SPECIAL DOSSIER ON THE "SABRA AND SHATILA" CASE IN BELGIUM

INTRODUCTION: NEW LIGHTS ON THE SHARON CASE

Chibli Mallat*

"If you can look into the seeds of time,
And say which grain will grow and which will not,
Speak then to me."[1]

It would have been difficult to anticipate, at 9:30 a.m. on the morning of June 18, 2001, in the office of the Investigating Judge Sophie Huguet at the Brussels Palace of Justice, the far-reaching effects of the criminal complaint of 28 victims filed "against Ariel Sharon, Amos Yaron and all Israelis and Lebanese responsible" for the massacres of Sabra and Shatila which took place on 16-18 September 1982. It would certainly have been hard to predict that the process would lead to a ruling of the Court of Cassation in February 2003 in favor of the plaintiffs, allowing the investigation and the trial to proceed; that the case would develop into the most serious crisis between Tel Aviv and a European capital since the establishment of the state of Israel; and that both the U.S. secretary of state and his defense counterpart would weigh in personally against the law on which the case was based. Nevertheless, one knew that the case would be an important test for international humanitarian law, for Belgian law, and for the future of justice and peace in the Middle East.

Preparing the case had taken several years of academic and practical work. It developed out of close familiarity with the *Pinochet* affair in England, the momentous action to establish the International Criminal Court, and the founding of INDICT, the London-based international campaign to bring Saddam Hussein and other mass assassins and torturers in Iraq to account, an undertaking that had received wide support in the U.S. Congress. It took several additional months of intense and precise work in the difficult conditions of the Palestinian refugee camps in Lebanon for the case finally to be brought to the Brussels judge by my two Belgian colleagues, Michaël Verhaeghe and Luc Walleyn, and myself on that morning of June 18, 2001.

The complaint was based on the so-called "universal jurisdiction" law that Belgium had adopted – by a unanimous vote of the peoples' representatives in both houses of par-

---

* Counsel for the Sabra and Shatila victims in the *Sharon* case in Belgium; EU Jean Monnet Professor in European Law, Saint Joseph's University, Beirut.

1 Shakespeare, *Macbeth*, III, i.

The Palestine Yearbook of International Law, Vol. XII, 2002/2003, pp. 183–190.
© 2005 Koninklijke Brill NV.

liament – first in 1993. The law was then amended in 1999 by an equally enthusiastic government and legislature. Shortly before the complaint was filed, the trial of the Rwandan "four" had just ended in their conviction, to universal acclaim. Ironically, the lawyer for the Rwandan victims would be, a few months later, the one whom the state of Israel would appoint to prevent the Sabra and Shatila victims from seeking redress under the same law. That was one bitter irony in the case, to be followed by many others – not the least the two amendments to the 1993/1999 law that followed the Court of Cassation ruling on February 12, 2003.

This dossier collects key legal documents in the *Sharon* affair. Being a legal dossier, the collection contains two sets of documents. The first set traces the evolution of Belgium's 1993/1999 "universal jurisdiction" law by making available in English, in several cases for the first time, translations of successive amendments to the law that first expanded, and then dramatically contracted, its scope. The second set of documents contains key pleadings and court decisions related directly to the *Sharon* case itself, beginning with the initial complaint filed by the plaintiffs and concluding with the June 10, 2003 ruling by the Brussels Court of Appeals that the case against Yaron may proceed. Several of these documents are also made available in English for the first time in this special dossier.

There are, of course, many other documents and materials directly related to this case, and three different books on the case have been completed, or are at press as of this writing: by Raoul Jennar, in French; by Stefania Limiti, in Italian; and by John Borneman, in America, the last following an international conference held at Princeton early in 2003. An important book was also published in Arabic in 2003 by Bayan Nuwayhid al-Hout, who has devoted years of work to assembling as accurate a picture as possible from survivors on the basis of their oral testimony. This, in addition to hundreds of articles in the press and a web site dedicated exclusively to the topic organized by Laurie King-Irani. Over three hundred lawyers wrote to express their support and their keenness to help from all five continents, including Israel, Australia and South Africa. Yale Law School's Human Rights Clinic, under the direction of Deena Hurwitz and Jim Silk, provided exceptional legal briefings in a whole range of issues raised by the trial. A fuller story still needs to be written, with the appropriate documents produced and reflecting the dedication of a large number of persons, jurists and non-jurists. The list is impressive and deserves a dedicated effort to account for an unprecedented international search for justice. Leah Tsemel and Raef Verstraeten also helped directly in the protracted trial. One can see in a detailed article in this volume of the *Yearbook* by Eric David, the "father" of the Belgian law, and in the continued, unyielding support of Amnesty International, Human Rights Watch, Avocats sans Frontières, and countless personalities, independently or through the various Sabra and Shatila committees that sprang up across the world, how the campaign ultimately involved a wide gamut of distinguished jurists and ordinary people. The international effort, spearheaded by my two Belgian colleagues, was nothing short of heroic. The patience and understanding of the plaintiffs, who were subjected to intense emotional pressure twenty years after the massacre, was no less remarkable, especially in view of the countless attempts by parasitic, sometimes ill-intentioned quarters, to derail the case or to use it for their own narrow purposes.

The case is not over, and as of this writing, the fight was still continuing in Brussels. Whether we succeed or not, there will be more books and many more articles about or touching on the *Sharon* affair. In this all too brief introduction, we shall endeavor to highlight a few lesser known but nevertheless salient aspects of the case.

As soon as the *Sharon* case – as it came to be known – was launched,[2] trouble erupted, and the regional and world media, including most prominently in Israel, showed much interest in its development.[3] However, that was just the beginning, and rarely have ups and downs been so marked in a modern judicial criminal case. As soon as the complaint was lodged, jurists in both the Ministries of Justice and Foreign Affairs in Israel expressed concern about the action, while the principal accused remained calculatingly silent, and has remained silent about it ever since.[4]

Under the Belgian system, investigations of criminal complaints may proceed in private. However, the Sabra and Shatila victims had agreed from the beginning that they had nothing to hide, and that their preferred course of action would be to launch as transparent a case as possible. Thirty immediate relatives of persons who had been killed or who had disappeared were identified by careful research in the camps of Lebanon. This was achieved by Sana Hussein, herself a resident of the camps, with the help of Dr. Rosemary Sayegh, a long-time friend of the Palestinian cause and the author of landmark books on the plight of the Palestinians in Lebanon. Of the thirty persons chosen, all from different families to cover the largest possible sample, two decided that the case would reopen the wounds in a way that they could not tolerate. Yet the other twenty-eight victims, who were aware of the uncertainties and possible risks in taking on powerful and violent defendants such as the prime minister of Israel, nevertheless decided to go forward.

The text of the complaint was distributed at the press conference held immediately after it was formally filed on the morning of June 18, and it was posted and widely distributed on the internet. Despite its length, it was eventually translated into over six languages, including Japanese. Another early irony was that Israeli media accounts later that same week reported that Israeli secret service agents were still scurrying around trying to obtain the text days after it had been widely quoted and discussed in the Belgian and Arab press.

Ridden with such conspiracy thinking, the Israeli government also reacted angrily to the airing of a BBC program entitled "The Accused" on the eve of filing of the complaint. Sharon and his aides were convinced that it was all a concerted international effort of some dark, coordinated plot to undermine him. Predictably, the BBC was accused of anti-Semitism and was openly associated with the complaint in Belgium. In reality, while we had known about the program through an Amnesty International friend two weeks before it was aired, and later through the row occasioned by the protestations of Sharon's government in the

---

2 The *Sharon* case is an inaccurate rendering of what should be more appropriately called "the Sabra and Shatila case," but the role of the former Minister of Defense in the invasion of Lebanon in 1982 and in the subsequent massacres was so central that it makes sense for the general public to refer to the case by the name of the top, active commander.

3 In contrast, the disinterest of the U.S. press and media was remarkable. With the exception of National Public Radio and, occasionally, the *Christian Science Monitor*, heavy silence descended on the case, even when the U.S. government actively worked to undermine the law in Brussels. Not one op-ed dealing with the case was allowed to be printed in the leading American papers over a period of two years.

4 When the Court of Appeals ruled on June 26, 2002 that the case could not go forward because the accused was not on Belgian soil, the Israeli press reported from circles close to him that this was his "best day" since he had become prime minister.

press, we had known little about its content until we actually watched it on television, like all other European viewers, at 11:00 p.m. Belgian time on June 17. A powerful testimony, "The Accused" would be aired in a number of countries, except, notably, in the United States.

As for the Belgium forum, it had been chosen after systematic research into international criminal law and a careful examination of the various possibilities offered in a number of western systems. This was carried out together with two outstanding lawyers, Andrew Allen and Peter van den Auweraert, whom I knew well as close friends and assistants during my tenure at London University. With its reinforcement by the Rwandan trials, it was clear that the 1999 amendment in Belgium had tightened the original 1993 "universal jurisdiction" law to prevent all the usual procedural barriers: territorial restriction, statutes of limitations, and immunities. In its amended form, the Belgian law had been carefully modeled after the Rome Statute for the International Criminal Court and conceived, as requested by the statute itself, to be complementary with the worldwide effort against impunity in mass crime.

"The fight against impunity" would remain the leitmotiv of the *Sharon* affair throughout the ups and downs that followed. From the beginning, the pressure of the Israeli government was relentless, and sometimes it took on an ugly aspect. In the week following the lodging of the case, the Belgian consulate in Tel Aviv was attacked, and during a visit of the Belgian Prime Minister as member of the European Union troika in 2002, he was grossly insulted by close supporters of Ariel Sharon, including the mayor of Jerusalem.

With all the ups and downs of the case, the most dramatic moment was occasioned by the assassination of Elias Hobeika on the morning of January 24, 2002 in Beirut. On January 22, on the occasion of the visit of a delegation of Belgian senators to Beirut, Elias Hobeika had received two of them, Josy Dubié, head of the Justice Commission at the Belgian Senate, and Vincent Van Quickenborne, a liberal young senator who supported the case from its very inception, along with a journalist from a leading Flemish paper. Hobeika repeated in the meeting, which took place at his house in the evening, his keenness to clear his name from the record that had singled him out in the Kahan Commission report as the major perpetrator of the massacres. The following day, on January 23, the senators left for Belgium, but on that day also, a session was scheduled at the Court of Appeal.[5] On January 23, it was scheduled for the prosecutor and for the lawyers of the plaintiffs/victims to make the case. We raised the issue of the reluctance of the investigating judge, followed by the prosecution and the court, to call upon Hobeika, if not as an accused at least as a witness, in accordance with his repeated statements to the press. We never received a proper answer to the question, which was the more legitimate since the investigating judge had asked for his address and contact numbers to invite him for a hearing in Belgium. The court session closed at around 2:00 p.m. Beirut time.

The following morning, at 9:00 a.m., Elias Hobeika was dead.

---

5 All these sessions were held *in camera*. We had not insisted that they should be public, so tense was the atmosphere in Belgium because of the aggressiveness of the Israeli government. Maybe it was a mistake, as it deprived the public, and more importantly, the victims back in Beirut, of a closer and more detailed observation of the proceedings. In fairness, however, most of the proceedings were of a mostly procedural nature, and it would have taken extensive explaining to unravel the intricacies raised by the technical arguments.

Elias Hobeika was killed, along with three bodyguards, near his home in Hazmiyye, a Beirut suburb. The investigation was unable to proceed very far, as the booby trapped car had been sold a few weeks earlier in Sidon to a person whose identity had clearly been forged. It is time to shed some light on this sinister assassination.

For us lawyers, the immediate reaction was one of distress. Distress was not so much because of what Hobeika would have said that could incriminate him or Ariel Sharon but because we truly believed that this case was one of important symbolic value, offering a peaceful alternative to the world of violence that had dominated the Arab-Israeli conflict for a hundred years. For the first time, Palestinian victims were reaching out to a judge for redress, rather than taking the matter into their own hands. That the crime at Sabra and Shatila would claim more yet lives was insufferable. Yet the fact that Elias Hobeika had come out so insistently to face the claims that had been hanging over him like an albatross ever since September 1982 was in itself a breakthrough of ominous consequences.

The point was not necessarily substance, or what Elias Hobeika had to say, although his point of view would have certainly shed important light on an affair which, as it turned out, had been improperly investigated because none of the militia members nor the victims had been heard by the Kahan Commission. However, since the commission had concluded in February 1983 that Sharon, then minister of defense, was "personally responsible" for the massacres, the matter of Sharon's guilt posed little problem, especially as he was the one who was singled out in the commission's conclusions for this sharp qualification.

As the case developed, the picture drawn by the Israeli commission proved increasingly incomplete. From the testimonies of our victims, two puzzling issues had emerged.

The first, which was emphasized in writings by Robert Fisk and Julie Flint (in addition to a remarkable Channel 4 documentary by Julie Flint) was the issue of the "disappeared": hundreds of mostly young men who were arrested, interrogated and taken away even after the massacre proper had officially ended.

The second discovery, also noted first in the testimonies of the victims, pointed to the fact that Israelis had been physically present in the camps, in contrast to the violent denials of any such presence before the Kahan Commission and in versions received since. As a matter of common sense, and even if the Israeli army did not enter the camps and left the matter of "cleaning them up" to the extremist Christian militias, as the official order from the Ministry of Defense on the morning of September 16 expressed it, it is nevertheless hard to imagine that no Israeli official set foot in the camps for three days. On the Sunday following the assassination of Hobeika, a French journalist who had spent several years researching the massacres was interviewed on French television and revealed that special Israeli units had entered the camps in the first hours and killed sixty-three persons. The unit was even named in the interview. It has remained puzzling that the channel never aired it again.

There were, therefore, enough "new" elements to attract renewed interest. This is also why, in retrospect, the killing of Hobeika appears to me as much – if not more – a matter of procedure than one of mere substance. In our pleadings on the morning of January 23, we focused intensively on the inexplicable reaction of the Belgian judges toward Hobeika's readiness to come to Brussels and to testify in the trial. Hobeika had repeated his keenness several times, expressing gratitude for the opportunity to clear his name

before "a neutral judge." In one telling moment, on the occasion of a television program in Beirut soon after I returned from Belgium after the complaint had been lodged, Hobeika was interviewed at his home by satellite, while I was the guest in the studio, and he expressed his gratefulness for us bringing the case. This was a particularly awkward moment, as I did not consider it proper to discuss publicly any particular evidence when a formal judicial forum was finally able to receive information and to rule upon it. To all the journalists who repeated the question, the answer was that it would be far more appropriate for any actor or witness, especially one who was universally perceived as the leader of the militias in the camps, to offer his testimony to the investigating judge rather than to the lawyers of the plaintiffs. Elias Hobeika understood this correctly. Never was a back channel approach attempted to reach me or my colleagues, and Hobeika repeated several times, to the written and televised media, his wish to go to Brussels. This was also what he told the Belgian senators.

On behalf of the victims, we repeatedly asked the investigating judge, Patrick Collignon, to hear Mr. Hobeika. Upon Collignon's demand, we informed him officially of his address and fax number so that he could contact him. He never did, despite having assured my Belgian colleagues that no one at that stage would be put in custody and that he merely wanted to take depositions of all the parties involved as witnesses. One of the great disappointments in the case was the pusillanimity with which Collignon carried out his task. This was clear to me when he went on a holiday at a time when the whole world was drawn to the dramatic developments of the case in Brussels, and then, when he came back, as he refused to listen to our side of the argument before pronouncing the *Ordonnance* (judgment) of September 7, 2001, which halted the investigation until the Court of Cassation reinstated it in its historic judgment of February 12, 2003.

Despite Hobeika's formal appearance as an accused under the "*constitution de partie civile*" procedure, Collignon and the Belgian judiciary would still not move. This was all the more puzzling since the office of the prosecutor, who had rallied to our position, had notified Sharon and Yaron formally of the accusation of the victims as "*parties civiles*." It was at this charged session of January 23 that the prosecutor, Pierre Morlet, an outstanding jurist by the account of all who dealt with him, also explained the convoluted means employed to notify the two Israelis formally accused, considering the awkwardness for the Belgian diplomatic corps, which had to relay the notification. This made the refusal to notify Hobeika the all stranger, since he was the one who was requesting to be heard by the court. No form of coercion was needed. A notification by fax would have been sufficient.

It was on this puzzling set of unusual hurdles that I based my oral argument before the court on January 23, 2003. While the distinct unease which I sensed on the bench might have been a merely subjective recollection, what happened afterwards confirmed this impression in a tragic manner. For until then, the argument that "the accused had to be in Belgium" for jurisdiction to exist had remained faint, for three major reasons.

The first concerns this mass type of crime, which tends to involve hundreds of victims, and dozens, if not hundreds of perpetrators. Under the classical system of penal jurisdiction, the persons involved on both sides tend to be limited, and an ordinary crime concerns only a few victims and one, or a limited gang, of assassins, who usually share the same nationality. However, with hundreds or thousands of actors involved, the traditional "passive" and "active" personality principles of jurisdiction – which establish the competence

of a national court to look into a crime taking place abroad if either the victim ("passive personality") or the accused ("active personality") is one of its nationals – break down. The nationality ramifications tend to be immense: in Sabra and Shatila in 1982, as in New York in 2001, the victims belonged to over ten different nationalities. Unlike New York, they were all from the third world, and the killers went to great lengths to avoid the assassination of the few foreign doctors and nurses who operated in the camps. Still, in mass crimes, the passive and active personality principles tend to be more easily trumped. When they are not, the system of extradition common for "normal" crimes should operate, as in the *Pinochet* case. In the case of Sabra and Shatila, it was a matter of luck for the accused that none of the relatives of the victims had acquired Belgian nationality, but it is only a matter of time before either some connection to the forum is found – for instance if one of the perpetrators is found to have dual nationality – or the rules on extradition are made more operational for jurisdictional purposes.

The second reason was textual: it was only through a very complicated and tortuous argumentation that the Court of Appeals found on June 26, 2002 that the principle of the accused "physically being" in Belgium governed the whole issue. Michaël Verhaeghe argued convincingly that this nineteenth century arrangement was moot in the twenty-first century, and we discovered that Sharon had actually visited Belgium in 1987. Not only was the argument weak but it came late in the day precisely because of the clear disposition of the law, which could be read literally in the *travaux préparatoires*: there, in response to a question, the government had clearly stated that "the accused need not be in Belgium" for the law to operate.[6]

The third reason was factual: the readiness of one of the alleged perpetrators, formally accused by the "*parties civiles*," to come to Belgium.

In the voluminous files of the *Sharon* trial, a break is clear. Before Hobeika's assassination, there was little focus on "the presence of the accused on Belgian soil." After his assassination, the exclusive focus of Sharon's defense was on "the presence of the accused." This is also why I personally think there is a heavy moral responsibility on Sharon's Belgian lawyers in the assassination.

The *Sharon* case is not difficult morally, even if it has witnessed some of the most elaborate legal argumentation in Belgian criminal legal history ranging, as the reader will discover in this dossier, from procedural law in Belgium, to amnesty laws in Lebanon, to the qualification of "inquiry committees" in Israel, to international law in so many of its aspects. Despite arguments both intricate and wide-ranging, the moral issue is simple: would the victims of one of the terrible landmarks in the late twentieth century be able to get some compensation, some relief, for their silent suffering? Would the man who was the commander of the operation, along with the aides and executioners, finally be brought to account?

In the Middle East, with its increasingly defining role for the stability and peace of the world, one cannot underline enough the importance of judicial accountability. In the current reality of the global world where, against economic forces that wreak havoc with peo-

---

6 This is why it was only natural for the Court of Cassation to overrule the complicated and torturous dismissal of the Court of Appeals.

ples' lives in a pattern that economic science has not yet been able to unravel even if it is now well described, the strongest counterbalance is that of international – or as Kant more correctly called it two centuries ago in his *Principles of Perpetual Peace* (1795) – *cosmopolitan* justice.

This is also why, until some justice comes to the victims, the Sabra and Shatila case will never be closed.[7]

September 9, 2003

7 Ed. note: On 24 September 2003, not long after Dr. Mallat had submitted his Introduction to this Special Dossier section, the Belgian Court of Cassation issued a "cessation of all cases filed concerning the massacre perpetrated in September 1982 in the Sabra and Shatila refugee camps in Beirut." The lawyers representing the survivors issued a press statement on the same day commenting upon the decision by the Court of Cassation that brought an abrupt end to at least this phase of the saga. The press release is included as the last document in this Special Dossier section.