

¹³² After World War II, the United Kingdom, the United States, the Soviet Union, and France wrote the Charter of the International Military Tribunal, which was subsequently applied in the trial of the German defendants at Nuremberg. It provided for individual criminal responsibility for crimes against peace, crimes against humanity, and war crimes as defined in the Charter. See BOYLE, *supra* note 131.

¹³³ See *id.* at 19.

¹³⁴ Analysis of responsibility of the individuals for crimes against peace for the Israeli invasion of Lebanon is beyond the scope of this article, and fully addressed in Malone, *supra* note 3. The Nuremberg Principles in Article 6(c) define crimes against humanity as "...murder, extermination, ...and other inhumane acts committed against any civilian population...." Refinement of the elements of the crime by scholars and the International Tribunals have focused on the extent to which the crime requires that the acts have been committed pursuant to a state policy or systematically. The potential breadth of this issue alone in the context of the invasion of Lebanon is beyond the scope of this analysis, given the more well established grounds for liability for grave breaches in the case of Yaron's potential liability.

¹³⁵ In an article on Begin's resignation, political correspondent Mark Segal speculated that Begin's "cruellest moment" in his Lebanese adventure came "when Begin finally recognized the reckless and irresponsible advice he had accepted from the two generals he so admired and trusted - Ariel Sharon and Rafael Eitan." He goes on to remark that "Begin may today regret not having carried out the implied recommendation of the Kahan Report by dismissing

became the new Prime Minister;¹³⁶ and Sharon remained in the Cabinet (although without his portfolio).¹³⁷

Under the international law of command responsibility, a commander who knows, or should know, 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 stop them is responsible for such crimes.¹³⁸ The Kahan Report concluded that Yaron should have known (and, in fact, he may very well have known) of the likelihood of a massacre and did nothing to keep the Phalangists from entering the camps nor did he stop the Phalangists once he received information that civilians were being killed. Even though the Phalangists were not under his direct chain of command, the Report makes it clear that Yaron, more than anyone else among the named Israeli individuals, exercised on-site, direct control of the Phalangists' entry and operations in the camps. In addition, his failure to intervene is complicity in genocide or conspiracy to commit genocide, assuming that the requisite intent for genocide is established. In the language of the Genocide Convention, there must be "intent to destroy, in whole or in part, a national, ethnical, racial or religious group,

Sharon from his cabinet." See JERUSALEM POST, Sept. 25-Oct. 1, 1983, at 15, col. 5-6 (int'l ed., on file with author).

¹³⁶ See David K. Shipler, *Cabinet in Israel Headed by Shamir is Voted in, 60-53*, N.Y. TIMES, Oct. 11, 1983, at A1 and at A3 (setting forth the relatively unchanged list of Cabinet members, including Mordechai Zipori as Minister of Communications).

¹³⁷ Sharon has said that as long as he continues to have "some influence," he would continue to serve in the government. See JERUSALEM POST, July 31-Aug. 6, 1983, at 9, col. 1 (int'l ed., on file with author). To quote Jonathan Randal, senior foreign correspondent of the Washington Post:

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

JONATHAN C. RANDAL, *GOING ALL THE WAY: CHRISTIAN WARLORDS, ISRAELI ADVENTURERS, AND THE WAR IN LEBANON*, 289 (1983). See also JERUSALEM POST, Feb. 13-19, 1983, at 1, col. 3-5, and at 2, col. 1-5 (int'l ed., on file with author) (evaluating the friction over Sharon's ouster as Defense Minister). Sharon was reported to have "lashed out" at his colleagues in the governing Herut party for denying him a portfolio in the newly formed government of Yitzhak Shamir. See *Sharon Asks Portfolio in Israeli Government*, N.Y. TIMES, Jan. 13, 1984, at A3. As to other of the named individuals found responsible by the Commission, Saguy was dismissed as Israel's chief of military intelligence and Yaron was stripped of his field command. See *Commanders in Disgrace*, TIMES (London), Mar. 2, 1983, at 6. Eitan retired as scheduled in April of 1983. See David K. Shipler, *Israel's Military Chief Retires and is Replaced by his Deputy*, N.Y. TIMES, Apr. 20, 1983, at 8.

¹³⁸ See *Application of Yamashita*, 327 U.S. 1 (1946); See also U.S. Dep't of Army, *Field Manual 27-10, Law of Land Warfare* para. 501, at 178-79 (1956).

as such.”¹³⁹ At the very least, Yaron acted with reckless disregard of the likelihood of massacres, but the *mens rea* element for genocide may necessitate a finding of purpose or knowledge for that particular liability. Nevertheless, Yaron’s clear responsibility for war crimes constituting grave breaches obligates each and every state to initiate prosecution for these offenses.¹⁴⁰

At the time that these crimes were committed, Yaron was not entitled to claim immunity either under the statute of limitations or the principles of sovereign immunity. His ineligibility for immunity has become even clearer in the progressive development of international law since that time. Although some courts still cling to the position that sovereign immunity may be available as a defense to war crimes and crimes against humanity, landmark decisions to the contrary, such as the Pinochet decision, the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and the Treaty of Rome establishing the International Criminal Court, have unequivocally rejected immunity as a defense. International law in this area now carries with it the once missing element, which often called into question its nature as “law” - mandatory imposition of sanctions.

When sanctions are not imposed for grave breaches of the Geneva Conventions, the fault is attributable to lack of resources or political will, not the inadequacies of international law. In 1996, the International Human Rights Law Institute embarked on a project to address the growing problem of impunity of individuals guilty of crimes, which must be prosecuted under international law.¹⁴¹ The project culminated in a document of “Guiding Principles for Combating Impunity for International Crimes.” The Principles require criminal prosecution for grave breaches, torture, and genocide (among other international crimes), and direct all states to prosecute crimes against humanity. In addition, the Principles require removal of individuals responsible for international

¹³⁹ See Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, S. Treaty Doc. No. 81-1, 78 U.N.T.S. 277.

¹⁴⁰ Under Article 146 of the Geneva Conventions, the state parties must enact legislation to provide “effective penal sanctions” for persons committing “grave breaches” as defined in Article 147. The parties are obligated to search for such violators and bring them to justice. “Grave breaches” are defined in Article 147 to include “willful killing, torture, or inhuman treatment...” Under common Article 1, it is the responsibility of the states to “undertake to respect and to ensure respect” for the Convention in all circumstances. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

¹⁴¹ The proceedings of the first conference at the Holocaust Museum in Washington were published in 14 *Nouvelles Etudes Penales*. The proceedings of a succeeding international conference in Siracusa, Italy in September, 1997, were published in *Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, LAW & CONTEMP. PROBS., Vol. 59 Autumn 1996 No. 4.

crimes from public office and the military, after according the individual due process in evaluating responsibility. Although never prosecuted, Yaron's prosecution was required by international law and is not subject to the defenses of sovereign immunity, statutes of limitations, or the defense of superior orders, a defense also precluded in the Siracusa Principles. Having already violated international law through its failure to prosecute, Israel compounded its violation in appointing Yaron to such a prominent and influential position. The appointment itself was prohibited by the Principles. The commentary to the Principles demonstrates that public appointment conflicts with state practice, thus violating general principles of international law, even if not yet customary international law.¹⁴² As negotiations for peace enter yet another fragile phase, and Israel demands punishment for crimes committed against Israelis, the state elevates to one of its most important posts, one of its most notorious human rights violators. The successful reconstruction of civil society depends upon both Palestinians and Israelis restoring public confidence in governmental institutions and, in this case, establishing new confidence in the Israeli military administration.

¹⁴² Following his appointment, the National Lawyers Guild, the Center of Constitutional Rights, and Madre put out statements condemning the appointment.

